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[1] Third Division created by Act July 15, 1941.
[2] Appointed to District Court of Appeal, took office Nov. 12, 1941.
[3] Died Nov. 11, 1941.

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LOS ANGELES COUNTY

Presiding Judge

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Presiding Judge

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Presiding Judge

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Reporter

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[4] Appointed, took office Jan. 1, 1942.
[5] Appointed to District Court of Appeal, took office Nov. 12, 1941.

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CALIFORNIA REPORTER

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SECOND SERIES

47 Cal.App.2d 68

WITHINGTON et al. v. SHAY, Sheriff, et al.

4 Civ. 2919.

Supreme Court of California.

Nov. 28, 1941.

Mechanics' liens ⇐246

Under the Code provisions relating to the foreclosure of mechanics' liens, sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor is not the only mode of enforcing a judgment in view of Code provision, as amended, authorizing a personal action to recover a debt due for materials furnished either in connection with the foreclosure of the lien or in a separate suit. Code Civ. Proc. § 1197.

In Bank.

On petition for hearing.

Hert & Withington and Robert Mack Light, all of San Bernardino, for appellants.

Howard A. Andrews, of Los Angeles, for respondents.

Petition denied.

Prior opinion, 117 P.2d 415.

PER CURIAM.

The petition for hearing in this court after decision by the District Court of Appeal of the Fourth Appellate District is denied.

However, such denial should not be considered as an agreement with the following sentence in the opinion [117 P.2d 415, 418]: "The code provisions relating to the foreclosure of mechanics' liens provide no mode of enforcing a judgment other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor. Central L. & M. Co. v. Center, 107 Cal. 193, 40 P. 334." In 1911, Section 1197 of the Code of Civil Procedure was amended to authorize a personal action to recover a debt due for materials furnished either in connection with the foreclosure of the lien or in a separate suit. See Wm. J. Bettingen Lbr. Co. v. Kerrin, 99 Cal.App. 686, 279 P. 163.



19 Cal.2d 19

ARCHER et al. v. CITY OF LOS ANGELES et al.

ALLISON et al. v. SAME.

L. A. 17613, 17612.

Supreme Court of California.

Nov. 14, 1941.

1. Trial ⇐142

A nonsuit should be granted only when, accepting the full force of evidence adduced, together with every reasonable inference favorable to plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes plaintiff from recovering a judgment.

2. Eminent domain ⇐2(1)

The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals, but, in certain circumstances, the taking or damaging of private property for such purposes is not prompted by so great a necessity as to be justified without proper compensation to owner. Const. art. 1, § 14.

3. Eminent domain ⇐2(1), 270

The liability of the state under constitutional provision requiring payment of just compensation for private property taken or damaged for public use arises when the taking or damaging of private property is not so essential to general welfare as to be sanctioned under the "police power", and the in-

jury is one that would give rise to a cause of action on part of owner independently of the constitutional provision. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

4. States ⇐191(1)

The constitutional provision requiring payment of "just compensation" for private property taken or damaged for public use permits an action against the state, which cannot be sued without its consent. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Just Compensation".

5. Eminent domain ⇐270

The constitutional provision requiring payment of "just compensation" for private property taken or damaged for public use is designed, not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist, and the state is not liable under such provision for an injury that is damnum absque injuria. Const. art. 1, § 14.

6. Eminent domain ⇐270

If a property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state under constitutional provision requiring payment of just compensation for private property taken or damaged for public use. Const. art. 1, § 14

7. Waters and water courses ⇐171(1)

A lower riparian owner has no right of redress for injury to his land caused by improvements made in the stream for purpose of draining or protecting land above, even though channel is inadequate to accommodate increased flow of water resulting from improvements.

8. Waters and water courses ⇐171(1)

An improvement for purpose of drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because improvement increases volume of water in stream as it comes to his land, even though burden he is necessarily under of protecting his land against stream is thereby increased and his land is injured because of his failure to meet such increased burden, and the rule is not subject to limitation that increased volume must not be such as to make the stream exceed capacity of its channel.

9. Waters and water courses ⇐171(2)

The construction of drainage improvements along natural course of a stream and its tributaries, which emptied into lagoon near plaintiffs' property, by subdivisions of the state, did not obligate subdivisions to improve outlet from lagoon, although improvements accelerated natural drainage of stream, and did not render subdivisions liable to plaintiffs for damages caused by floodwaters which overflowed from lagoon because of inadequate outlet, even though a different plan might have avoided damages. Const. art. 1, § 14.

10. Waters and water courses ⇐171(1)

Drainage improvements must follow natural drainage of the country and, if water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to owner whose land is injured by such discharge.

11. Waters and water courses ⇐79

Straightening, widening, or deepening the channel of a stream to improve drainage entails no "diversion" of waters therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Diversion".

12. Waters and water courses ⇐119(3)

There is no "diversion" if surface waters, flowing in no defined channel, are for a reasonable purpose gathered together and discharged into stream that is their natural means of drainage even though stream channel is inadequate to accommodate increased flow.

13. Waters and water courses ⇐119(2, 3)

A California landowner may not collect surface waters and discharge them upon adjacent land, but he may discharge them for a reasonable purpose into stream into which they naturally drain without incurring liability for damage to lower land caused by increased flow of stream.

14. Waters and water courses ⇐60

Any damage caused by an obstruction to natural flow of waters is actionable.

15. Waters and water courses ⇐176

Where flooding of plaintiffs' land near a lagoon was caused by inadequacy of outlet of lagoon and would have occurred regardless

of obstruction created by bridge which defendants built and which caught debris swept into lagoon thereby obstructing flow of water, plaintiffs could not recover damages from defendants on basis of construction of bridge.

16. Waters and water courses ⇐96

A riparian owner may erect bulkheads or other structures along banks of a stream to protect his land from being washed away.

17. Eminent domain ⇐300

In lower riparian owners' action against a city and other subdivisions of the state to recover damages caused to owners' land by the overflow of floodwaters from a lagoon which was fed by a natural stream on which defendants had made drainage improvements, where owners sought to recover under constitutional provision requiring payment of just compensation for private property taken or damaged for public use, evidence for owners was insufficient to establish a right of recovery. Const. art. 1, § 14.

18. Appeal and error ⇐1097(6)

A decision of the District Court of Appeal holding that complaint stated a good cause of action against general demurrer was not binding on Supreme Court in passing on sufficiency of evidence to support allegations of complaint.

CARTER and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Actions by Agatha Archer and others against the City of Los Angeles, etc., and others, and by James L. Allison and others against the City of Los Angeles, etc., and others, to recover damages resulting from the overflow of storm waters on plaintiffs' land. From judgments of nonsuit, plaintiffs appeal.

Affirmed.

For prior opinion, see, Cal.App., 102 P. 2d 791.

Rehearing denied; CURTIS and CARTER, JJ., dissenting; HOUSER, J., not participating; SPENCE, J., Acting pro tem.

Dempster & Dempster, Grace Dempster, J. H. Creighton, and Jerrell Babb, all of Los Angeles, for appellants.

Hibbard & Kleindienst, Hill, Morgan & Bledsoe, Charles P. McCarthy, Julius V. Patrosso, Earle M. Daniels, Bartlett & Kearney, Harry J. McClean, Irsfeld & Irsfeld, Latham & Watkins, Freston & Files, Chase, Barnes & Chase, and Henry M. Lee, all of Los Angeles, amici curiae for appellants.

Everett W. Mattoon, Co. Counsel, J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, J. F. Moroney, Deputy Co. Counsel, Ray L. Chesebro, City Atty., Frederick von Schrader and Leon T. David, Asst. City Attys., and Howard E. Crandall and Henry C. Ramsey, Deputy City Attys., all of Los Angeles, for respondents.

TRAYNOR, Justice.

Plaintiffs own land in Venice, a suburb of the city of Los Angeles. The land is located near La Ballona lagoon, a body of water about two miles long and two miles wide, which empties into the Pacific ocean and is fed by La Ballona creek, a natural watercourse draining an area of about 134 square miles. A map of the area as it existed in 1893 shows that the waters descending from the hills followed no defined course until they reached lower La Ballona creek. In the ensuing years, however, the area drained by the creek and its tributaries was transformed into residential and business districts and the waters were gradually confined to ditches and channels emptying into the creek. The City of Los Angeles, the Los Angeles County Flood Control District, and the County of Los Angeles, acting independently, straightened, widened, and deepened the creek and its tributaries and constructed concrete storm drains to improve the drainage. The urbanization of the area resulted in less absorption of water into the earth, while the improved drainage accelerated the flow of water into the lagoon. The outlet from the lagoon into the ocean, however, was in no way improved to accommodate the increased flow of water but remained in its natural state. Meanwhile several bridges were constructed across the lagoon.

Throughout December 31, 1933, and January 1, 1934, a heavy rainstorm occurred. The waters swept down La Ballona creek and into the lagoon where, because of the inadequate outlet, they overflowed on to plaintiffs' properties, flooding them to a depth of from six to eight feet for about four days.

The plaintiffs thereupon brought these actions for damages against the city, the county, and the flood control district. They claim the right to recover from defendants under article 1, section 14 of the California Constitution, which requires the payment

of just compensation for private property taken or damaged for public use. The complaints allege that defendants acted negligently in constructing a drainage system with an inadequate outlet, improperly permitted obstructions in the lagoon, diverted water from streets within the drainage area on to plaintiffs' properties, and damaged plaintiffs' property for a public use without making compensation.

A demurrer of the defendant flood control district to one of the complaints was sustained without leave to amend, but on appeal the District Court of Appeal reversed the judgment, holding that the complaint stated a good cause of action. Archer v. City of Los Angeles, 15 Cal.App.2d 520, 59 P.2d 605. The actions were then consolidated for trial. At the conclusion of plaintiffs' evidence, the trial court entered judgments of nonsuit in favor of defendants, and plaintiffs have appealed.

[1] It is settled that "a nonsuit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment * * *". Mastrangelo v. West Side U. H. School Dist., 2 Cal.2d 540, 544, 42 P.2d 634, 636; Angelus Securities Corp. v. Ball, 20 Cal.App.2d 423, 435, 67 P.2d 152. Plaintiffs have established by their evidence that defendants straightened and widened the channel of La Ballona creek and constructed concrete storm drains that followed the natural drainage of the country; that these improvements accelerated the flow of the water; that the outlet into the ocean remained unimproved and could not accommodate the increased flow; that the defendants had knowledge of the inadequacy of the outlet; that in the opinion of two experts such a drainage system was "not good engineering"; and that the flow of water was obstructed by several bridges across the lagoon, including one constructed by the city.

The question presented is whether a governmental agency is liable under article 1, section 14 for damaging property for a public use when improvements constructed by it along the natural course of a stream and its tributaries accelerate the flow of the water, and lower lands are flooded because of the inadequacy, known to the agency, of the outlet to accommodate the increased flow.

[2-6] The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. Gray v. Reclamation Dist., 174 Cal. 622 at page 640, 163 P. 1024; Bowditch v. Boston, 101 U.S. 16, 25 L.Ed. 980; Chicago, B. & Q. R. Co. v. People of State of Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175; Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773, see cases cited 5 Cal.Jur. 696 et seq. In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; see cases cited in 10 Cal. Jur. 283-4, 295. The liability of the state under article 1, section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the "police power" (Pennsylvania Coal Co. v. Mahon, supra; Chicago, B. & Q. R. Co. v. Chicago, supra; 10 Cal. Jur., supra; see Mugler v. Kansas, 123 U. S. 623, 8 S.Ct. 273, 31 L.Ed. 205), and the injury is one that would give rise to a cause of action on the part of the owner independently of the constitutional provision. Lamb v. Reclamation Dist., 73 Cal. 125, 129-131, 14 P. 625, 2 Am.St.Rep. 775; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; Jefferson County Drainage Dist. v. McFaddin, Tex.Civ.App., 291 S.W. 322. The provision permits an action against the state, which cannot be sued without its consent. It is designed, not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist. The state is therefore not liable under this provision for an injury that is damnum absque injuria. If the property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state. Lamb v. Reclamation Dist., supra, 73 Cal. 129–131, 14 P. 625; San Gabriel Valley Country Club v. County of Los Angeles, supra; Jefferson County Drainage

Dist. v. McFaddin, supra. In the present case, therefore, plaintiffs have no right to compensation under article 1, section 14 if the injury is one that a private party would have the right to inflict without incurring liability.

[7-9] It is established in California and other jurisdictions that a lower owner has no right of redress for injury to his land caused by improvements made in the stream for the purpose of draining or protecting the land above, even though the channel is inadequate to accommodate the increased flow of water resulting from the improvements. San Gabriel Valley Country Club v. County of Los Angeles, supra; Board of Drainage Com'rs v. Board of Drainage Com'rs, 130 Miss. 764, 95 So. 75, 28 A.L.R. 1250; Mizell v. McGowan, 129 N.C. 93, 39 S.E. 729, 85 Am.St.Rep. 705; O'Donnell v. City of Syracuse, 184 N.Y. 1, 76 N.E. 738, 3 L.R.A.,N.S., 1053, 112 Am.St.Rep. 558, 6 Ann.Cas. 173; City of Hamilton v. Ashbrook, 62 Ohio St. 511, 57 N.E. 239; Lessenger v. City of Harlan, 184 Iowa 172, 168 N.W. 803, 5 A.L.R. 1523; Strauss v. Allentown, 215 Pa. 96, 63 A. 1073, 7 Ann. Cas. 686; Peck v. Herrington, 109 Ill. 611, 50 Am.Rep. 627; Jefferson County Drainage Dist. v. McFaddin, Tex., supra; City of Ludlow v. Broderick, 181 Ky. 123, 203 S.W. 1082; Manteufel v. Wetzel, 133 Wis. 619, 114 N.W. 91, 9 L.R.A.,N.S., 167; Trigg v. Timmerman, 90 Wash. 678, 156 P. 846, L.R.A.1916F, 424; Robb v. Village of La Grange, 158 Ill. 21, 42 N.E. 77. In the San Gabriel Valley Country Club case Los Angeles County constructed concrete storm drains that followed the natural drainage of the country, accelerated the flow of water, and prevented its absorption by adjoining lands. As a result plaintiff's land, situated below the point where the drains emptied into the stream, was damaged during a heavy rain storm. In holding that plaintiff had no right of recovery against the county this court stated [182 Cal. 392, 188 P. 559]: "* * * an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden, * * * the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel." Accordingly, the construction of the improvements by the defendants in the instant case did not place upon them the duty of improving the outlet. They cannot be held negligent for doing what they had a right to do even though a different plan might have avoided the damage. Board of Drainage Com'rs v. Board of Drainage Com'rs, supra, at page 81, of 95 So.; Dudley v. Village of Buffalo, 73 Minn. 347, 76 N.W. 44, 45; City of Hamilton v. Ashbrook, supra, at page 241 of 57 N.E.; Lessenger v. City of Harlan, supra, at page 805, of 168 N.W.

[10-13] The improvements must follow the natural drainage of the country. If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge. Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213; Stanford v. San Francisco, 111 Cal. 198, 43 P. 605; Farrell v. City of Ontario, 39 Cal. App. 351, 178 P. 740; Id., 36 Cal.App. 754, 173 P. 392; Dick v. City of Los Angeles, 34 Cal.App. 724, 168 P. 703; Mulder v. City of Los Angeles, 110 Cal.App. 663, 294 P. 485; Newman v. City of Alhambra, 179 Cal. 42, 175 P. 414; see 11 Cal.L.Rev. 444. In the present case, however, there is no evidence of diversion. Straightening, widening, or deepening the channel of a stream to improve the drainage entails no diversion of the waters therein. San Gabriel Valley Country Club v. County of Los Angeles, supra; Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53, 21 L.R.A. 611; Gentry v. Weaver, 130 Kan. 691, 288 P. 745; St. Paul & D. R. Co. v. Duluth, 56 Minn. 494, 58 N.W. 159, 23 L.R.A. 88, 45 Am.St.Rep. 491; Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531, 112 Am.St.Rep. 171; see 67 C.J. 902. Likewise there is no diversion if surface waters, flowing in no defined channel, are for a reasonable purpose gathered together and discharged into the stream that is their natural means of drainage even though the stream channel is inadequate to accommodate the increased flow. San Gabriel Valley Country Club v. County of Los Angeles, supra, 182 Cal. 401, 402, 188 P. 554, 9 A.L.R. 1200; Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462, 26 L.R.A. 632; Board of Drainage Com'rs v. Board of Drainage

Com'rs, supra; Mizell v. McGowan, supra; Dudley v. Village of Buffalo, 73 Minn. 347, 76 N.W. 44, 45; Waffle v. New York Central R. Co., 53 N.Y. 11, 13 Am.Rep. 467; St. Paul & D. R. Co. v. Duluth, supra; City of Hamilton v. Ashbrook, supra; Lessenger v. City of Harlan, supra; Peck v. Harrington, supra; Jefferson County Drainage Dist. v. McFaddin, supra; Manteufel v. Wetzel, supra; see Robb v. Village of La Grange, supra; O'Donnell v. City of Syracuse, supra; City of Maysville v. Brooks, 145 Ky. 526, 140 S.W. 665; see cases cited in 85 Am.St.Rep. 733, 734. A California landowner may not collect such waters and discharge them upon adjacent land (LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336), but he may discharge them for a reasonable purpose into the stream into which they naturally drain without incurring liability for damage to lower land caused by the increased flow of the stream. As stated in San Gabriel Valley Country Club v. County of Los Angeles, supra, at pages 401, 402 of 182 Cal., at page 558 of 188 P., 9 A.L.R. 1200: "Not to permit an upper land owner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy. Such a rule would seriously interfere with the development of the country. Because of this and because of the necessity of permitting the utilization for drainage of the means afforded by nature for the purpose, a very great preponderance of the decisions in other states go further than it is necessary to go in this case and hold that a riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. Furthermore, this rule is adopted regardless of whether the so-called common-law rule concerning surface waters prevails in the particular jurisdiction or, as here, the civil law rule, which forbids the gathering together of surface waters and discharging them as a stream upon adjoining lands. If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added. [Citing cases.] Mr. Freeman in his note in 85 Am.St.Rep. 727, reviews very thoroughly the authorities dealing with the right to accelerate or diminish the flow of water, and upon the particular point under discussion says (p. 733): 'We have just noticed the difference between merely draining on to another's land, and draining into a natural channel or water course, which flows across such land. So far as streams or natural watercourses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume without subjecting himself to liability for any damage suffered by a lower owner.'" The evidence here presented shows clearly that the storm drains constructed by defendants either followed the channel of natural streams (see Larrabee v. Cloverdale, 131 Cal. 96, 100, 63 P. 143), or discharged into the creek surface waters which would naturally drain into it.

[14-17] Any damage caused by an obstruction to the natural flow of waters is also actionable (Richardson v. City of Eureka, 96 Cal. 443, 31 P. 458; Dick v. City of Los Angeles, supra; Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375; Conniff v. San Francisco, 67 Cal. 45, 7 P. 41; Larrabee v. Cloverdale, supra; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570), and plaintiffs contend that several bridges and other structures obstructed the flow of waters through the lagoon. Their evidence shows that only one bridge was constructed by defendants. The basis of liability must therefore depend upon this bridge. Plaintiffs' evidence establishes that this bridge caught debris swept down into the lagoon and obstructed to some extent the flow of the waters. The testimony of plaintiffs' own experts makes it clear, however, that the flooding of plaintiffs' land was caused by the inadequacy of the outlet and would have occurred regardless of the obstruction created by the bridge. Plaintiffs have made no showing that the obstruction of the bridge contributed to the damage caused by the overflow. No liability can be imposed upon defendants merely because the bulkheads supporting the banks on either side of the bridge might have prevented the water from forcibly widening the channel by washing away the banks; for it is firmly established that a riparian owner may erect bulkheads or other structures along the banks of a stream to protect his land from being washed away. Barnes v. Marshall, 68 Cal. 569, 10 P. 115; Weinberg v. Bixby, 185 Cal. 87, 196 P. 25;

Horton v. Goodenough, 184 Cal. 451, 194 P. 34; De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 279, 280, 39 P. 610, 46 Am.St. Rep. 237; Lamb v. Reclamation Dist., 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98; see cases cited in 25 Cal.Jur. 1051, 1052, sec. 47; 26 Cal.Jur. 290-292, secs. 503-508. The evidence presented by the plaintiffs in the instant case is therefore insufficient to establish a right to recover against the defendants.

[18] Plaintiffs contend that the decision of the District Court of Appeal holding that their complaint stated a good cause of action against a general demurrer, is the law of the case and requires this court to reverse the nonsuit of the trial court. The District Court of Appeal, 15 Cal.App.2d 520, 59 P.2d 605, 606, stated that "The gist of [the] * * * complaint * * * is that respondent constructed and built an artifical drainage system so defectively, carelessly, and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended" and "that the injury to the appellants occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona lagoon, which was too small to conduct the water turned into it by and through the drainage system constructed, operated, and maintained by respondent * * *". According to the allegations of the complaint, the damage resulted because defendants negligently diverted water out of its natural channel, and obstructed the channel of the creek. Plaintiffs' evidence, however, fails to substantiate such allegations. The decision of the District Court of Appeals on demurrer is therefore not binding on this court in passing on the sufficiency of the evidence to support the allegations.

The judgment is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The statement of facts in these cases contained in the majority opinion is both incomplete and inaccurate and the legal theory upon which the decision is based is manifestly unsound and unsupported by respectable authority. The principles of law, if they may be called such, announced in the majority opinion, are clearly contrary to the settled law of California and the weight of authority elsewhere.

Since a correct statement of the facts is essential to the proper determination of every law suit, I will first set forth the facts as they appear in the record before us in these cases.

Consolidated actions were brought to recover damages resulting from the overflow of storm waters upon the real property of the plaintiffs and their assignors located in Venice, a suburb of the city of Los Angeles. At the close of plaintiffs' evidence, judgments of nonsuit were entered from which the plaintiffs have appealed.

The litigation concerns the drainage area of La Ballona creek, approximately twelve miles square, located in the westerly part of Los Angeles county, and is bounded on the north by the Santa Monica mountains and the Hollywood hills, on the south by the Baldwin hills, on the east by Vermont avenue and on the west by Sepulveda canyon and the Pacific ocean. Within the above-mentioned area are situated the towns of Culver City, Beverly Hills and Palms, and a portion of the defendant City of Los Angeles. The entire area is a part of the defendant Los Angeles County Flood Control District.

It was agreed in the court below that the issue of liability or nonliability should be tried first. The evidence regarding the development and urbanization of the area, including changes in the methods of drainage, is voluminous and technical. Briefly, when the watershed was in its natural state much of the rain that fell into it never reached the outlet at La Ballona lagoon, a large submerged area close to the Pacific ocean which constituted its outlet. The drainage of the watershed extended over a wide area in "thin sheets", and much of the water was absorbed in the ground, lost by evaporation, or held by large lakes or swamps and slow-moving streams. The development of the area brought a gradual confinement of the drainage, and sections which had once been absorptive, came to have a run-off themselves. The defendant city constructed thirteen concrete storm drains, the defendant county three. These drains collected the surface waters. The defendant flood control district built its structures

in the middle reaches of La Ballona creek to deepen, widen and straighten the channel, and constructed levees along the banks to confine the water to the channel of the creek. These improvments followed the former natural watercourse and entailed no diversion of water from without the watershed. They caused the water to run off faster from the drainage area and increased the volume flowing into La Ballona lagoon, the main outlet into the ocean. The surface water collected by the storm drains emptied into a large basin *where the improvements ended some three miles east of the lagoon.* The water in the basin entered the lagoon at two places and flowed through it to the only outlet into the ocean.

It is the contention of the plaintiffs that "by said operation and the inadequate outlet into the ocean a *'cul de sac'* was formed", which had the effect of impounding the storm waters and causing them to overflow the banks of said lagoon.

On December 31, 1933, and January 1, 1934, a heavy rain occurred and the storm waters went down La Bellona creek and into the lagoon where they overflowed and flooded to a depth of six to eight feet for about four days the properties of the plaintiffs and their assignors *located some three miles north of the lagoon or main outlet* into the ocean, which properties were *not riparian to the lagoon or La Ballona creek.* These actions for damages followed, and each complaint alleges five causes of action. The first cause alleges that the defendants were negligent in constructing and maintaining an "artificial" drainage system of insufficient size in that the lagoon outlet was inadequate to carry and discharge into the ocean the concentrated and accelerated flow of water which resulted from the high-speed impervious concrete storm drains installed by defendants. The second cause alleges that while the improvement of the drainage area was for a public use and purpose no compensation was made to the plaintiffs and their assignors for the damage thereby caused to their property. The third cause alleges that the defendants disregarded plaintiffs' rights by constructing a drainage system which caused more storm or surface water to be carried into La Ballona lagoon than it could carry, and by failing to remove such obstructions in the lagoon as bridges and an oil derrick. The fourth cause alleges that the defendants have by means of the concrete storm drains and conduits "diverted" water from the streets within the drainage area to the plaintiffs' property in increasing quantities and with destructive force. The fifth cause alleges that the defendants have caused and permitted obstructions in and across the lagoon outlet without taking the necessary precautions against the overflow of storm waters flowing therein.

Prior to the consolidation of these two actions for trial, a demurrer of the defendant flood control district to the first, fourth and fifth causes of action was sustained without leave to amend in the Archer case. Upon appeal it was stated, in part, by the District Court of Appeal, 15 Cal.App.2d 520, 59 P.2d 605, 606, that "The gist of [the] * * * complaint * * * is that respondent constructed and built an artificial drainage system so defectively, carelessly, and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended" and "that the injury to the appellants occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona lagoon, which was too small to conduct the water turned into it by and through the drainage system constructed, operated, and maintained by respondent * * *." The District Court of Appeal thereupon reversed the judgment entered upon the sustaining of the demurrer without leave to amend, concluding that the complaint adequately alleged causes of action in the respects mentioned. Archer v. City of Los Angeles, 15 Cal.App. 2d 520, 59 P.2d 605. This is of significance upon this appeal since the motion for nonsuit made (and here granted) at the close of the plaintiffs' case operates as a demurrer to the evidence. See cases cited in 9 Cal.Jur. 551, sec. 35. If, as held by the District Court of Appeal, the complaint in the Archer case (identical with that in the Allison case) states causes of action for damages based on the negligent or defective construction of public works, and the evidence thereafter adduced by the plaintiffs tends to establish the allegations of the complaints, the trial court must be held to have erred in nonsuiting the plaintiffs. It is settled that "a nonsuit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in con-

flict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances". Mastrangelo v. West Side U. H. School Dist., 2 Cal.2d 540, 544, 42 P.2d 634, 636; Angelus Securities Corp. v. Ball, 20 Cal. App.2d 423, 436, 67 P.2d 152.

The witness Frisbie, a civil engineer, who had been familiar with the La Ballona drainage area for approximately eighteen years, described its natural state and subsequent development. He pointed out that engineers employ two principal methods to control flood waters: to retard and hold them back in storage reservoirs, or to *confine the waters that naturally flow over porous soils to line channels* at high speed so that more water will flow to the outlet at given times. He added that the problem in the latter method, which he stated *was employed by the defendants* to drain the La Ballona watershed, is the outlet. He testified that the effect of the concrete storm drains and the straightening and widening of the La Ballona channel to concentrate the run-off, was not only to accelerate the flow but to cause *more water* to flow down because it was no longer in part lost in absorption or evaporation. "To discharge that water through these high-speed drains, concentrate, and discharge it right out into open space, with no control over it, and then a thoroughly bottled up outlet, in my opinion, would be very bad engineering. * * * The capacities of the outlets into the lagoon between the sand bar and the sand dunes, in the condition in which they were during that period, were insufficient to carry off the water, to carry the water away as fast as it was arriving." He gave a negative answer to the question whether it was "good engineering to construct an elaborate system of storm drains in the upper part of the La Ballona creek watershed, and for the Los Angeles County Flood Control District to construct a fine, high-speed main channel down to and beyond Centinela boulevard, and then turn the storm water loose at that point with such facilities as existed for its escape into La Ballona lagoon, as existed on December 31, 1933". As reasons therefor he added: "Because the construction of all these high-speed drains and the great areas of impervious surfaces greatly increased the quantity of storm waters that would arrive down in that area at a given time, and would require good, ample facilities for an outlet capacity far greater than it required under the natural conditions of that watershed, when a great deal of that water never got there, because it was absorbed in the debris cones and absorbed in the brush and all kinds of growth, and when it approached at very slow velocities through these cienagas and over the natural surface—to turn that loose at that point with no open, flat country and no possible way to force that water through a limited outlet without piling the water up several feet deep, in my opinion, was not good engineering."

The witness Bell, a consulting civil engineer, who many years earlier had done some work for the defendant flood control district and the defendant county in connection with La Ballona creek, described the area in its natural and subsequently altered state much as did the witness Frisbie. He, too, testified that it was not "good engineering to construct an elaborate system of storm drains in the upper part of La Ballona watershed, and for the Los Angeles County Flood Control District to construct a fine, high-speed main channel down to and beyond Centinela bridge * * * and then turn the storm waters loose at the point with such facilities as existed for its escape into La Ballona Lagoon, as existed on December 31, 1933, * * * because if there were no facilities for the escape of that water when it got down to the estuary of La Ballona, there was created what you might call practically a cul de sac. It could not get out. It was bound to collect like a reservoir and spread out all over the country; nothing to prevent it."

A series of letters, placed in evidence by the plaintiffs as exhibits, definitely indicate that the *appropriate officers of the three defendant entities had knowledge for several years prior to the flood here involved of the imperative necessity for a change in the La Ballona outlet to the ocean.* On January 6, 1931, the chief engineer of the defendant flood control district addressed a letter to the board of supervisors of the defendant county wherein he stated that in the previous month he had received a letter from the Venice Chamber of Commerce requesting the "construction of a dyke to protect Venice from flood waters". In his letter the chief engineer pointed out to the board that "The *natural rate of flow of La Ballona Creek has been greatly increased*

due to the discharge into it of six (16 in 1933) storm drains of which four are Los Angeles City, one Culver City and one County Drain. The Flood Control District has during the past summer enlarged and cleaned the entire channel where rights of way were obtained. Lacking an adequate outlet to the ocean the channel capacity *has each year been barely sufficient to handle the relatively low flows that have occurred* and in the event of a major or even a moderate flood two principal locations would be subject to damage. 1. The City of Venice. 2. Culver City and vicinity * * *" In an earlier letter (1930) to the board of supervisors in which the chief engineer discussed the *drainage changes* that had been made in the area and of the then existence of five storm drains (county and city) and of the proposal of the city to construct five additional drains, he added "to fully relieve the present situation an outlet to the ocean is essential."

It is manifest that the foregoing facts are sufficient to make a prima facie case in accordance with plaintiffs' allegations and to establish what the District Court of Appeal declared to be the gist of the Archer action, that is, that "The gist of [the] * * * complaint * * * is that respondent constructed and built an artificial drainage system so defectively, carelessly, and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended" and "that the injury * * * occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona lagoon, which was too small to conduct the water turned into it by and through the drainage system constructed, operated, and maintained by respondent * * *". Archer v. City of Los Angeles, supra. On the doctrine of the law of the case, as to the Archer case, and stare decisis, as to the Allison case, it must be held that plaintiffs have established the liability of defendants.

The attempted answer to that incontrovertible proposition advanced by the majority opinion is that: "According to the allegations of the complaint, the damage resulted because defendants negligently *diverted* water out of its *natural channel,* and obstructed the channel of the creek. Plaintiffs' evidence, however, fails to substantiate such allegations." That statement is palpably incorrect. The gist of the action as stated by the District Court of Appeal was *not* that water had been *"diverted* out of its natural channel", rather it was that the defendants negligently "turned the storm waters into La Ballona lagoon", that is, collected surface waters and discharged them into the lagoon. The evidence without contradiction shows that that occurred. The storm waters were collected into drains and turned into the lagoon and creek, the outlet of which was too small to carry them, with the result that plaintiffs' lands were flooded when the lagoon overflowed. The prior decision is therefore the law of the case and controlling here.

The true basis of liability in cases of this character is found in the constitutional provision prohibiting the taking or damaging of property for a public use without the payment of just compensation. California Constitution, art. I, sec. 14. The liability exists independent of negligence on the part of the public agency. Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814; Elliott v. County of Los Angeles, 183 Cal. 472, 191 P. 899; Kaufman v. Tomich, 208 Cal. 19, 280 P. 30. In the instant case the evidence shows that the defendants launched and constructed an extensive public improvement, to-wit: The drainage of the area above-mentioned into the Pacific ocean. It establishes that the improvement was inherently improper, was negligently planned and carried out, and was contrary to skillful engineering practices. The drainage of the water into the Pacific ocean could not be accomplished without flooding plaintiffs' land with the condition of the outlet from La Ballona lagoon being in the condition in which it existed. Further, the evidence shows that defendants knew of that condition. It cannot be said that the object and design of the drainage system did not include the discharge of the drainage water into the ocean. That discharge was necessarily an inseparable part of the entire drainage scheme. Defendants were obligated therefore to either properly improve the outlet or to compensate anyone whose property was damaged by reason of the insufficiency of the improvement. They knew that the improvement would result in the flooding of property; that flooding was a necessary and component part of the entire system, and as they failed to acquire by eminent domain the right to so flood the property, then they must now compensate

the owners thereof for the injury thereby caused. In essence the situation is no different than if defendants had constructed an outlet from the lagoon to the ocean which was too small to carry the water and a flood resulted. They adopted the natural outlet known to be insufficient in size as a part and parcel of the improvement, the drainage system. The case is not essentially different than Kaufman v. Tomich, 208 Cal. 19, 280 P. 130. There the improvement consisted of a sewer line in a street. While the sewer ditch was open, plaintiff's property, lying adjacent to the street, was damaged by the shifting of the soil upon which rested the foundation of her building. This court in affirming judgment for plaintiff stated at page 21 of 208 Cal., at page 131 of 280 P.: "* * * that if the act commanded by the municipality was inherently wrong, then both the municipality and the agent performing the work would be answerable in damages to any one injured thereby, even in the absence of negligence in its performance. This declaration finds support in Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50, 53, wherein the rule is expressed in the following language: 'Upon the other hand, if the act is one commanded by the municipality, itself, if inherently wrong, the municipality and the agent who performed will both be liable. * * * If the injury results, however, not from the wrongful plan or character of the work, but from the negligent or improper manner in which it is performed, the one so negligently acting will always be responsible, and the public corporation may or may not be responsible, depending upon the relationship which it may sustain to that agent.' Being satisfied that the trial court, on competent evidence, had found the plan and location of the sewer to be inherently wrong and dangerous, Judge Strother declared, as his opinion, that judgment was properly entered against both defendants." The trial court had found in the Kaufman case that the "location and alignment of the said sewer were intrinsically dangerous and inherently wrong, and were of such a nature and of so close proximity to the front of plaintiff's property and plaintiff's wall *as were likely in the natural course of construction of the said sewer* * * * to damage and injure said property * * *". (Emphasis added.) In the cases at bar the evidence is capable of the construction that the drainage system without a proper outlet was not only likely but certain to cause the flooding of plaintiffs' land and the defendants knew that result would follow.

Reference may be made to the language in Conniff v. San Francisco, 67 Cal. 45, 50, 7 P. 41, 44, involving the flooding of plaintiff's land by the construction of a street which dammed a stream: "The case before us is not one of mere consequential damage which the land-owner must protect himself against, and for which the law affords him no redress. It is a direct trespass on the property of plaintiff by the construction of a dam *which a moment's reflection would have made clear to any one must inevitably, in the course of nature, have resulted in the permanent overflowing the land of plaintiff* when the rainy season came, and from which he could only free himself by cutting away a public highway for which he might have been proceeded against both by a civil and criminal action." (Emphasis added.) In the instant case, not only would a moment's reflection have made it clear to anyone that plaintiffs' land would be flooded, but *defendants actually knew it.* In Spangler v. San Francisco, 84 Cal. 12, 23 P. 1091, 18 Am.St.Rep. 158, the construction of a street along a stream interfered with the flow therein, and defendant provided sewers or storm drains to carry the waters thereof to Mission Bay; by reason of disrepair the sewer failed to carry the water and plaintiffs' property was flooded. This court said at page 17 of 84 Cal., at page 1092 of 23 P., 18 Am.St.Rep. 158: "It is the duty of the city, when it does provide water-ways, *to provide such as are sufficient to carry off the water that might reasonably be expected to accumulate.* The rule is so laid down in Damour v. Lyons City, 44 Iowa [276], 282, approved and followed in Powers v. City of Council Bluffs, 50 Iowa [197], 201, 202. See Mayor [of New York] v. Bailey, 2 Denio [N.Y.] 433. We think the rule above stated correct, and approve it." (Emphasis added.) And at page 19 of 84 Cal., at page 1093 of 23 P., 18 Am.St.Rep. 158: "Dillon states that 'there is a municipal liability where the property of private persons is flooded, either directly or by water or sewage being set back, when this is the result of the negligent execution of the plan adopted for the construction of gutters, drains, culverts, or sewers, or of the negligent failure to keep the same in repair and free from obstruction; and this whether the lots are below the grade of the streets or

not. The cases support this proposition with great unanimity.' "

In Stanford v. San Francisco, 111 Cal. 198, 43 P. 605, the construction of a street (analogous to the drains in the cases at bar) by a city caused the collection of surface water which flowed into plaintiff's basement because of insufficient drainage facilities. It was held that the city was liable, this court stating at page 202 of 111 Cal., at page 606 of 43 P.:

"Here the grade of Jessie street was not changed, nor is there any claim that the premises occupied by plaintiffs were below grade. Here a street which, before it was paved, absorbed the water falling upon it, by the paving is made to retain and collect the same upon its surface, no means being provided for removing or conducting it away. The portion of the street so paved crossed no street or alley by which it could be diverted, and as the easterly end was more than two feet lower than its westerly end, and was absolutely closed at the lower end by a building which crossed it, *it was inevitable that the water falling on that portion of the street below Fourth street would be collected and retained until it could escape by flowing over the curb and sidewalk, and into the basement occupied by the plaintiffs.* * * *

"Counsel for appellant cites section 1039 of Dillon's Municipal Corporations, in support of the proposition that 'the law regards surface water as a common enemy which every proprietor may fight or get rid of as best he may.'

"That section, and the two following, are devoted to the subject of 'Liability in Respect of Surface Water,' and the last of these (section 1041) is devoted to the question of the 'omission to provide drains.' The learned author says: 'It is clear that there is no liability on the part of a municipal corporation for *not* exercising the discretionary or legislative powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means for draining for surface waters, so as to prevent them from flowing upon the adjoining lots.' But in note 2 to said section it is said: *'If the necessity for the drainage is caused by the city, the doctrine of the text* (section 1041), *that it is not bound to supply the drainage, does not apply.'* Even as applied to property below the level of the street, the same learned author says: 'It is possible there may be no middle ground, but we are unable to assent to the doctrine that by reason of their control over streets and the power to grade and improve them, the corporate authorities have the absolute and unconditional legal right intentionally to divert the water therefrom, as a mode of protecting the streets, and to discharge it by artificial means, in increased quantities, and with collective force and destructiveness, upon the property, perhaps improved and occupied, of the adjoining owner.' [Dillon on Municipal Corporations], section 1042. In a note to this section, in the fourth edition, he says: 'The many cases, since decided, cited in the notes, have found and defined the "middle ground," therein referred to, and adjudged the law to be as stated in the text.'

"In Ashley v. Port Huron, 35 Mich. 296 [24 Am.Rep. 552], it was held that where a city constructed a sewer in such manner as to throw a large quantity of water upon plaintiff's premises, which otherwise would not have flowed there, it was liable for the damage caused thereby. In the opinion in that case, after referring to a great many authorities, Chief Justice Cooley said: 'It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of its streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other.'

"In Seifert v. Brooklyn, 101 N.Y. 136, 142, 4 N.E. 321 [54 Am.Rep. 664], it was

said: 'Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned. Baltimore [etc.] R. R. [Co.] v. Fifth Baptist Church, 108 U.S. 317, 2 S.Ct. 719 [27 L.Ed. 739]. This principle has been uniformly applied to the act of such corporation in constructing streets, sewers, drains, and gutters, whereby the surface water of a large territory, *which did not naturally flow in that direction,* was gathered into a body, and thus precipitated upon the premises of an individual, occasioning damage thereto.' See, also, note to Chalkley v. Richmond [88 Va. 402], 14 S.E. 339, 29 Am.St.Rep. 742, under the head 'Surface Water,' where a large number of cases from many different states are cited.

"In Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 470, 37 P. 375, the same principle is asserted; and in the later case of De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 282, 39 P. 610 [46 Am.St.Rep. 237], it was said: 'But if the work was inherently, and according to its plan and location, a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream (the city of Los Angeles), but the person placing the obstruction, was severally liable for the entire damage.' See, also, Reardon v. San Francisco, 66 Cal. 492, 6 P. 317 [56 Am.Rep. 109], where the city was held liable for an injury to plaintiff's lot caused by work done upon the street, which was the immediate, direct, and necessary effect of the work done.

"Corcoran v. Benicia, 96 Cal. 1, 30 P. 798 [31 Am.St.Rep. 171], and the other cases cited by appellant on page 5 of his brief, do not conflict with the authorities which we have cited above. Corcoran v. Benicia, supra, is to the effect that a municipal corporation is not liable for damages caused by the prevention of the flow of surface water *from* the lot of a private owner, by raising the street to the grade, where such water does not run in a natural channel across the lot. The distinction between that case and this is obvious, and the other cases cited by appellant rest upon similar facts." (Emphasis added.)

There is no distinction between failure to provide a proper sewer to carry off the surface waters collected by the municipality, and a failure to provide a proper outlet from La Ballona lagoon. Also there is no distinction between the paving of a street which thereby collected surface water and discharged it on plaintiff's land and accomplishing the same result by concrete drains.

It is said in 43 Corpus Juris 1126, in regard to establishment of drainage systems by municipalities: "But according to a number of authorities this rule does not extend to exempt a municipality from liability for negligence in the adoption of a plan for drains or sewers, and where the municipal authorities negligently adopt or devise a plan or system which is obviously defective, or the unfitness of which has been demonstrated by previous experience, the municipality is liable for the resulting damage. It has also been laid down that the rule under discussion is subject to the distinction that, where the plan adopted by a municipality must necessarily cause an injury to private property, equivalent to some appropriation of the enjoyment thereof to which the owner is entitled, then the municipality is liable, but where the fault found is with the wisdom of the measure or its sufficiency or adaptability to carry out or accomplish the purpose intended, and where its construction according to the plan adopted invades no private rights, then the municipality is not liable."

Pacific Seaside Home v. Newbert Protection Dist., 190 Cal. 544, 213 P. 967, is a case precisely in point and squarely contrary to the holding of the majority opinion. This court said in that case at page 546 of 190 Cal., at page 968 of 213 P.:

"The gist of the plaintiff's complaint is that the defendant *constructed channels for the water of the Santa Ana river so defectively and negligently that they would not carry the waters of the stream.* Plaintiff alleges that—'Had the defendant not changed the natural course of the Santa Ana river, *or in any wise interfered with its natural flow, the waters of the Santa Ana river, would have flowed on into Newport Bay and no damage would have accrued to the plaintiff had the said river been permitted to flow as it naturally would* had not the defendant constructed its channel to divert the same. * * *' It is further alleged in effect that the in-

jury occurred to the plaintiff by reason of the fact that the defendant *negligently turned the waters of the Santa Ana river into a channel which was too small,* and which was negligently constructed and maintained, and that by reason thereof it was damaged.

"These facts sufficiently state a cause of action." (Emphasis added.)

In the cases at bar defendants constructed drains, altered the channel and interfered with the natural drainage and discharged the waters into the lagoon, the outlet of which "was too small", all to the damage of plaintiffs.

Commencing with the premise that the state or an agency thereof would not be liable for the flooding of plaintiffs' lands, if an individual would not be responsible for the same conduct, the majority opinion concludes that defendants are not liable because: "It is established in California and other jurisdictions that a lower owner has no right of redress for injury to his land caused by improvements made in the stream for the purpose of draining or protecting the land above, even though the channel is inadequate to accommodate the increased flow of water resulting from the improvements." Obviously the statement is directly contrary to Pacific Seaside Home v. Newbert Protection Dist., supra. In connection therewith it is also stated: "Likewise there is no diversion if surface waters, flowing in no defined channel, are for a reasonable purpose gathered together and discharged into the stream that is their natural means of drainage even though the stream channel is inadequate to accommodate the increased flow. * * * A California landowner may not collect such waters and discharge them upon adjacent land * * *, but *he may discharge them for a reasonable purpose into the stream into which they naturally drain without incurring liability for damage to lower land caused by the increased flow of the stream.*" (Emphasis added.) Those propositions are entirely out of line with the long and firmly established law in California with respect to surface waters. An upper owner may not collect surface waters in channels and thereby cause them to flow upon a lower owner's land in increased volume to his damage. This rule has been commonly referred to as the civil law rule as distinguished from the common law rule. The rule in this state was stated many years ago in Conniff v. San Francisco, supra, at page 49 of 67 Cal., at page 43 of 7 P.: "An individual has no right to collect in artificial channels mere surface water and precipitate it upon the land of another. Nor has a corporation, whether public or private, the right to collect in such channels mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another. The cases to this effect are numerous, and may be found cited in a note to section 272 of Gould on Waters." See, also: Los Angeles Cemetery Ass'n v. Los Angeles, 103 Cal. 461, 37 P. 375; Stanford v. San Francisco, supra; Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400; Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143; Wood v. Moulton, 146 Cal. 317, 80 P. 92; Galbreath v. Hopkins, 159 Cal. 297, 298, 113 P. 174; Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213; Heier v. Krull, 160 Cal. 441, 117 P. 530; Thomson v. La Fetra, 180 Cal. 771, 183 P. 152; Le Brun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Switzer v. Yunt, 5 Cal.App. 2d 71, 41 P.2d 974; Everett v. Davis, 18 Cal.2d 389, 115 P.2d 821.

Even though the surface waters collected are discharged in a natural channel on the upper owner's land, he is liable for flooding the land of the lower owner where the cause of the flooding is the increase in the volume of the water flowing to the lower owner beyond the capacity of the stream.

The true rule with respect to the drainage of surface waters and rights in relation thereto is set forth in Le Brun v. Richards, 210 Cal. 308, 314, 291 P. 825, 827, 72 A.L.R. 336. Although the factual situation there was not the same as here the rule there announced is applicable to a factual situation such as that here involved. It was there stated:

"'* * * From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by *interfering* with natural conditions, cause such surface water to be *discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions.* This is the settled law of this state.' In support of the above statement, the court cites a long array of earlier decisions. On the other hand, a different rule applies in the case of flood waters. Such waters are regarded as 'a common enemy, against which every man

has a right to defend himself, regardless of the fact that the barriers he erects for the protection of his land may cause the flood to rise higher, or flow with greater force upon his neighbor.' McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 797, 8 L. R.A. 575. This rule has been enunciated and applied in a number of cases, among which may be mentioned Lamb v. Reclamation Dist., 73 Cal. 125, 14 P. 625, 2 Am. St.Rep. 775; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 99, 89 Am.St.Rep. 169; Gray v. Reclamation Dist., 174 Cal. 622, 163 P. 1024; and Horton v. Goodenough, 184 Cal. [451], 455, 194 P. 34, 35." And again at page 315 of 210 Cal., at page 828 of 291 P., 72 A.L.R. 336:

"The upper proprietor may not divert by artificial means the surface waters upon his own lands to the lands of the lower proprietor, *nor may he accelerate by means of ditches or increase the drainage of his own land to the injury of the lower owner.* His right 'is limited to the disposition of the water through the chosen channels of nature.' Board of Trustees v. Rodley, supra [38 Cal.App. 563, 177 P. 175]." (Emphasis added.)

By the weight of authority the right of an upper owner to drain surface water into a watercourse is qualified to the extent that the flow must not be increased beyond the capacity of the stream; the flow of a stream cannot be increased beyond its natural capacity as was done here to the injury of one's property below by flooding. Thompson on Real Property, Perm.Ed., Vol. 2, Sec. 663; Ryder v. Town of Lexington, 303 Mass. 281, 21 N. E.2d 382; North Dakota v. Minnesota, 263 U.S. 365, 44 S.Ct. 138, 68 L.Ed. 342; Jackman v. Arlington Mills, 137 Mass. 277; Belcastro v. Norris, 261 Mass. 174, 158 N.E. 535; Smith v. Orben, 119 N.J.Eq. 291, 182 A. 153; McCormick v. Horan, 81 N.Y. 86, 37 Am.Rep. 479; Spink v. Corning, 61 App.Div. 84, 70 N.Y.S. 143; Board of Drainage Com'rs v. Board of Drainage Com'rs, 130 Miss. 764, 95 So. 75, 28 A.L.R. 1262. And that rule is applicable where the one doing the draining is a public corporation. Sisters of St. Joseph Corporation v. Atlas Sand, Gravel & Stone Co., 120 Conn. 168, 180 A. 303; Baldwin v. Ohio Twp., 70 Kan. 102, 78 P. 424, 67 L.R.A. 642, 109 Am.St.Rep. 414; Hicks & Carter v. Owensboro, 6 Ky. Law Rep. 226; Noonan v. Albany, 79 N.Y. 470, 35 Am.Rep. 540; McCutchen v. Peekskill, 167 Misc. 460, 3 N.Y.S.2d 277; Ryder v. Town of Lexington, supra; Miller v. City of Woodburn, 134 Or. 536, 294 P. 349; McQuillin Mun. Corps., Vol. 6, Secs. 2874, 2878, 2881, 2882, 2885.

The obvious result of the conclusion reached in the majority opinion is that an upper owner may, with absolute impunity, gather surface waters on his land in any quantity, discharge them into a stream, and thereby flood the land of a lower owner even though that lower owner's land is not riparian to the stream, is three miles away from the stream, and has never been burdened with surface waters in connection with the stream involved or from the drainage area involved. The authorities relied upon by the majority opinion for that shocking proposition are not in point when applied to a factual situation disclosed by the record in these cases. They consist, with a single exception, of cases from other jurisdictions. A review of several of them reveals their character. The case of Board of Drain. Com'rs etc. v. Board of Drain. Com'rs, 130 Miss. 764, 95 So. 75, 28 A.L.R. 1250, predicated its holding on the premise that an *upper riparian owner by virtue of his ownership,* may collect the surface waters and discharge them into a stream even though a lower riparian owner is injured. *That case conceded that the weight of authority was to the contrary.* Furthermore, the conduct involved was not the act of any one upper owner which caused the flooding; that result followed only because of a similar practice by many owners. See Drainage Dist. v. Haverstick, 186 Ark. 374, 53 S.W.2d 589, 590, 591. That is not the case here. In City of Hamilton v. Ashbrook, 62 Ohio St. 511, 57 N.E. 239, the flooding was caused by the breaking of a levee and not by excess drainage into the stream.

In Peck v. Herrington, 109 Ill. 611, 50 Am.Rep. 627, the right was limited to the flow of surface waters into *natural* channels. In that case the court said: "The *natural* flow of the surface water was *not changed.*" (Emphasis added.) In the cases at bar surface water is collected in artificial channels and the flow increased.

The language in Robb v. Village of La Grange, 158 Ill. 21, 42 N.E. 77, is dictum.

In O'Donnell v. City of Syracuse, 184 N.Y. 1, 76 N.E. 738, at page 743, 3 L.R.A., N.S., 1053, 112 Am.St.Rep. 558, 6 Ann. Cas. 173, the flooding was caused by ar

act of God and not the discharge of drainage waters. The court stated: "The plaintiff and the other citizens affected by the flood *were no worse off than they would have been if the creek had not been used at all for sewerage purposes,* except for the incidental deposit of sewage matter." (Emphasis added.) Plaintiffs in the cases at bar are undeniably worse off because of the drainage system.

Dudley **v.** Village of Buffalo, 73 Minn. 347, 76 N.W. 44, at page 45, is clearly not in point. There the court stated: "It is clear, then, that the village is not liable for putting in the upper drain, and thereby carrying the water across the street, because it *did not gather the surface water,* and unnecessarily discharge it in a stream upon the plaintiff's premises, where it did not naturally belong." (Emphasis added.)

Waffle v. New York Central R. R. Co., 53 N.Y. 11, 13 Am.Rep. 467, is distinguished in a *later* New York case which recognizes and applies the rule that an upper riparian owner may not collect surface waters and discharge them into a stream in excess of its capacity. In Noonan v. City of Albany, 79 N.Y. 470, at page 477, 35 Am.Rep. 540, the court in limiting the rule of the Waffle case stated: "The right of a riparian owner to drain the surface-water on his lands into a stream which flows through them, and which is its natural outlet is an incident to his right as riparian owner to the reasonable use of the stream. But this right is not, we conceive, an absolute right under all circumstances, *irrespective of the size of the stream,* or the natural purpose which it subserves, to throw into it, surface-water by means of ditches or drains, when by so doing it will be *filled beyond its natural capacity, and overflow and flood the lands of a lower proprietor.*" (Emphasis added.) This is directly in accord with the views herein expressed by me.

City of Maysville v. Brooks, 145 Ky. 526, 140 S.W. 665, does not involve a factual situation in any way analogous to the cases at bar.

In Strauss v. Allentown, 215 Pa. 96, 63 A. 1073, 7 Ann.Cas. 686, the court applied the *"common enemy"* rule to *surface* waters. It cannot be doubted that such rule is applicable *only* to flood waters in California, and may *not* be applied to surface waters. 26 Cal.Jur. 279-293. The same is true of Jefferson County Drainage Dist. v. McFaddin, Tex.Civ.App., 291 S.W. 322; City of Ludlow v. Broderick, 181 Ky. 123, 203 S.W. 1082, at page 1083, recognized the limitation on the right to collect and discharge surface waters. The court said: "Finally it is insisted that the smooth surface of the brick street has facilitated the flow of the water and allowed it to pass freer and faster but in the *same* course and *quantity.* The rule recognized in this state does not allow a recovery by a lower or servient estate for damages where the quantity of water is not increased nor caused to flow in a new or different course or channel. So long as the *volume of the water remains the same* and is confined to its usual and ordinary course there is not actionable wrong in facilitating its flow by cleaning the channel or leveling the surface so as to let it pass without obstruction or run rapidly." (Emphasis added.)

The same is true of Manteufel v. Wetzel, 133 Wis. 619, 114 N.W. 91, at page 92, 9 L.R.A.,N.S., 167, the court stating: "In other words, causing surface water to flow in its natural direction through a ditch on one's own land instead of over the surface or by percolation as formerly, where no new watershed is tapped by said ditch and *no addition to the former volume of surface water is caused thereby,* except the mere carrying in a ditch what formerly reached the same point on defendant's land over a wider surface by percolation through the soil or by flowing over such wider surface, is not, when not negligently done, a wrongful or unlawful act." (Emphasis added.)

A similar comment applies to Trigg v. Timmerman, 90 Wash. 678, 156 P. 846, L. R.A. 1916F, 424.

A further review of the authorities from other jurisdictions relied upon by the majority opinion would serve no useful purpose. Most of them do not stand for the rule for which they are cited; many are, on the contrary, in accordance with the views herein expressed. In any event as has heretofore been seen those apparently in point are out of line with the weight of authority.

The only case in California cited in the majority opinion for the foregoing propositions is San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200. Not only are the facts of that case inaccurately stated in the majority opinion, but the purported holding therein relied upon is dictum and was

in no way necessary to the decision of that case. In that case the County of Los Angeles placed concrete conduits in a *natural watercourse.* The watercourse flowed through plaintiff's land which was riparian thereto and was situated about a mile below the point where the conduit ended. The conduit accelerated the flow of the stream, causing erosion where the stream flowed through plaintiff's land. There was not any construction of "concrete storm drains" as stated in the majority opinion; the conduit was placed in and as a part of a *natural watercourse.* There was *no collecting of surface waters by the construction of drains* and the discharge therefrom of water into a natural watercourse, as exists in the cases at bar. There was no evidence of any flooding of plaintiff's land or that the conduit caused water to flow in the stream in excess of its capacity. This court there said at page 404 of 182 Cal., at page 559 of 188 P., 9 A.L.R. 1200. *"It does not appear from the findings in the present case whether the plaintiff's land was flooded or not."* It is quite apparent therefore that the San Gabriel case is *not* similar to the cases at bar on its *facts,* and anything stated therein with respect to gathering surface waters and discharging them into a stream followed by a flooding of a lower owner's land because the capacity of the stream was overtaxed, is nothing but dictum and not here controlling. Furthermore, the views so expressed are in conflict with the law in this state with respect to surface waters, and are in effect discarded by Le Brun v. Richards, supra, which at a later date expressed the true California rule on the subject.

In addition to the foregoing discussion there are many other respects in which the San Gabriel case is not properly an authority for the rules enunciated in the majority opinion.

First, it is said in that case, at page 396 of 182 Cal., at page 555 of 188 P., 9 A.L.R. 1200: "But the whole effect of the drains, so far as increasing the volume in the stream is concerned, may be summed up by saying that they *add no water to that already in the channel* and that which would come to it on the way, but merely serve to pass such waters more completely and more speedily from one point in the channel to another, all entirely above the plaintiff's land." (Emphasis added.)

In the cases at bar the drains do *add* water to that already in the channel by collecting and discharging the surface water therein.

Second, the court states in the cited case, at page 396 of 182 Cal., at page 555 of 188 P., 9 A.L.R. 1200: "The plaintiff's land is a mile or more below the lower end of the drains, and *any impetus the water may have as it emerges from the drains must be lost long before reaching the plaintiff's land.* There is no increase in velocity, in other words, except such as is a necessary incident of an increased volume." (Emphasis added.)

In other words, any increased velocity of the flow was lost before the stream reached plaintiffs' land.

Third, it is stated therein that it does not appear "that it [the conduit in the watercourse] was constructed in a manner more burdensome to the plaintiff than was required for the purpose for which it was constructed". In the instant cases the evidence is clear that the flooding of plaintiff's land could have been avoided if the outlet to the ocean had been given proper attention.

Fourth, the waters involved in the San Gabriel case were *not surface waters;* here the waters collected by the drains which run into the La Ballona creek conduit are surface waters which are collected by artificial means, the drains, and discharged into La Ballona creek. The increase of water so brought about contributed to the flooding. It is said in the San Gabriel case, at page 398 of 182 Cal., at page 556 of 188 P., 9 A.L.R. 1200: "It should also be observed at the outset that the present case is *not concerned with surface waters.* Such waters in the legal sense are those which fall on the land by precipitation from the skies or arise in springs and spread over the surface of the ground without being collected into a definite body. McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L.R.A. 575; 3 Farnham on Waters, § 278. As to such waters the rule has been established by numerous decisions in this state that *a land owner may not gather them together on his land* by artificial means and discharge them on to lower lying land in greater volume or in a different manner than they would naturally be discharged. Of this character are the following decisions cited on behalf of the plaintiff: Conniff v. San Francisco [67 Cal. 45, 7 P. 41]; Stanford v. San Francisco, 111 Cal. 198, 43 P. 605; Cushing v. Pires, 124 Cal. 663,

57 P. 572; Galbreath v. Hopkins, 159 Cal. 297, 113 P. 174; Shaw v. Sebastopol, 159 Cal. 623, 115 P. 213; Heier v. Krull, 160 Cal. 441, 117 P. 530; Cox v. Odell, 1 Cal. App. 682, 82 P. 1086; Peck v. Peterson, 15 Cal.App. 543, 115 P. 327; and [Board of Trustees of Leland] Stanford University v. Rodley [38 Cal.App. 563], 177 P. 175. But the present case is *not concerned with surface waters,* and the foregoing decisions are not in point. The waters upon which the drains here in question act have *lost their character as surface waters before they reach the drains and have already been gathered into a definite body flowing as a stream in a water course.* The difference between surface waters and those collected and flowing in a watercourse is well recognized, and the same rules by no means apply to one as to the other." (Emphasis added.)

Fifth, in the cases at bar the water which caused the damage was collected and discharged into La Ballona lagoon and was thereby caused to be discharged or spread over land it had never before covered. Plaintiffs' land is three miles from the lagoon. This distinction appears from the statement at page 398 of 182 Cal., at page 556 of 188 P., 9 A.L.R. 1200: "Likewise the distinction should be observed at the outset between the present case and such decisions as Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400, Larrabee v. Cloverdale, 131 Cal. 96, 63 P. 143, Wood v. Moulton, 146 Cal. 317, 80 P. 92, and Humphreys v. Moulton, 1 Cal.App. 257, 81 P. 1085, which are also cited on behalf of the plaintiff. These cases were all concerned with water in watercourses and *with improvements or changes in drainage.* So far they resemble the case at bar. But in all of them, *unlike the present case,* the improvement or change did *not have the effect merely of passing down the water in a stream* more completely and speedily from one point in its channel to another, but of diverting it entirely from its channel and discharging it either into a different channel in which it did not naturally flow or *upon neighboring land where there was no* channel." (Emphasis added.)

Sixth, the plaintiffs' land here is not riparian to La Ballona creek, it is three miles away and that creek never crossed it. In the San Gabriel case the stream whose bed was improved crossed plaintiff's land. For that reason he must assume the burdens as well as the benefits of riparian ownership, one of which is that certain repairs and improvements may be made in the bed of the stream above his land although the result is to his injury. In the instant cases the *stream never invaded plaintiffs' land* which is three miles therefrom, and to them the flooding of the waters onto their land is the *same as a diversion of the stream onto their property* which is admittedly an unlawful trespass. Even if it were conceded that an upper owner may with impunity, collect and discharge surface waters into a natural watercourse with the result that lower land *riparian* to that stream is flooded, defendants here would still be liable. Under such a concession the *reason* for no liability would be *that by reason of the riparian character of the lower owner's land, his riparian right and land might be said to be subject to a servitude* or easement owned by the upper owner, that is, the right of the upper owner to use the stream as a drainage channel. But in the cases at bar plaintiffs' land is three miles from the stream and is not subject to any such servitude. Furthermore, defendants have no property rights to which such an easement could be appurtenant. (More is said on that subject later herein.)

Seventh, the court repeatedly points out in the San Gabriel case that there is no claim of the insufficiency or impropriety of the drainage system of defendant, but in the instant cases it is clear that the system was obviously improperly constructed and insufficient because no proper outlet was furnished for the discharged drainage water.

Eighth, this court has recently held (July 31, 1941) that although it may be that an upper owner may collect surface waters and discharge them into a stream flowing through his land (citing the San Gabriel case as authority) he *may not* in so doing change the *natural conditions or alter the flow in the stream to the damage of the lower owner.* In Everett v. Davis, supra, at page 824 of 115 P.2d, this court said: "The appellants also seek to justify their actions upon the ground that the *highway ditch was the natural means of drainage;* that all of the water from Estes Wash flows into it at one point or another, and therefore *they were entitled to concentrate these waters by a channel and bring them to the ditch at one point.* Of course, one may gather and discharge surface waters into a stream which is their natural means of drainage. San Gabriel Valley Country

Club v. [County of] Los Angeles, supra. But before the acts complained of in the present case, the water naturally dispersed over the land, and that part of it which reached the ditch *had lost much of its force. After* the appellants constructed their fences, the *waters were sent through a narrow channel in a manner quite different from the natural flow.* Theretofore only some of these waters had flowed into the ditch at different points over a wide area; the channel contrived by the appellants *brought practically all of the flow of Estes Wash to one point with destructive* force. Under these circumstances the principle relied upon by the appellants has *no application.*" (Emphasis added.) The majority opinion is squarely contrary to the Everett case. In the cases at bar the waters were gathered in excessive quantities in the La Ballona lagoon contrary to natural conditions, and the inevitable flooding occurred.

As heretofore stated the majority opinion launches its discussion of the San Gabriel case on the premise that if a private owner would not be liable for the conduct with which the defendants are here charged, the public agencies, defendants in this case, would not be liable, and in the foregoing discussion I have accepted that premise, but it will not withstand a careful analysis. In fact, even a casual scrutiny reveals its fallacy. Defendants here may well be liable even though a private upper landowner might not be. That rule may be proper as a general proposition, if its application is limited. It is not applicable, however, unless the state is in the same position as a private individual who is not liable although inflicting damage because such damage occurs in the proper exercise by him of some *property right* possessed by him. If he is not liable it is because what he has done has been in the lawful enjoyment of a property right. See Stewart v. Birchfield, 15 Cal.App. 378, 114 P. 999. For illustration, if an upper riparian owner uses the portion of the water to which he is lawfully entitled, the lower owner may well be injured thereby because of an insufficiency of water to satisfy all of the needs of both of them. The lower owner, though damaged, could not recover from the upper owner because the latter in making a reasonable use of the water was exercising a legal property right. That is the basis for the rule that there may be injury but not liability. As a general rule a person is not liable to another for an injury inflicted upon the latter if such injury occurs by reason of the lawful exercise by the former of his property right. In the illustration above mentioned it would not be questioned that if someone who had no rights in the stream diverted the same quantity of water, the lower owner could hold him liable. The state or public agency is in no different category. When it has no property right to be exercised, it cannot escape liability for damaging a person's property, although such damage might not be actionable if caused by a private individual while lawfully exercising a property right. Lacking a property right, there are only two bases for a damaging of property by the state, namely, the power of eminent domain, where compensation must be paid, and the police power.

Defendants urge that the contruction of the improvements here involved was a proper exercise of the police power and for that reason plaintiffs may not be compensated for the damages suffered by them. The majority opinion discusses the police power, but then for some unrevealed reason does not reach any conclusion with respect to its application to the cases at bar. It does not hold that the plaintiffs are barred from recovery because the flooding was done under the police power. It does state: "In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by *so great a necessity* as to be justified without proper compensation to the owner. * * * The liability of the state under article 1 section 14 of the California Constitution arises when the taking or damaging of private property is *not so essential to the general welfare as to be sanctioned under the 'police power.'*" (Emphasis added.) Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. If the degree of public necessity be the test then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such

a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damages for a public improvement. Who may say that property for schools, highways, streets, etc., is not absolutely necessary for the proper functioning of the government? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter the dividing line between the exercise of the two powers, it may be justifiably said that police power operates in the field of regulation, except possibly in some cases of public emergency such as a fire where buildings may be destroyed, rather than in the taking or damaging of property for some public improvement. A man may be prevented under the police power from so using or maintaining his property that it is detrimental to the public health, safety, morals or general welfare. Regulations may be invoked to prohibit such use and maintenance. But where neither his property nor its use or maintenance by him has any relation to the public good sought to be accomplished or evil to be remedied, other than that the public desires to use his property, he should be compensated for the taking or damaging of it if the constitutional guarantee still exists. In the cases at bar plaintiffs' use and maintenance of their property has no relation to defendants' improvements.

The distinction between the two powers is discussed in Lewis, Eminent Domain, 3d Ed., Vol. 1, Sec. 6, p. 13, as follows: "Everyone is bound so to use his own property as not to interfere with the reasonable use and enjoyment by others of their property. For a violation of this duty the law provides a civil remedy. Besides this obligation, which every property owner is under to the owners of neighboring property, he is also bound so to use and enjoy his own as not to interfere with the general welfare of the community in which he lives. It is the enforcement of this last duty which pertains to the police power of the State so far as the exercise of that power affects private property. Whatever restraints the legislature imposes upon *the use and enjoyment* of property within the reason and principle of this duty, the owner must submit to, and for any inconvenience or loss which he sustains thereby, he is without remedy. It is a *regulation, and not a taking,* an exercise of police power, and not of eminent domain. But the moment the legislature passes beyond *mere regulation,* and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power. We shall defer until a subsequent chapter a discussion of the limits of the police regulation of private property and of the acts which, though under the guise of police regulation, amount to a taking of property for public use, and which, therefore, can only be accomplished under the power of eminent domain. It is sufficient for the present purpose to point out the distinction between the two powers. Under the one, the public welfare is prompted by regulating and restricting the use and enjoyment of property by the owner; under the other, the public welfare is promoted by taking the property from the owner and appropriating it to some particular public use." (Emphasis added.)

The majority opinion cites the case of Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024, in support of the proposition that the state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety or morals. While it is true that the Gray case holds that the drainage and reclamation of lands, apart from any question of the navigability of streams, is a legitimate exercise of the police power of the state, it is in no respect an authority for holding that the damages suffered by plaintiffs in the cases at bar can be justified under the most liberal exercise of the police power that has ever been asserted by enthusiastic advocates of the extension of that power. While there is much dictum in the Gray case which has been seized upon by those desiring to extend the application of the police power doctrine into the field of eminent domain, I think it is clear that when the Gray case is studied and analyzed, it cannot be said that the prin-

ciples of law therein announced in any way trench upon or purport to abrogate the provisions of section 14 of article I of our state Constitution prohibiting the taking or damaging of private property for public use without the payment of just compensation therefor. In the first place, the plaintiff in the Gray case sought to restrain the reclamation district, which was created by a statute passed by the legislature of this state, from carrying into effect the provisions of such statute which were designed to control the flood waters of the Sacramento and San Joaquin rivers to the end that the navigability of those rivers would be improved, and lands which were in danger of being flooded during the period of run-off each year would be protected from injury as the result of such floods, and thousands of acres of land within the drainage area of said rivers would be reclaimed from a state of inundation and brought into a state of productive use. The injury complained of by plaintiff in the Gray case was prospective and temporary only and this court expressly stated that plaintiffs could protect themselves against it. At page 639 of 174 Cal., at page 1031 of 163 P., of the opinion in said case the court states: "In the case at bar it is to be observed that the flooding, occasioned only by reason of the diminution of the area of the Sutter basin, *will in the first place be but temporary, and will end when the reclamation works in the Sutter basin are completed, and, in the second place, may be protected against by the levee district,* in which most of plaintiff's lands are situated, and by the other property owners by a back levee, or by the construction of the eastern levee of the Sutter basin bypass, for their proportionate expense in building which their lands would be liable under assessment by the Sacramento & San Joaquin Drainage District; while, upon the other hand, the builders would be entitled to compensation from that district for any excess expenditure over their due proportion which they might incur in the construction of the work." (Emphasis added.)

In discussing the application of section 14 of article I of our Constitution to the factual situation in the Gray case, this court stated at pages 645 and 646 of 174 Cal., at page 1034, of 163 P., as follows:

"'* * * It is insisted, however, that a distinction should be made because of the provision of our Constitution that "private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." Article 2, § 22, Const. 1874. In reaching the conclusion above announced, we are not unmindful of the constitutional provision, but where no right has been violated, there is no injury for which the liability affords compensation, and it is a case of an injury without damages.' The Supreme Court of Mississippi, under a constitutional provision like ours, where the acts complained of were the acts of its levee commissioners in controlling the waters of the river whose name the state bears, has held that the landowner is not entitled to compensation because the construction of the levee renders the land between it and the river worthless for agriculture and necessitates the removal of houses on to the protected side of the levees. Richardson v. Levee Com'rs, 68 Miss. 539, 9 So. 351.

"Nothing in any of our decisions in the slightest militates against this conclusion. Reardon v. San Francisco, 66 Cal. 492, 6 P. 317, 56 Am.Rep. 109, contains a discussion of the meaning of the word 'damage' as newly placed in the Constitution. The holding was that it applied to *special* consequential damages which the owner of adjoining property received over and above the common injury to other abutters on the street or the general public, by reason of a street improvement. It based its conclusion largely upon the views of the Supreme Court of Georgia, reference to which has hereinbefore been made. No difficulty arises over this case, which by its very language is limited to special damage occasioned to particular property which is not a common damage to all abutting property. Upon the other hand, in De Baker v. [Southern] California Ry. Co., 106 Cal. 257, 39 P. 610, 46 Am.St.Rep. 237, this court in bank, referring to the contention that because of the modification of our Constitution, the doctrine of Green v. Swift [47 Cal. 536], and Green v. State [73 Cal. 29, 11 P. 602, 14 P. 610], and Lamb v. Reclamation District [73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775], were no longer the law, passed it by with the statement merely that 'it is possible this may be true.' But here and now, therefore, for the first time is the question presented, and for the reasons above given, we hold that the doctrine of *damnum absque injuria* is applicable to the *prospective temporary consequential damage* which it may be found will be inflicted upon the plaintiffs' lands by the future raising of a flood plane, which

floods are of temporary duration and character, *which raising the plaintiffs may protect themselves against,* and which floods, in the progress of the work, will be taken care of so that future injury will be avoided, all this under the state's plan of vast magnitude and importance to abate, on behalf of the whole state, as well as for the benefit of private landowners, including these plaintiffs, flood conditions, which, if unchecked, would inevitably lead to the destruction of the navigability of the river and to the greater impairment and damage of all the adjacent land. *Further than this it is not necessary here to go.*" (Emphasis added.)

It should be apparent to anyone familiar with the factual situation in the Gray case that it bears no similarity whatever to the factual situation in the cases at bar and that therefore the principles of law involved in that case are in nowise applicable to the cases now before us.

In the cases at bar the improvement has directly caused the damage suffered by the plaintiffs. In the Gray case the improvement instead of causing damage to the plaintiff would ultimately result in a benefit and improvement of his property; the damages involved being only prospective and temporary and *incidental to the construction of the improvement rather than the improvement itself.* Furthermore, as pointed out by this court in its decison in the Gray case, the plaintiff could protect his property against the prospective temporary damage to which his property was subjected, but the plaintiffs in the cases at bar obviously had no such opportunity.

I cannot refrain from adverting to the recent but growing tendency of some courts and judges toward the destruction of constitutional guarantees by the process of specious interpretation. It may be that such constitutional guarantees are obnoxious to the social or economic philosophy of the judge or judges deciding the particular cause; but I submit that it is for the people and not the courts to bring about changes in our Constitution. To invoke the police power as a justification for the taking or damaging of private property for public use in violation of section 14 of article I of the Constitution of California is nothing less than amending the Constitution by judicial edict or nullification by sanction of law.

In the cases at bar, the public agencies here involved constructed a drainage system presumably for the benefit of the public, or a portion thereof. Conceding that such system was properly and efficiently constructed and maintained, but its operation necessitated the flooding of plaintiffs' premises situated three miles away, under what possible theory can it be argued that plaintiffs' property was not damaged for the public purpose of maintaining said drainage system? If it was so damaged, defendants are liable to plaintiffs under section 14 of article I of our Constitution. If, on the other hand, the system was improperly or inefficiently constructed or maintained, and the flooding of plaintiffs' premises resulted therefrom, the liability of defendants could be predicated upon the provisions of the 1923 statute (Stats. of 1923, p. 675), as well as the above-mentioned provision of the Constitution. In other words, defendants could not avoid liability for the damaging of plaintiffs' property because of their negligent conduct in the construction or maintenance of the public improvement if they would be liable therefor notwithstanding such negligent conduct.

Finally, it is stated in the majority opinion that the evidence does not establish that the bridge maintained across the lagoon by one of the defendants was a contributory cause of the flooding of plaintiffs' lands. I have heretofore set forth the facts in these cases and they manifestly show that the bridge blocked the flow of the water and the debris thereby caused to collect was a contributing cause of the flooding. It must be remembered that these cases are here on appeal from judgments entered after orders granting nonsuits, and all the evidence must be viewed and every reasonable inference drawn favorable to plaintiffs. There is undeniably sufficient evidence to require the submission of the cases to the jury on that question of fact.

Summing up, we have cases where public agencies, with no proprietary right so to do, have collected surface waters by the installation of drains, have discharged those waters into a natural watercourse, and have failed to provide adequate means of escape for those waters into the ocean, well knowing that their conduct would cause the flooding of plaintiffs' premises. As a result of that conduct, the waters discharged in the watercourse exceeded its capacity and could not escape through the inadequate outlet, and plaintiffs' land and the improvements thereon, not riparian to the stream, being

three miles away, and not having theretofore been subject to overflow by any of the waters, is flooded and damaged. The majority decision is contrary to the firmly established law in California and the weight of authority in other jurisdictions. It will not only result in a grievous miscarriage of justice in the cases now under consideration, but will cause great confusion in the law on the subject here involved.

In my opinion the judgments should be reversed.

CURTIS, Justice (dissenting).

I concur in the conclusion reached in the dissenting opinion.



19 Cal.2d 61

O'HARA et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

L. A. 17614.

Supreme Court of California.

Nov. 14, 1941.

Rehearing Denied Dec. 12, 1941.

1. Eminent domain ⇐2(1), 270

Compensation for private property taken or damaged for a public use must be made under the Constitution only when the taking or damaging of property is not so essential to public health, safety, and morals as to be justified under the police power, and injury is one which would give rise to a cause of action on part of owner if it were inflicted by a private person. Const. art. 1, § 14.

2. Waters and water courses ⇐171(1)

A lower riparian owner has no redress for injury to his land caused by improvements in the stream when there has been no diversion of water out of its natural channel.

3. Levees and flood control ⇐36

In landowners' action against a county flood control district for damages to land, a complaint alleging that district replaced low permeable dikes that bordered a river with certain improvements, which were constructed for flood control, and that improvements increased velocity of water flowing in river and obstructed drainage of surface waters into river, and that owners' land was flooded during a rainstorm by surface waters, which were prevented by improvements from draining into river, and by water flowing in river, which burst through river banks, did not state a cause of action, since it appeared as matter of law that district was properly exercising its police power.

4. Waters and water courses ⇐118

In California, a private landowner may not obstruct flow of surface waters that naturally drain across his property from adjoining land.

5. Eminent domain ⇐2(6)

A governmental agency, in constructing public improvements such as streets and highways, may validly exercise its "police power" to obstruct flow of surface waters not running in a natural channel without making compensation for resulting damages.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

6. Levees and flood control ⇐1

The construction of improvements along a stream for purposes of flood control is no less essential to public health and safety than the grading of streets.

7. Levees and flood control ⇐36

Where landowners who sought damages from a county flood control district for flooding of owners' land did not allege that obstructed surface waters were flowing in a natural channel, district was under no obligation to compensate owners for damages caused by obstruction.

8. Appeal and error ⇐1144

By declining to amend after sustaining of demurrer, plaintiffs took position that whatever facts they might prove in support of their action were alleged in complaint and voluntarily based their case upon demurrer, and hence there was no ground for giving plaintiffs another opportunity to amend complaint after Supreme Court affirmed judgment sustaining demurrer.

CARTER and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Jamie O'Hara and another against the Los Angeles County Flood Control District to recover for damages alleged

to have been suffered when plaintiffs' property was flooded. From an adverse judgment, plaintiffs appeal.

Affirmed.

For prior opinion, see, Cal.App., 102 P.2d 790.

Rehearing denied; CURTIS and CARTER, JJ., dissenting; HOUSER, J., not participating; SPENCE, J., Acting pro tem.

Joseph K. Coady and Henry K. Elder, both of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Arthur S. Loveland, Deputy Co. Counsel, all of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiffs are the owners of certain land in Los Angeles county near the Los Angeles river. The Los Angeles County Flood Control District replaced the low permeable dikes that bordered the river with concrete levees, and constructed a concrete embankment running at right angles to the levees away from the river. These improvements, constructed for the purpose of flood control, increased the velocity of the water flowing in the river by preventing it from spreading out over adjoining lands, and obstructed the drainage of surface waters into the river. The only provision for drainage of the area created by the levee and the embankment was a four-foot culvert opening into the river at a point near the junction of the levee and the embankment. On March 2, 1938, a heavy rainstorm occurred. The water flowed in the river at a speed heightened by defendant's improvements, burst through the river banks and damaged plaintiffs' property. The surface waters, prevented by defendant's improvements from draining into the river, flooded plaintiffs' land. Plaintiffs thereupon brought this action against the Flood Control District, claiming the right to recover damages under article I, section 14 of the California Constitution. Defendant's demurrer to the complaint was sustained, and plaintiffs have appealed after refusing to amend.

[1] Compensation for private property taken or damaged for a public use must be made under article I, section 14 only when the taking or damaging of property is not so essential to the public health, safety, and morals as to be justified under the "police power", and the injury is one which would give rise to a cause of action on the part of the owner if it were inflicted by a private person. Archer v. City of Los Angeles et al. (Allison v. City of Los Angeles), Cal. Sup., 119 P.2d 1, this day decided.

[2, 3] A lower riparian owner has no redress for injury to his land caused by improvements in the stream when there has been no diversion of water out of its natural channel. Archer v. City of Los Angeles (Allison v. City of Los Angeles), supra. The present complaint, therefore, does not state a good cause of action against the defendant for injuries caused by the overflow of the water flowing in the stream.

[4-7] In California a private land owner may not obstruct the flow of surface waters that naturally drain across his property from adjoining land. Los Angeles Cemetery Association v. City of Los Angeles, 103 Cal. 461, 37 P. 375. In the present case the plaintiffs would therefore have a cause of action against a private person who obstructed the flow of surface waters from their land. A governmental agency, however, in constructing public improvements such as streets and highways, may validly exercise its "police power" to obstruct the flow of surface waters not running in a natural channel without making compensation for the resulting damage. Corcoran v. City of Benicia, 96 Cal. 1, 30 P. 798, 31 Am.St. Rep. 171; Conniff v. San Francisco, 67 Cal. 45, 7 P. 41; Jefferis v. City of Monterey Park, 14 Cal.App.2d 113, 57 P.2d 1374; Lampe v. City and County of San Francisco, 124 Cal. 546, 57 P. 461, 1001; see 7 So. Cal.L.Rev. 295, et seq. The construction of improvements along a stream for purposes of flood control is no less essential to the public health and safety than the grading of streets (see Gray v. Reclamation District, 174 Cal. 622, 163 P. 1024; Lamb v. Reclamation District, 73 Cal. 125, 14 P. 625, 2 Am. St.Rep. 775; Jackson v. United States, 230 U.S. 1, 33 S.Ct. 1011, 57 L.Ed. 1363; Hughes v. United States, 230 U.S. 24, 33 S.Ct. 1019, 57 L.Ed. 1374, 46 L.R.A., N.S., 624; Franklin v. United States, 6 Cir., 101 F.2d 459), and a governmental agency should no more be liable in the one case than in the other for obstructing surface waters. Plaintiffs do not allege that the obstructed surface waters were flowing in a natural channel. The defendant therefore is under no obligation to compensate for the damage caused by the obstruction.

[8] Plaintiffs admit that the improvements were constructed by the defendant for the purpose of flood control and the facts

alleged in plaintiffs' complaint have been accepted as true. It therefore appears as a matter of law that defendant was properly exercising its police power and there is no reason for returning the case to the lower court for trial. Likewise there is no basis for giving plaintiffs another opportunity to amend their complaint. By declining to amend after the sustaining of the demurrer by the trial court, plaintiffs took the position that whatever facts they might prove in support of their action were alleged in the complaint and they voluntarily based their case upon the demurrer. Goldtree v. Spreckels, 135 Cal. 666, 672, 67 P. 1091; Sutter v. City and County of San Francisco, 36 Cal. 112, 116, 117.

The judgment of the trial court is affirmed.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The majority decision is predicated on the police power doctrine and the main authority cited therefor is Archer v. City of Los Angeles (Allison v. City of Los Angeles), Cal.Sup., 119 P.2d 1, this day decided. I pointed out in my dissent in those cases that although the majority opinion discussed the police power, it came to no conclusion in regard to its application to those cases; that discussion was dictum. In the instant case that dictum is the only authority relied upon for the majority decision. This is a practical illustration from a theoretical standpoint of "lifting one's self by his own bootstraps". That is, a dictum is set forth in one case to be used as authority for the decision in another case decided at the same time. This process is rendered even more obnoxious when the dictum is unsound, as is the case here.

In my dissenting opinion in the Allison and Archer cases, I have endeavored to point out the inapplicability of the police power doctrine to a factual situation where property has been taken or damaged for a public improvement such as in the case at bar. What I said there is applicable to the case at bar, and for the reasons there given and under the authorities there cited, the judgment in the case at bar should be reversed.

CURTIS, J., concurred in the dissent.

47 Cal.App.2d 787

SECURITY–FIRST NAT. BANK OF LOS ANGELES et al. v. WRIGHT et al.

Civ. 13237.

District Court of Appeal, Second District, Division 2, California.

Nov. 17, 1941.

1. Wills ⇐686(1), 689

Under husband's declaration of trust for wife and unadopted boy providing that on wife's death trust should terminate as to one-half of corpus if boy was living and was not 25 years of age, giving wife a testamentary power of appointment over that half and directing that half to be delivered to her heirs if she failed to make appointments, and providing that the other half should remain in further trust for boy depending on his surviving wife and his age, wife had an unqualified power of appointment over half of trust property and trust as to that half terminated upon her death, but the mere fact of her death did not ipso facto terminate trust over the other half, and the determination with respect to that half depended on whether boy was alive and, if living, his age.

2. Trusts ⇐117
Husband and wife ⇐279(1)

Where a husband's declaration of trust for his wife and a property settlement agreement were parts of the same transaction, they were required to be read together.

3. Trusts ⇐140(3)

Where property settlement agreement showed that declaration of trust executed as part of the same transaction was made by husband for his wife and an unadopted boy only, and that consideration for declaration was wife's agreement to relinquish her interest in other property standing in husband's name, wife rather than husband was the "settlor", and hence, even if there had been a failure of language in declaration to dispose of anything other than one-half of the property to the boy, the other half would revert to wife's estate upon her death and not to that of husband.

See Words and Phrases, Permanent Edition, for all other definitions of "Settlor".

Appeal from the Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by the Security-First National Bank of Los Angeles and others against Charles O. Wright and others for a declaratory judgment construing a trust. From the judgment, defendants appeal.

Affirmed.

R. B. Bidwell, of Glendora, Tscharner & Miller, of Azusa, and Edward H. Marxen and Catlin & Catlin, all of Los Angeles, for appellants.

James L. Patten, of Los Angeles (Frank W. Doherty, of Los Angeles, of counsel), for respondents.

HANSON, Justice pro tem.

This is an appeal upon the judgment roll from a declaratory judgment adjudicating that under the terms of a trust the wife during her lifetime had been vested with, and had exercised a testamentary power of appointment to, one-half of the corpus of the trust, and that accordingly the property did not become a part of the husband's estate. The appellants are the residuary legatees of the husband. The only question involved is whether the terms of the trust are adequate to sustain the holding of the trial court.

The facts which need to be stated here are these: After thirty-two years of married life the wife, Belle Wright, instituted a divorce action against her husband, Reason Wright. A few days thereafter the husband delivered to her, for her signature, an agreement by the terms of which she was to dismiss the divorce action and accept the financial provisions set forth therein. Included in the agreement was an undertaking on the husband's part to transfer to a trustee, to hold for the wife and Douglas Baird Wright, an unadopted boy residing in their household, certain property in the manner set forth in an unexecuted declaration of trust which was annexed to the agreement. It is the construction of the terms of that particular declaration of trust which is here in controversy. The wife accepted the agreement and thereupon the husband transferred to the predecessor of the plaintiff, as trustee, some $38,000 in negotiable bonds, and such trustee executed the agreed declaration of trust. The record discloses that the transfer to the trustee was absolute, and accordingly the measure of the trustee's duties in respect thereto is as set forth in its written declaration of trust. From and after the execution of the agreement and the declaration of trust the parties resided separate and apart but were never divorced. The husband died in 1922, the wife in 1940, at which later date the unadopted boy was over twenty-five years of age.

[1] The controversy before us turns upon the construction which is to be given to the fourth paragraph of the declaration of trust. We now set forth its language with the understanding, however, that what appears in brackets has been inserted by us merely for our purposes in discussing the paragraph hereafter. With these additions the paragraph reads as follows:

"Fourth: [1] Upon the death of said Belle Wright this trust shall terminate as to one-half of the then corpus of the trust property, in the event Douglas Baird Wright, an unadopted boy, who has for several years past resided with Reason Wright and Belle Wright, is living at said time and at said time has not attained the age of twenty-five years, and the said Trustee shall convey, deliver and pay over said one-half of said corpus unto those persons who shall be appointed by the last will and Testament of said Belle Wright to receive the same, but in the event she fails to make testamentary appointments with respect to said property or dies intestate, then the said one-half of said corpus shall be conveyed, delivered and paid over unto her heirs at law according to the present statute of succession of the State of California. [2] In the event said Douglas Baird Wright has not at the time of the death of said Belle Wright attained the age of twenty-five years, the other one-half of said corpus shall remain in further trust until said Douglas Baird Wright attains said age, and all the net income therefrom shall be paid unto him, in convenient monthly or quarterly installments, and upon his death or upon his attaining the age of twenty-five years, whichever of said events is first to happen, this trust as to said one-half shall terminate and the said Trustee shall convey, deliver and pay over the same unto him, if he survives such termination, otherwise unto his heirs at law in accordance with the present statute of succession of the State of California. [3] In the event that said Douglas Baird Wright is living and has attained the age of twenty-five years at the time of the death of said Belle Wright, then one-half of said corpus shall not remain in further trust but shall be conveyed, delivered and paid over unto him. [4] In the event said Douglas Baird Wright dies during the lifetime of

said Belle Wright, then upon her death one-half of the said corpus shall be conveyed, delivered and paid over as aforesaid unto her heirs, as the case may be, and the other one-half thereof unto the heirs at law of said Douglas Baird Wright."

It is the contention of appellants that as the unadopted boy was more than twenty-five years of age at the time of the wife's death, then no power of appointment was vested in her under the terms of paragraph 4, nor could the property pass to her heirs at law or beneficiaries under her will; that therefore one-half of the trust property was undisposed of and reverted to the husband's estate, and as residuary legatees thereof they are entitled to it.

Appellants argue that the paragraph sets forth three separate and distinct contingencies governing the disposal of the entire trust estate. They assert the first contingency provides that if the boy had not attained the age of twenty-five years at the time of the death of the wife the latter would be entitled to exercise the power of appointment. They assert likewise that in the event of the death of the boy during the wife's lifetime then also would she have been vested with the power of appointment in question. But they contend that the remaining contingency is the one which actually occurred—that is, that the boy had attained the age of twenty-five years before the death of the wife and therefore she had no power of appointment whatsoever, in that under the second sentence of the paragraph in the trust there is no mention of any such power. We are not only of the opinion that the construction which appellants seek to put on the fourth paragraph of the declaration of trust is wholly unsound, but also that even if it were correct the property would not revert to the estate of the husband but would go as unappointed property to the estate of the wife.

An examination of the fourth paragraph discloses very clearly that the intention thereof was to divide the trust estate into two halves. As to the first half the trust was to terminate and the property was to be disposed of on the death of the wife. The only contingency was with respect to the recipients of the half, which contingency was whether or not at the time of her death the wife had or had not exercised the power of appointment. The provisions of the trust relating to and controlling that half are contained entirely in the first sentence of the fourth paragraph. As to the balance of the trust, that is to say, the other one-half, there are contingencies established depending on the age of the boy or his death; but these provisions are complete in themselves and apply only to such half.

Appellants' basic fallacy appears to be their failure to appreciate that each of the two separate halves is completely disposed of under the fourth paragraph of the trust, and that there are no contingencies applicable to the wife's one-half other than her death and her exercise or failure to exercise her power of appointment. It is significant that the second sentence of the fourth paragraph particularly provides for the "further trust" in the remaining one-half of the property; that the third sentence is the negative corollary of the same provision and provides the contingency upon which the boy's one-half shall not remain in "further trust".

It will be observed from what we have heretofore said that the particular contingency, and the language thereof, upon which appellants base their case, is the sentence labeled "[3]", reading: "In the event that said Douglas Baird Wright is living and has attained the age of twenty-five years at the time of the death of said Belle Wright, then one-half of said corpus shall not remain in further trust but shall be conveyed, delivered and paid over unto him."

Reading this contingency separate, apart and distinct from what precedes or follows it, appellants rightly state that the sentence fails to make any disposition of the other half of the trust fund. Conceding, as appellants necessarily must, that we may not read this isolated sentence with "blinders" to blur out what precedes and follows, they nevertheless argue that it alone is controlling because the second contingency, unlike that of the first and third, has no provision whereby the wife might appoint one-half of the trust fund. But from the language of the paragraph viewed as a whole, it appears that the wife was given an unqualified power of appointment over one-half the trust property and that the trust as to that half terminated upon her death. The mere fact of her death was not an event which ipso facto terminated the trust over the other one-half of the property in the hands of the trustee. Instead, the determination as to when the trust in that half should terminate was made to depend upon wholly different events or conditions, i. e., whether Douglas was (1) alive or dead, and (2) if living, his age. In short, the trust upon the death of

the wife was, by that mere fact, to terminate as to only one-half of the property embraced therein, if Douglas was living and under twenty-five years of age at the time; but if living and over twenty-five years of age, the trust was to terminate wholly. If, however, he had died prior to the death of Mrs. Wright, then likewise the trust was to terminate wholly. In any of the situations narrated the one-half of the property was to go as she appointed or, in default of appointment, to her heirs. In the case of Douglas, the other one-half of the property was to go directly to him if, as and when he attained the age of twenty-five years, and in the meantime he was to receive the net income of that half. If, however, he died before Mrs. Wright, or if he died subsequent to her death but before he attained the age of twenty-five years, then his one-half was to go to his heirs.

[2, 3] If the language of the fourth paragraph of the trust may reasonably be said to be doubtful, its meaning cannot be a matter of doubt when the property settlement agreement is read in connection with the declaration of trust. The two were parts of but one transaction, and so must be read together. The property settlement agreement plainly shows not only that the declaration of trust was made for the wife and the unadopted boy, and no one else, but in addition that the consideration for it was the wife's agreement to relinquish her interest in other property standing in the name of the husband. In effect, then, the wife furnished the consideration for the declaration of trust, and not the husband. Hence she, rather than the husband, must be deemed the settlor. 3 Scott on Trusts, sec. 422a, at page 2205. Accordingly, even though there had been a failure of language in the declaration of trust to dispose of anything other than one-half of the property to Douglas, the other half would revert to the estate of the wife and not to the husband. Moreover, no plausible reason has been suggested for supposing that any of the parties to the declaration of trust intended by the language there used to achieve a result directly contrary to the intent which is so clearly expressed in the property settlement agreement.

For the reasons indicated the judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

WILKERSON v. SEIB et al.*

Civ. 13384.

District Court of Appeal, Second District, Division 2, California.

Nov. 18, 1941.

Hearing Granted Jan. 15, 1942.

1. Executors and administrators ⇐443(1)

A complaint alleging that deceased executed deed naming plaintiff as grantee and delivered deed to notary for delivery to plaintiff after deceased's death, and that notary did not deliver deed to plaintiff but treated realty as property of estate, of which notary was executor, and that subsequently appointed administratrix held realty as trustee for plaintiff and received income therefrom and sold realty to purchasers, was insufficient to state cause of action against administratrix and her attorneys to whom she paid some of proceeds of use and sale of property, in absence of allegation that administratrix received the property with knowledge of plaintiff's claim thereto, or the process by which administratrix and attorneys acquired property and proceeds from use and sale thereof.

2. Evidence ⇐83(1)

Money disposed of by administratrix is presumed to have been disposed of pursuant to orders of court made concerning administration of estate.

3. Executors and administrators ⇐443(1)

A plaintiff seeking recovery of money on ground that administratrix received such money charged with trust in favor of plaintiff, had burden to include some allegation sufficient properly to subject to a claim any money which it would appear from the complaint the administratrix and her attorneys had received as innocent third persons and for value, where administratrix and her attorneys to whom she had paid such money had no knowledge of plaintiff's claim, and presumption was that money was disposed of pursuant to court order.

4. Pleading ⇐48

A court of equity is fully justified in demanding as a condition precedent to consideration by court of any case, that complaint shall be clear and sufficient and shall state ultimate facts which if true would be sufficient to prevail against presumptions set out in Code of Civil Procedure and to entitle plaintiff to judgment. Code Civ.Proc. § 1963.

* Subsequent opinion 127 P.2d 904.

5. Deeds ⇐67

A grantee's acceptance of deed which grantor delivered to third person for delivery to grantee on grantor's death could operate retroactively by relation only if rights of third persons had not intervened, and when they have intervened, deed cannot operate so as to destroy such rights.

6. Pleading ⇐232

Where plaintiff purposely omits from complaint certain ingredients essential to stating a clear and unequivocal cause of action, and where it appears from other allegations of complaint that those elements if pleaded might be adverse to plaintiff, trial court may properly demand that ultimate facts upon which plaintiff relied to support his claim of right to recover shall be included in complaint.

7. Pleading ⇐204(3)

A demurrer to second count of complaint was properly sustained where plaintiff sought therein to recover on the same set of facts as were covered by first count, and demurrer to first count was properly sustained.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action for money had and received by Herbert Wilkerson against Etta B. Seib and others. From the judgment, the plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

E. L. Overholt, of Los Angeles, for respondent Seib.

Mier & Schaper, of Los Angeles, in pro. per.

SCOTT, Justice pro tem.

Plaintiff appeals from a judgment of dismissal following order sustaining demurrer to third amended complaint without leave to amend.

In substance the third amended complaint alleges the following in the first count: One Elizabeth J. Herbst, now deceased, owned a house and lot in Los Angeles, and in January, 1931, executed a deed naming plaintiff as grantee and irrevocably delivered it to one Mitchell, who as notary had taken her acknowledgment of it, with instructions to hold it without recording and upon her death to deliver it to plaintiff. Plaintiff was alleged to have been an acquaintance of Mrs. Herbst who had "rendered and performed acts and deeds for her". Mrs. Herbst died in October, 1932, leaving a will naming Mitchell as executor. The will was admitted to probate, he was appointed executor and acted as such until he died in August of 1936. Mitchell did not deliver the deed to plaintiff but treated it as property of the estate, collecting and depositing to the credit of the estate the sum of $1,632.29. In December, 1936, defendant Seib, a niece of Mrs. Herbst, was appointed as administratrix with will annexed of the Herbst estate and continued as such until August, 1939. She took over the real property and the past revenue therefrom and collected current income amounting to $957.58 up to the time when she conveyed the property to one Zillotto for a consideration of $2,400, making a total of $4,989.79 so received by Seib and out of which she paid the other two defendants, attorneys Mier and Schaper, some unknown amount in excess of $2,000. It is alleged that this plaintiff's attorney, while going through Mitchell's papers in June of 1939, discovered the deed and contacted plaintiff, who in August, 1939, demanded of defendants the money derived from the property. He proceeds upon the theory that the property had been held by Mitchell and that it is now held by the defendants as trustees for plaintiff, and that they refused to comply with such demand. The second cause of action is merely a common count for money had and received, in the same sum.

This suit was filed in September, 1939. Plaintiff does not offer further amendments but insists that the trial court erred in sustaining the demurrer and that it should have been overruled and that defendants be required to answer.

[1–3] The third amended complaint, which was further amended after filing by interlineation, did not state facts sufficient to constitute a cause of action against defendants. It traced the real property and the earlier proceeds therefrom into the hands of defendant Seib at a time when she was acting in her representative capacity as administratrix with will annexed of the Herbst estate, but alleges that she received the property and income as trustee for plaintiff and not as administratrix. There is nothing in the complaint to indicate that this trusteeship was known to any person—certainly not to the court or to any of the parties to this action. There is no claim

that defendant Seib so received the property in question with knowledge of any right or interest of plaintiff, or that she had any such knowledge prior to the time of plaintiff's demand in August, 1939, the same month in which her services as administratrix terminated. The complaint merely alleges that at the time of its filing defendants were in possession of the money derived from the use and sale of the property, having received the same without giving any consideration therefor. The complaint avoids any allegation concerning the means or process by which the money in question came into the hands of defendants. Absence of knowledge by defendants of any claim of plaintiff, coupled with the presumption that the money was disposed of pursuant to orders of the court made concerning the administration of the estate, whether in extinguishment of a just and legally established claim or of rights under the will, made it incumbent upon plaintiff to include some allegation sufficient properly to subject to his claim any money which it would appear from other allegations in the complaint defendants had received as innocent third persons and for value.

[4–6] We need not discuss the case of Seib v. Mitchell, 10 Cal.App.2d 91, 52 P.2d 281, decided by this court and referred to by both parties in their briefs, except to observe that the establishment by this defendant Seib, who was plaintiff in that case, of her claim against the Herbst estate, in a suit wherein she was represented by the other two defendants in this case as her lawyers, in no way strengthens plaintiff's case, but gives independent support to our views as to the need for clear and unequivocal allegations in the complaint covering this matter. A court of equity is fully justified in demanding as a condition precedent to consideration by it of any case that the complaint shall be clear and sufficient and shall state ultimate facts which if true would be sufficient to prevail against presumptions set out in section 1963 of the Code of Civil Procedure and to entitle plaintiff to judgment. Plaintiff alleges that he accepted title to the property so that it related back to the time when Mrs. Herbst as grantor first handed the deed to Mitchell. This acceptance could operate retroactively by relation only if the rights of third persons have not intervened (Green v. Skinner, 185 Cal. 435, 197 P. 60), and when they have intervened it cannot operate so as to destroy them. Where a plaintiff purposely omits from his complaint certain ingredients essential to stating a clear and unequivocal cause of action, and where it appears from other allegations of the complaint that those elements if pleaded might be adverse to plaintiff, the trial court may properly demand that the ultimate facts upon which plaintiff relies to support his claim of right to recover shall be included in the complaint. Plaintiff's failure herein to respond to the court's demand in this regard must be held to be fatal to his right to proceed further on his first cause of action.

[7] As to the second or common count, plaintiff seeks therein to recover on the same set of facts as are covered by the first count, and in view of our conclusions as to the first count it follows that the demurrer to the second count was properly sustained. Birch Ranch & Oil Co. v. Campbell, 43 Cal. App.2d 624, 111 P.2d 445; Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 110 P.2d 396.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



47 Cal.App.2d 793

In re SEHABIAGUE'S ESTATE.

Civ. 6641.

District Court of Appeal, Third District, California.

Nov. 18, 1941.

Hearing Denied Jan. 15, 1942.

1. Husband and wife ⇐249

Courts cannot fix the community interest of a husband and wife from a computation of possible increase of property originally held by one of the parties at date of marriage alone, but they must consider also the financial contribution of each, co-operative business activity, thrift and sacrifice, moral responsibility upon which loans may have been obtained, and other values going into a community aside from financial contribution, as well as any agreement, express or implied, between the parties. Civ.Code, § 164.

2. Husband and wife ⇐249

That title to property stands in the name of one or the other of the spouses cannot be controlling in fixing the community interest of a husband and wife. Civ.Code, § 164.

3. Husband and wife ⇐262(1)

The statutory presumption that property acquired during coverture and taken in the name of the husband is community property must be accepted by a court unless it is successfully controverted by other evidence. Civ.Code, § 164.

4. Husband and wife ⇐249

Where separate and community property are so commingled that it is impossible to trace the funds, the whole will be treated as community property on the principle that the party contending that property is separate property has the burden of establishing its character as such. Civ.Code, § 164.

5. Husband and wife ⇐262(1)

The statutory presumption that property acquired during coverture and taken in the name of the husband is community property applies with equal force to bank deposits as it does to other kinds of property. Civ. Code, § 164.

6. Appeal and error ⇐1008(1)

The matter of fixing the community interest of a husband and wife in property presents largely a question of fact for the trial court.

7. Appeal and error ⇐1011(1)

Whether evidence offered is clear and convincing is for the trial court, and the determination of that court in favor of either party on conflicting or contradictory evidence is not open to review.

8. Husband and wife ⇐266

Where a husband and wife agree that property shall be considered community property, that is sufficient to make it community property.

9. Husband and wife ⇐266

The separate property of either or both spouses may be transmuted into community property without regard to the statutory presumption that property acquired during coverture and taken in the name of the husband is community property, and that may be done without the necessity of any written agreement, provided the agreement or understanding to that effect is fully consummated. Civ. Code, § 164.

10. Appeal and error ⇐1012(1)

It is not the province of the District Court of Appeal to weigh evidence.

11. Appeal and error ⇐1010(1)

Even if the District Court of Appeal is of opinion that a finding should have been otherwise, unless there is a total absence of competent evidence to sustain the finding, that court cannot reverse the trial court.

12. Appeal and error ⇐989

The question for the District Court of Appeal is not how that court would have determined the facts, but whether there is substantial evidence supporting the conclusion of the trial court.

13. Husband and wife ⇐264

Evidence was sufficient to sustain finding that certain property, together with furnishings therein, as well as approximately $3,000 remaining unpaid on a loan to deceased husband's brother was community property and vested in surviving widow on husband's death.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceedings in the matter of the estate of Thomas Sehabiague, deceased, wherein Amelie R. Sehabiague, widow, filed a petition to determine the community character of property and to determine who was entitled to distribution of the decedent's estate, and wherein Honore A. Sehabiague filed a claim. From the decree, Honore A. Sehabiague appeals, opposed by Amelie R. Sehabiague and Thomas Sehabiague, Jr.

Affirmed.

O'Gara & O'Gara, of San Francisco (Gerald J. O'Gara and John O'Gara, both of San Francisco, of counsel), for appellant.

Brewster F. Ames and Franklin T. Poore, both of San Francisco, for respondent.

PER CURIAM.

This appeal arose from a proceeding instituted by Amelie R. Sehabiague, the widow, to determine the community character of the property and who was entitled to distribution of the estate of her husband, Thomas Sehabiague, who died intestate on November 10, 1935.

The petition revealed that Thomas Sehabiague and Amelie R. Garnaud were

married on the 28th day of May, 1908, and remained husband and wife for some 27 years, and until the husband's death. The next of kin and heirs at law of deceased were his wife Amelie; Honore A. Sehabiague, a son by a prior marriage, and Thomas Sehabiague, Jr., a son of the deceased and Amelie.

It was further alleged that all of the property of which the deceased died possessed (with the exception of certain personal property, one-half interest in an apartment house at 315 Hyde street, and also a store building at Hayes and Central avenue) was acquired after the marriage of deceased and the petitioner, and was community property at the time of his death, and by reason of the law one-half should be assigned to petitioner, and an undivided one-half was subject to distribution.

The matter was heard and a decree was entered wherein the court found, among other things, that the property known as 530 Stockton street, together with the furnishings therein, as well as approximately $3,000 remaining unpaid on a loan to a brother of deceased, was community property and vested in petitioner. As to certain other property known as 315 Hyde street and the furnishings therein, and the Hayes and Central stores, together with a bank account in the sum of $1,092.16, and certain articles of jewelry, belonged to decedent, and upon his death his interest in these properties vested in the widow and the two sons, share and share alike.

While the only controversy presented is as to whether or not there is sufficient evidence to support the finding of the community interest as to the property at 530 Stockton street, together with the furnishings, and the unpaid balance upon the loan to the brother of the deceased, it becomes necessary to examine in some detail the activities that went into the building up of the entire estate.

Thomas Sehabiague came to San Francisco in 1887 from France, he being then about 17 years of age. His brother, a few years his senior, had preceded him here. The two young men were frugal and industrious, and shortly after Thomas arrived they opened a French Bakery which they conducted as partners until they dissolved their partnership in 1909, Thomas Sehabiague then receiving as his share the sum of $2,300.

At the time of the San Francisco fire in 1906 they owned a three-flat building at 323 Church street, unimproved property at 2040 Hyde street, and a three-story apartment house at Greenwich and Jansen streets. In the fire the Greenwich street property was destroyed. A few years later the brothers acquired a piece adjoining their original lot at Jansen and Greenwich streets and improved both pieces of land. This property was in 1925, with a cash payment of $12,500, exchanged for 315 Hyde street. An undivided one-half of this property the court found to be the separate property of decedent, and we are not particularly concerned with it here.

The unimproved property at 2040 Hyde street was, in 1913, sold, and Thomas received for his interest $1,950.

In 1913, a few months after the sale of the Hyde street property, Thomas and his brother purchased a three-story apartment house at 993 Haight street. This property they held for about two years and then exchanged it for property in Palo Alto. In 1925 Arnaud Sehabiague sold his undivided one-half interest in the Palo Alto property to his brother Thomas. Then Thomas and his wife conveyed the Palo Alto property for a two-flat building on Thirty-third avenue, and in 1926 this was turned in, with other property, on the deal for the Stockton street property.

The Stockton street property, which constitutes the principal asset of the estate, and which the trial court found to be community property, was conveyed to Thomas and Amelie Sehabiague in 1926, in consideration of the conveyance to the seller of the property referred to herein as 1453 Hyde street, the property at 1360 Hyde street, the Thirty-third avenue property, and the assuming by Mr. and Mrs. Sehabiague of a deed of trust for $70,000, which at the death of Thomas Sehabiague had been reduced to $32,500. During the period of their ownership they had paid some $19,400 in taxes, in addition to the interest on the loan.

It would therefore appear that during some 17 or 18 years Mr. and Mrs. Sehabiague had traded, sold and exchanged some 10 or 12 pieces of property until their interests merged in the apartment property at 530 Stockton street, worth $42,500. In the meantime decedent held the Greenwich and Jansen street property, which the trial court has found to have been separate prop-

erty, and in 1926 property on Chestnut street was purchased by Thomas Sehabiague with separate funds. It also appears that during their married life the husband earned about $3,000, and the wife earned $2,100, and she had made a cash contribution of about $1,800 upon the purchase of their first piece of property shortly after their marriage.

What part therefore, if any, of the Stockton street property was community property? The trial court has found the entire interest was community, and we are satisfied, after a careful study of the record, that by the planning and saving of this man and his wife over a period of 27 years, the court has correctly so decided.

[1-3] In fixing the community interest of a man and wife, where that relationship had extended over a considerable period of their active lives, courts cannot determine the issue from a computation of possible increase of property originally held by one of the parties at the date of marriage alone. There must be considered also the financial contribution of each, and their co-operative business activity; their thrift and sacrifice, the moral responsibility upon which loans may have been obtained, which made possible the expansion of their credit standing, and other values that go into a community aside from the financial contribution, as well as any agreement, express or implied, between the parties. Neither can the fact that title stood in the name of one or the other of the spouses be controlling. Killian v. Killian, 10 Cal.App. 312, 101 P. 806; Mitchell v. Moses, 16 Cal.App. 594, 117 P. 685; Fountain v. Maxim, 210 Cal. 48, 290 P. 576, 577. In fact, section 164 of the Civil Code provides that property acquired during coverture and taken in the name of the husband is presumed to be community property, and unless that presumption is successfully controverted by other evidence a court is bound to find according to that presumption.

[4] As said in Fountain v. Maxim, supra, "It has also long been the rule in this state that, where separate and community property are so comingled that it is impossible to trace the funds, the whole will be treated as community property, upon the principle that the burden is upon the party claiming property is separate property to establish its character as such. 5 Cal.Jur. 298, § 16."

[5] This presumption also applies with equal force to bank deposits. Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St.Rep. 361; In re Boody's Estate, 113 Cal. 682, 45 P. 858. In this latter case, as in the case at bar, in several instances the evidence showed that a portion of the money deposited by the deceased was the proceeds of the sales of some real estate which was her separate property, as well as certain rentals therefrom, but that fact standing alone was insufficient to overcome the presumption.

[6, 7] The question here presented is largely a question of fact, and in Couts v. Winston, 153 Cal. 686, 96 P. 357, 358, the court said that "whether or not the evidence offered * * * is clear and convincing is a question for the trial court * * * [and] the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court," which language was quoted with approval in Re Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L.R.A.,N.S., 1092, where the trial court in a close case there held the property was the separate property of the husband and that the presumption had been overcome.

It is asserted the husband and wife agreed early in their married life that their property should be considered as community property, and as to that the testimony shows that about a year after their marriage they were considering the purchase of the property at 1857 Hyde street. The husband said he didn't have any money, so respondent herein, the wife, said she had $1,000, and that if he wanted to buy some property she would contribute her money, but if he proposed to buy with someone else she would not advance the money; they then agreed to make the investment together, and after that, as she testified "we started out and kept on buying things and getting bigger and bigger." She also testified that often the deed was taken in the husband's name, as he told her it didn't make any difference. He also suggested that they carry their bank account in a joint tenancy account, which was opened in January, 1929.

[8] Many cases emphasize the rule that when the parties agree that property shall be considered community property, that is sufficient to so create it. In re Estate of Wahlefeld, 105 Cal.App. 770, 288 P. 870; Vieux v. Vieux, 80 Cal.App. 222, 251 P.

640; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214; In re Estate of Watkins, 1940, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1.

In Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398, the parties had orally agreed, both before and after marriage, that all the property owned by them, or subsequently acquired, was to belong to them equally. During the marriage, as here, they had improved some, disposed of some, and acquired other property, and the court said: "To attempt to trace any particular fund or parcel would not only be difficult but a futile and useless task in view of the trial court's finding that all property owned by the spouses at the time of the commencement of the action was community property."

[9] The following language in Re Estate of Sill, 121 Cal.App. 202, 9 P.2d 243, 244, is very appropriate to the situation before us: "Conceding that the entire purchase price of the property was made up from the separate property of both deceased and respondent, we are nevertheless of the opinion that there was ample evidence to justify the finding and conclusion that the property in question became the community property of the spouses. Without regard to the presumption found in section 164 of the Civil Code, it is well settled that the separate property of either or both spouses may be transmuted into community property and this may be done without the necessity of any written agreement providing the agreement or understanding to that effect is fully consummated. [Citing cases.] * * * In Estate of Wahlefeld [105 Cal.App. 770, 288 P. 870], the court said at page 776 of 105 Cal.App., 288 P. 870, 873: 'In the present case there was a meeting of minds and any form of express words, either spoken or written, that the property was to be considered community property was sufficient.' In Martin v. Pritchard [52 Cal.App. 720, 199 P. 846], the court said, at page 724 of 52 Cal. App., 199 P. 846, 848: 'That the wife had an interest in the property is very clear. What the character of that interest was is not so certain. The court came to the conclusion, on a balancing of probabilities, that a community interest was intended by the parties. It cannot be said that the court's finding has no support in the evidence.' * * *"

[10, 11] It is not the province of this court to weigh the evidence (Van Buren v. Green, 120 Cal.App. 461, 7 P.2d 1079; Mitchell v. Holmes, 9 Cal.App.2d 461, 50 P.2d 473), and even should we be of the opinion that the finding should have been otherwise, unless there is a total absence of competent evidence to sustain the finding, we cannot reverse the trial court. Thoele v. Thoele, 102 Cal.App. 387, 282 P. 1001; In re Estate of Seegelken, 103 Cal. App. 691, 284 P. 987; In re Estate of Filippi, 9 Cal.App.2d 407, 49 P.2d 892; Washko v. Stewart, 20 Cal.App.2d 347, 67 P.2d 144.

[12, 13] The question for this court is not how we would have determined the facts, but whether there is substantial evidence supporting the conclusion of the trial court. Parker v. Riddell, 41 Cal.App.2d 908, 108 P.2d 88; Fewel & Dawes, Inc., v. Pratt, 17 Cal.2d 85, 109 P.2d 650. And after an examination of the record in this matter, assisted by able oral presentation by respective counsel, we cannot find wherein the trial court has committed any error, and the judgment and decree are therefore affirmed.

19 Cal.2d 94

MOORE v. VANDERMAST, Inc.

L. A. 17265.

Supreme Court of California.

Nov. 25, 1941.

1. Reformation of Instruments ⇐45(1)

A person seeking to reform a written instrument on the ground of mutual mistake by the introduction of extrinsic evidence must produce clear and convincing proof or something more than a preponderance of the evidence. Civ.Code, § 3399.

2. Reformation of Instruments ⇐45(9)

A lessor seeking to have a lease reformed on the ground of mutual mistake was required to establish by clear and convincing evidence that the objectionable language found in the lease was the result of a mutual mistake by the parties, where there was no allegation of fraud or that one party knew or suspected that the other was acting under a mistake. Civ.Code, § 3399.

3. Reformation of Instruments ⇐45(1)

In absence of clear and convincing evidence to the contrary, a written instrument is presumed to express the true intent of the parties, particularly where the instrument was drafted by an attorney representing the party seeking to alter the terms of the instrument.

4. Reformation of Instruments ⇐45(9)

In lessor's action to reform a lease providing for rental computed on gross receipts from business done in demised premises so as to provide for rental computed on gross receipts from lessee's entire business regardless of number of stores involved or location of stores, lessor's evidence was insufficiently clear and convincing to show that both parties by mutual mistake understood that lessee's business would continue to be operated as in the past, through a single store, and hence lessor was not entitled to relief. Civ. Code, § 3399.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Walter L. Moore against Vandermast, Inc., to reform a written lease and to recover damages for breach of the reformed lease. From that portion of a judgment which denied his right to have the lease reformed and denied the recovery requested under the reformed provisions of the lease, plaintiff appeals.

Affirmed.

Harvey & Harvey and Jack J. Rimel, all of Santa Ana, for appellant.

Drumm, Tucker & Drumm and Forgy, Reinhaus & Forgy, all of Santa Ana, for respondent.

GIBSON, Chief Justice.

This action was brought to reform a written lease and to recover damages for a breach of the reformed lease. The plaintiff appeals from that portion of the judgment which denied his right to have the lease reformed and denied the recovery requested under the reformed provisions of the lease. No appeal was taken from that portion of the judgment granting plaintiff recovery for the defendant's breach of the lease as written.

The plaintiff, Walter L. Moore, is the owner of a four-story structure known as the "Moore building" in the city of Santa Ana. The defendant corporation and its predecessors have been engaged in the merchandising business in that city for many years. Since 1929, the defendant has maintained a retail clothing store in the Moore building which it leased from the plaintiff. During the year 1933, declining business conditions made it impossible for the defendant to make the rental payments specified in the fifteen-year lease entered into in 1929. A substantial arrearage in rentals consequently accrued which, according to the plaintiff, amounted to something over $20,000. It is admitted that the defendant was in desperate financial condition at that time and, as a result, negotiations were entered into for the purpose of drawing up a new lease which would permit the defendant to continue in business.

After considerable discussion between the parties, in which each was aided by counsel, the lease which is the subject of the present action was executed on March 7, 1934. The lease was drafted by the plaintiff's attorney and was a so-called percentage lease, providing for a specified percentage of defendant's gross receipts as rental. The lease covered a five-year period and provided, among other things, that the rental to be paid by the defendant "shall be the sum of Six Percent (6%) of the gross receipts from all its merchandising business *done in the above demised*

premises * * *". The lease also contained a provision for a guaranteed minimum rental of $350. For the purpose of computing the rental "gross receipts" were defined to include "the amount received by Lessee from the sale of goods, wares, and merchandise * * * *sold from the hereinbefore described property and premises* in the ordinary course of Lessee's business as the same is now being conducted *in said location* and/or as the same may be conducted *thereat* in the future * * *". The arrangement contemplated in the lease was carried out without dispute until the latter part of the year 1936 when the defendant opened a second merchandise store in the city of Santa Ana. The second store was located on premises in which the plaintiff had no interest. This division of defendant's clothing business brought about a substantial reduction in the gross receipts of the first store from which plaintiff's percentage as lessor was computed. The plaintiff made an unsuccessful attempt to secure a percentage of the gross receipts of defendant's entire merchandising business as rental under the lease, and thereafter brought this action for reformation of the lease.

The express provisions of the lease limit plaintiff's percentage to the gross receipts of the business done in the premises leased from him. It was alleged, however, that the language of the percentage lease limiting plaintiff's percentage to the gross receipts derived from the particular store located on his premises was inserted as the result of a mutual mistake of the parties. Plaintiff, therefore, seeks to have the lease reformed so as to provide for a rental computed upon the gross receipts from the lessee's entire business, regardless of the number of stores involved or the location of the stores. The trial court found against the plaintiff on all material issues and concluded that there was no mutual mistake in the execution of the percentage lease which would justify a reformation of the instrument.

[1, 2] Although plaintiff's contentions upon this appeal are stated in various ways, the basic point upon which he relies is that the evidence is insufficient to support the findings of the trial court. In this connection it should be noted that where one seeks to reform a written instrument by the introduction of extrinsic evidence, the courts have generally required clear and convincing proof, or something more than a preponderance of the evidence, as the basis for such an invasion of the parol evidence rule. Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796; Siem v. Cooper, 79 Cal.App. 748, 754, 250 P. 1106; Restatement, Contracts, section 511 (Calif.Annotations); 22 Cal.Jur. 742; 5 Williston, Contracts, Rev.Ed., 1937, page 4450, section 1597; 9 Wigmore, Evidence, 3d Ed., 1940, page 331, section 2498. Civil Code, section 3399, provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention * * *". There is no allegation of fraud in the present case, or that one party knew or suspected that the other was acting under a mistake. It was therefore incumbent upon the plaintiff to establish, by clear and convincing evidence, that the objectionable language found in the lease was the result of a mutual mistake by the parties. Hochstein v. Berghauser, 123 Cal. 681, 684, 56 P. 547; Burt v. Los Angeles Olive Growers' Ass'n, 175 Cal. 668, 675, 166 P. 993; California Trust Co. v. Cohn, 9 Cal.App.2d 33, 40, 48 P.2d 744.

[3, 4] After an extended trial, the court below found no mutual mistake in the execution of the lease which plaintiff sought to reform. In attempting to establish that this finding is unsupported by the evidence, plaintiff points out that for many years there had been only one Vandermast store in the city of Santa Ana. He argues that the actual understanding of the parties was that defendant would continue to operate as it always had, and that the rental was to be computed upon a percentage of defendant's total business which both assumed was to be operated from the single location. The mutual mistake relied upon by the plaintiff, therefore, is said to be the understanding of both parties that the defendant's business would continue to be operated as in the past, through a single store. An examination of the record shows that there is no evidence which indicates that the parties had any understanding on this point. It was testified by the parties and by the attorney who drafted the percentage lease that there was never any discussion of the possibility that Vandermast might open a second store. In the absence of clear and convincing evidence

to the contrary, a written instrument is presumed to express the true intent of the parties. Hochstein v. Berghauser, supra; Burt v. Los Angeles Olive Growers' Ass'n, supra; California Trust Co. v. Cohn, supra. This is particularly true where, as here, the instrument was drafted by an attorney representing the party seeking to alter the terms of the written instrument.

The plaintiff has not met the burden of proving there was a mutual mistake in the execution of the lease.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 100

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. MARXEN et al.

L. A. 17284.

Supreme Court of California.

Nov. 27, 1941.

1. Appeal and error ⇐1122(3)

Where it has been determined by an appellate court that the evidence and findings support only a particular judgment which is directed to be entered, it becomes unnecessary for such court to make additional findings, even though it also concludes that certain other findings are not supported by the evidence.

2. Appeal and error ⇐1207(4)

Where there was no question that judgment in quiet title action was not entered by trial court in accordance with mandate of District Court of Appeal, on a former appeal, the decision by such court on the former appeal that remaining findings, except one found inconsistent with other findings, and the evidence supported only the judgment directed to be entered was conclusive against defendant's contention that judgment entered in conformity with mandate was not supported by the findings.

3. Appeal and error ⇐1097(1)

In quiet title action, where law of the case, as established by a judgment of reversal on former appeal, was that defendant expressly, by written agreement, and by joining in a subsequent lease, both of which were found by an appellate court to have been duly executed, had subordinated its leasehold rights to the right and title of plaintiff, the issues presented "questions of law" only, and such issues, having been decided adversely to defendant on former appeal, required an affirmance of the judgment entered in conformity with appellate court's mandate.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Suit by the Security-First National Bank of Los Angeles against Edward H. Marxen, as trustee in bankruptcy, the La Monica Dance Hall, Incorporated, and others, to quiet title to real property. From a judgment for plaintiff, the defendant La Monica Dance Hall, Incorporated, alone appeals.

Affirmed.

L. R. Brigham, of Los Angeles (H. Elliot Pownall, Jr., of Los Angeles, of counsel), for appellant.

Thorpe & Bridges, Roane Thorpe, and Gerald Bridges, all of Los Angeles, for respondent.

SHENK, Justice.

On August 22, 1935, the Security-First National Bank of Los Angeles brought an action against Edward H. Marxen, as trustee of Santa Monica Amusement Company, a bankrupt, La Monica Dance Hall, Inc., and others, to quiet title to certain real property in the city of Santa Monica. The defendant, La Monica Dance Hall, Inc., answered the complaint. A decree was entered which included an adjudication that the plaintiff's right, title and interest was subject to the leasehold rights of La Monica Dance Hall, Inc. The plaintiff appealed. The portion of the judgment decreeing the plaintiff's title to be subject to the leasehold rights of the defendant, La Monica Dance Hall, Inc., was reversed with directions to the trial court to enter judgment quieting the plaintiff's title as against the claims of said defendant. Security-First National Bank of Los Angeles v. Marxen, 28 Cal.App.2d 446, 82 P.2d 727. Thereupon La Monica Dance Hall, Inc.,

hereinafter referred to as the defendant, filed a notice of intention to move for a new trial. The motion was denied and the trial court entered judgment in accordance with the directions of the order of reversal. From the judgment so entered this appeal is prosecuted.

The defendant contends that the trial court erred in denying its motion for a new trial. It also asserts that inasmuch as neither the District Court of Appeal nor the trial court made new findings of fact, the present judgment is not supported by the findings.

Finding VIII is asserted by the defendant to be the only finding on the issues raised between the plaintiff and the defendant, and that the reversal by the District Court of Appeal was based on lack of evidence to support that finding. Finding VIII states that the title of the plaintiff was subject to the interest of the defendant as lessee under the terms of a lease dated August 24, 1928, entered into between Santa Monica Amusement Company as lessor and the defendant as lessee, and that the expiration date of said lease was June 6, 1936.

[1, 2] The defendant, however, is incorrect in assuming that finding VIII was the only finding on the issues as between the plaintiff and the defendant. The District Court of Appeal on reversal in substance concluded that finding VIII was inconsistent with other findings of the trial court to the effect that La Monica Dance Hall, Inc., had entered into two agreements, one dated September 12, 1932, and one dated May 25, 1935, by which, it was held, the defendant had expressly subordinated its title to that of the plaintiff, and that because of those agreements finding VIII had no support in the evidence. The other findings referred to are the basis of the judgment directed to be entered against the defendant and are sufficient support for the present judgment. When it has been determined by an appellate court that the evidence and the findings support only a particular judgment which is directed to be entered, it becomes unnecessary for that court to make additional findings, even though it also concludes that certain other findings are not supported by the evidence. There is here no contention that the present judgment was not entered in accordance with the direction of the appellate court. The decision on the former appeal that the remaining findings and the evidence support only the present judgment is conclusive against the defendant's contentions on this appeal. Lambert v. Bates, 148 Cal. 146, 82 P. 767.

[3] The contention that the trial court erred in denying the defendant's motion for a new trial is based on the assumption that the reason for the reversal on the former appeal was the supposed financial inability of the defendant, La Monica Dance Hall, Inc., to comply with the provisions of the lease. The showing on the motion for a new trial was directed to an offer of proof that the defendant was able financially to comply with the terms of the lease. The District Court of Appeal in its decision made some reference to an absence of evidence that the defendant having assigned its lease, had retained any other source of income from the leased property with which it could pay the stipulated rentals (28 Cal.App.2d at page 454, 82 P.2d 727); but, from what we have said, it is apparent that its remarks in that respect were not necessary for the determination of the appeal. The law of the case, as established by the judgment of reversal, is that the defendant expressly, by written agreement, and by joining in a subsequent lease, both of which were found by the court to have been duly executed, had subordinated its leasehold rights to the right and title of the plaintiff. The issues presented questions of law only. Those issues, decided adversely to the defendant on the former appeal, also require an affirmance of the judgment on this appeal. Lierly v. McEwen, 208 Cal. 645, 283 P. 943; Snoffer v. City of Los Angeles, 14 Cal.App.2d 650, 58 P.2d 961.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 98

SAN DIEGO TRUST & SAVINGS BANK v. YOUNG.

L. A. 18061.

Supreme Court of California.

Nov. 25, 1941.

1. Judgment ⇐564(1)

Where no appeal had been taken from judgment of superior court in action to foreclose trust deed and time had expired within which motion might be presented to set aside the judgment, it was a "final judgment". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Judgment ⇐504(3)

Where judgment in action to foreclose trust deed had become final, provision directing commissioner to issue commissioner's deed to purchaser at expiration of three-month period following foreclosure sale could not be attacked on ground that it was incorrect because execution of trust deed antedated statutory amendment by which redemption period was reduced to three months in view of fact that record affirmatively established that trial court had jurisdiction of the subject matter and of the parties. Code Civ.Proc. § 725a.

3. Mandamus ⇐3(3)

Where judgment in action to foreclose trust deed directed commissioner to execute and deliver deed at expiration of three-month period following sale, on continued failure of commissioner to comply with judgment, purchaser at sale had an adequate remedy by the institution of proper proceedings in superior court to enforce such compliance and therefore application for alternative writ of mandate to compel issuance of commissioner's deed was denied.

In Bank.

Proceeding by the San Diego Trust & Savings Bank against Fred S. Young, commissioner to sell under decree of foreclosure, for an alternative writ of mandate to compel issuance of a commissioner's deed.

Application for writ denied and proceeding dismissed.

Luce, Forward, Lee & Kunzel and A. J. Lee, all of San Diego, for appellant.

No appearance for respondent.

PER CURIAM.

The petitioner herein made application to this court for an alternative writ of mandate to compel the issuance of a commissioner's deed following the sale of property after foreclosure of a trust deed. The application was noticed by the petitioner for hearing by this court during its September calendar at Los Angeles. Respondent admitted service thereof and consented to submission of the application. Upon the calling of the calendar no appearance was made by respondent, and the matter was submitted.

The application sets forth the following facts: As beneficiary under a deed of trust dated September 19, 1935, the petitioner instituted the foreclosure action in the superior court of San Diego county. The trustors defaulted and on April 22, 1941, judgment was entered by which the court decreed foreclosure of the trust deed and sale of the premises. It was expressly provided in the judgment that the trustors might redeem the property within three months after the sale, and "that said commissioner, after the expiration of three (3) months following the date of said sale, providing no redemption * * * is made, shall execute a commissioner's deed to the purchaser * * *". At the sale which was held on May 21, 1941, the petitioner purchased the property. The three months' redemption period provided for in the decree expired on August 21, 1941, and thereafter the commissioner, respondent herein, refused to execute and deliver a deed—for the asserted reason that the superior court was without jurisdiction to direct the delivery of a deed prior to the expiration of one year following the date of sale of the property. In that regard respondent contended that inasmuch as the execution of the trust deed antedated the 1939 amendment of section 725a of the Code of Civil Procedure, St.1939, p. 1990 (by which the redemption period upon foreclosure of trust deeds was reduced from one year to three months) the amendment was inapplicable to the situation here involved.

[1, 2] However, it is unnecessary to dispose of the substantive question thus presented by the petition, for the reason that no appeal from the judgment of the superior court in the foreclosure action was ever taken by the defendants therein, and the judgment has become final. Also, the time has expired within which they might

have presented a motion to set aside the judgment, pursuant to the provisions of section 473 of the Code of Civil Procedure. Furthermore, as heretofore stated, by its terms the judgment specifically directed respondent to execute and deliver a deed at the expiration of the three months' period following the sale. Having become final, the judgment may not now be attacked by respondent on the asserted ground that it is incorrect, since from the record it affirmatively appears that in the foreclosure action the trial court had jurisdiction of the subject-matter and of the parties thereto. Gray v. Hall, 203 Cal. 306, 314, 265 P. 246; In re Estate of Gardiner, 45 Cal.App. 2d 559, 114 P.2d 643; Matter of Trust of Trescony, 119 Cal. 568, 570, 51 P. 951.

[3] Therefore, on the continued failure of respondent to comply with the terms of the judgment, the petitioner has an adequate remedy by the institution of proper proceedings in the superior court to enforce such compliance.

The application for a writ is denied and the proceeding is dismissed.



19 Cal.2d 87

HINDS v. STATE BAR OF CALIFORNIA. L. A. 18019.

Supreme Court of California.

Nov. 25, 1941.

1. Attorney and client ⇐53(2)

In proceeding to discipline attorney for professional misconduct in altering husband's deed to wife whom respondent represented in her divorce action, by adding name of respondent's daughter as cograntee for purpose of securing respondent's attorney's fees, respondent's evidence *held* insufficient to establish legal excuse for such conduct and absolve him from charge of violating duty of fidelity to his client. St.1939, p. 357, §§ 6103, 6106.

2. Attorney and client ⇐32

If attorney believed that woman whom he represented in her divorce action perpetrated fraud on court by false statements in her affidavit, in preparation of which attorney aided, for order to show cause why husband should not pay alimony, attorney's fees, etc., it was attorney's duty to divulge such facts to court.

3. Attorney and client ⇐34
Constitutional law ⇐56

The State Bar Act is not unconstitutional as delegating judicial powers to Board of Governors of the State Bar. St.1939, p. 347, § 6000 et seq.

4. Attorney and client ⇐48, 52

In proceeding to review the record in disciplinary proceedings by the State Bar against an attorney, charges against respondent will not be dismissed because the complaint or order to show cause was not verified.

Proceeding by Miller K. F. Hinds to review the record in disciplinary proceedings initiated by the State Bar for asserted professional misconduct of petitioner as an attorney at law.

Order suspending petitioner from the practice of law for six months.

Miller K. F. Hinds, in pro. per.

W. Eugene Craven, of Merced, for respondent.

PER CURIAM.

This is a proceeding to review the record in disciplinary proceedings initiated by The State Bar of California, pursuant to service on petitioner, an attorney at law, of a notice to show cause why he should not be disciplined for asserted professional misconduct.

The notice to show cause charged petitioner with having committed acts "involving moral turpitude", and with having violated his oath and duties as an attorney at law within the meaning of sections 6103 and 6106 of the Business and Professions Code, St.1939, p. 357, the specific charge being that without the knowledge or consent of his client he altered a deed in which she was named as grantee.

Following the hearings on such charges the local examining committee of The State Bar found petitioner guilty and recommended that he be given a public reprimand. After the matter had been transferred to the board of bar governors, that body adopted the findings of the local examining committee, and recommended that petitioner be suspended from the practice of the law for a period of six months.

The findings made by the local examining committee, and adopted by the board of bar governors, were substantially as follows:

"That on March 29, 1940, respondent [petitioner] was the attorney for Sue S. Blankenship and * * * was representing her in an action for divorce against her husband John R. Blankenship * * *"; that "as attorney for Mrs. Blankenship, and in connection with a property settlement agreement between the parties to said action, respondent prepared a quitclaim deed covering certain real and personal property by the terms of which Mr. Blankenship quitclaimed all of his interest in said property to Mrs. Blankenship"; that "on March 29, 1940, in the presence of Mrs. Blankenship and respondent, Mr. Blankenship signed said quitclaim deed"; that "thereupon and while acting as Mrs. Blankenship's attorney", and on the understanding that he do so, respondent (who was a notary public) took the deed to his office for the purpose of completing the notarial acknowledgment and of recording the deed; that "while said deed was in the possession of respondent he inserted, or caused to be inserted, in said quitclaim deed the name of his daughter, Mary J. Grady, as a grantee, for the purpose of securing his attorney's fees in said divorce action"; that "the insertion by respondent of the name of Mary J. Grady as a grantee was done without the authority and without the knowledge of Mrs. Blankenship"; that "on April 5, 1940, respondent, at the request of his client, Mrs. Blankenship, caused said deed to be recorded without informing Mrs. Blankenship that he had inserted the name of his daughter as a grantee in said deed"; that "thereafter Mrs. Blankenship entered into negotiations for the sale of the property described in" the deed, and in connection with the proposed sale she opened an escrow in a bank; that "under date of April 9, 1940, respondent addressed a letter to said bank enclosing a quitclaim deed from Mary J. Grady and W. C. Grady, wife and husband, covering the real and personal property described in the original quitclaim deed from Mr. Blankenship to Mrs. Blankenship" in which he "instructed said bank that it was authorized to use * * * [the] quitclaim deed from Mary J. Grady and her husband to Mrs. Blankenship only on condition that" the bank "collect from said escrow on respondent's behalf the sum of $90.50." Parenthetically, it may here be said that Mrs. Blankenship did not become aware of the fact that the deed had been altered until the escrow proceedings disclosed such fact.

[1] There is sufficient evidence in the record to support the foregoing findings and, therefore, the charges should be sustained, unless, in accordance with petitioner's contention, it can be said that at the time he altered the deed there were in existence facts and circumstances sufficient to excuse his conduct in that regard.

From the record it appears that when the divorce proceedings were instituted it was agreed between Mrs. Blankenship and petitioner that his fee would be $150. At the time of such agreement, however, and in connection with the divorce action, petitioner prepared an affidavit for an order to show cause with respect to the payment of alimony, attorney's fees, etc., which affidavit Mrs. Blankenship signed and acknowledged before petitioner. In such affidavit it was averred that no arrangement had been made for the payment of attorney's fees and that affiant had no separate property. On March 29, 1940, at the hearing on the order to show cause in the divorce action the court ordered the defendant husband to pay alimony in a stated amount and attorney's fees in the sum of $100. The defendant was not present at such hearing but was in another department of the superior court in response to judicial process. The record shows, however, that copies of the orders made at the hearing on the order to show cause were served on John Blankenship on March 29, 1940, at the McCracken Home at Wilmar, California, where he was then staying, and it was later in the evening of that day that he executed in favor of his wife the quitclaim deed which was subsequently altered by petitioner. The record also shows that on April 1, 1940, Mrs. Blankenship made a payment to petitioner in the sum of $60, to be credited toward the attorney's fees in the divorce action.

Although petitioner admitted having altered the deed on April 5, 1940, by the inclusion of the name of his daughter as cograntee, for the express purpose of securing the balance of his attorney's fee, he contended the deed had been delivered to him as the agent of Blankenship, the grantor, by whom he had been instructed not to deliver the deed to Mrs. Blankenship until she had paid the attorney's fees and exe-

cuted a property settlement agreement incorporating a release of the grantor from each of the court orders made at the hearing on the order to show cause. In that connection petitioner asserts that immediately after the court issued the orders with respect to attorney's fees and alimony he became aware of certain acts of fraud which he contends Mrs. Blankenship had committed and intended to commit to the detriment of Blankenship. According to petitioner, such asserted acts of fraud consisted of Mrs. Blankenship's alleged false statement in her affidavit in support of the order to show cause that she had no separate property and of a statement which she assertedly made to petitioner immediately after the court orders had been made, to the effect that she intended both to secure the quitclaim deed from her husband and to refuse to release him from carrying out the court orders with regard to alimony payments and attorney's fees. Petitioner testified that, under the circumstances, he conceived it to be his duty to inform Blankenship of such asserted fraudulent acts and proposed fraudulent acts and, therefore, on the afternoon of March 29, 1940, without the knowledge of Mrs. Blankenship, he interviewed Blankenship at the McCracken Home and apprised him of his wife's alleged deception in the respects mentioned; and that at such time and place Blankenship executed a quitclaim deed to the property heretofore mentioned (which deed petitioner assertedly had prepared prior thereto), in which Mrs. Blankenship and Mary J. Grady were named as cograntees —the interest of the latter having been described in the deed as a mortgage to secure the payment of petitioner's fee as Mrs. Blankenship's attorney. Petitioner further testified that he took possession of such deed for the purpose of completing the notarial acknowledgment, and retained it in his office together with the deed which Blankenship executed in the evening of the same day in the presence of petitioner and Mrs. Blankenship, wherein the latter alone was named as grantee; that thereafter, and on April 5, 1940, Blankenship came to his office and in the presence of the witness Simmons, detached his signature from the deed in which Mary J. Grady was named as cograntee, but at the same time and place gave petitioner permission to alter the deed in which Mrs. Blankenship had been named as sole grantee, to include the name of Mary J. Grady, as a cograntee; also that on such occasion, with the approval of Blankenship, petitioner issued a receipt or memorandum in triplicate in which it was recited that the name of Mary J. Grady as cograntee had been added to the deed last mentioned as security for the payment of his attorney's fees. Petitioner produced evidence, particularly that given by the witness Simmons, which, if believed, would tend to substantiate petitioner's statement with regard to what assertedly had occurred in his office on April 5th. However, Blankenship's testimony in that respect was to the contrary. He maintained that petitioner had not visited him at the McCracken Home on the afternoon of March 29, 1940; that he had neither signed a deed in which the name of Mary J. Grady had appeared as a grantee, nor had he at any time authorized petitioner to alter the deed which he had executed in favor of his wife on the evening of March 29; furthermore, that he had not instructed petitioner, as his agent, to withhold delivery of such deed to Mrs. Blankenship until she had complied with any named condition.

It is clear that the matters and circumstances related by petitioner as alleged justification of his action in altering the deed, even though true, would not operate to absolve him from the charge of having violated his duty of fidelity to his client. He admitted he was not acting as the legal representative of anyone other than Mrs. Blankenship and, in effect, conceded the impropriety of any act on his part which would have placed him in the position of having attempted to represent both his client and her adversary in the pending court action. Moreover, in connection with the matters and circumstances related by petitioner as alleged justification of his conduct, several discrepancies and inconsistencies are readily apparent. Not only did Mrs. Blankenship deny having stated to petitioner, after the court orders had been made, that she intended to secure the quitclaim deed from her husband and also compel him to pay alimony and her attorney's fees, but, as heretofore related, the record shows that a day or so after she assertedly made such statement she voluntarily paid petitioner the sum of $60 on account of his fee. And, besides the fact that Blankenship denied he had ever executed a quitclaim deed in which Mary J. Grady was named as a cograntee, even if it be assumed that, for the reasons implied by petitioner, Blankenship did execute such a deed on the afternoon of

March 29th, no logical reason is apparent why he should have executed another quitclaim deed to his wife in the evening of that day—in view of the fact that at the time he executed the later deed he was fully aware of the import of the court orders and, so far as the record shows, he was under no legal compulsion to execute such a deed in favor of his wife. Furthermore, when questioned with regard to the incidents which he asserted took place immediately prior to his alteration of the deed, petitioner advanced no reasonable explanation for Blankenship's action in detaching his signature from the alleged deed in which Mary J. Grady had purportedly been named as a cograntee—while at the same time authorizing petitioner to place her name as a cograntee in the deed which Blankenship had executed in the presence of petitioner and Mrs. Blankenship, in which the latter was named as sole grantee.

Sufficient has been said herein to illustrate the unreliability of much of the evidence presented by petitioner in alleged defense of his action in altering the deed without his client's knowledge or consent. Moreover, as heretofore indicated, even had the circumstances relied on been as related by him, they were insufficient to constitute a legal excuse for his conduct,—which points to the conclusion that in his zeal to insure the collection of his fee he assumed a position inimical to the interests of his client.

[2] Had petitioner in good faith become convinced that his client intended to secure an unwarranted advantage over her husband which as her legal adviser he would have been unable to dissuade her from exercising, he could have withdrawn as her counsel. Likewise, had he believed that she had intentionally or otherwise perpetrated a fraud on the court by reason of the false statements made in her affidavit for the order to show cause,—in the preparation of which it appears he aided,—it became his duty to divulge such fact to the court which had issued the orders.

[3, 4] There is no merit in petitioner's contention that the State Bar Act, St.1939, p. 347, § 6000 et seq., is unconstitutional for the asserted reason that it is an attempt by the legislature to delegate judicial powers to the board of governors of The State Bar. In re Shattuck, 208 Cal. 6, 279 P. 998; Brydonjack v. State Bar, 208 Cal. 439, 445, 281 P. 1018, 66 A.L.R. 1507; Carpenter v. State Bar, 211 Cal. 358, 295 P. 23; In re Richardson, 209 Cal. 492, 498, 288 P. 669; 9 Cal. Jur. 10-Yr. Supp., p. 341. Nor can petitioner's claim be sustained that the charges against him should be dismissed for the reason that the complaint, or order to show cause, was not verified. Herron v. State Bar, 212 Cal. 196, 298 P. 474; Bruns v. State Bar, 213 Cal. 151, 1 P.2d 989; Golden v. State Bar, 213 Cal. 237, 2 P.2d 325; Schaffer v. State Bar, 212 Cal. 367, 368, 298 P. 994; 9 Cal.Jur. 10-Yr. Supp., p. 460.

In accordance with the views hereinbefore expressed, it is ordered that petitioner be and he hereby is suspended from the practice of law in this state for the period of six months, effective thirty days after the filing of this decision.



19 Cal.2d 85

CALIFORNIA FEDERAL SAVINGS & LOAN ASS'N v. ALLEN, Superior Court Commissioner.

L. A. 17736.

Supreme Court of California.

Nov. 25, 1941.

Appeal and error ⇐781(4)

An appeal from order denying application for peremptory writ of mandate to compel issuance of commissioner's deed after foreclosure, on ground that statute reducing from one year to three months period of redemption following foreclosure was inapplicable, was dismissed as presenting a "moot question", where foreclosure sale was made by commissioner more than one year prior to Supreme Court's decision. Code Civ.Proc. § 725a, as amended by St.1939, p. 1990.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by the California Federal Savings & Loan Association against R. E. Allen, Commissioner of the Superior Court of Los Angeles County, for peremptory writ of

mandate to compel issuance of a commissioner's deed after foreclosure sale. From an adverse order, the plaintiff appeals.

Appeal dismissed.

Prior opinion, 112 P.2d 959.

Edgerton & Colwell, of Los Angeles, for appellant.

R. E. Allen, in pro. per.

PER CURIAM.

This is an appeal from an order denying the petitioner's application for a peremptory writ of mandate to compel the issuance of a commissioner's deed after foreclosure sale.

The sole issue presented is whether the 1939 amendment, St.1939, p. 1990, of section 725a of the Code of Civil Procedure (by which the trustor's period of redemption after foreclosure sale is reduced from one year to three months) may be applied to trust deeds executed—as was the one here involved—prior to the effective date of such amendment. At the expiration of three months after the foreclosure sale, the commissioner who had been appointed by the court to conduct the sale refused to deliver a deed to the petitioner (the beneficiary under the trust deed and purchaser at the sale) for the asserted reason that to give such a retroactive effect to the 1939 amendment would be contrary to constitutional inhibitions against the impairment of contract obligations. Thereupon, a proceeding in mandamus to compel such action was instituted in the superior court, and from an order denying the petition this appeal has been prosecuted. No brief on behalf of the respondent has been filed with this court.

Although the question presented by the appeal may be interesting from an academic standpoint, it has become moot by lapse of time. Therefore, we find no occasion here to consider or determine it. From both the transcript and the appellant's brief it appears that the sale was made by the respondent commissioner on January 30, 1940, more than one year ago. In view of the fact it is now immaterial whether the three months' period or the one-year period of redemption is applicable; and from the absence of any effort on the part of the appellant, pending this appeal, to prevent an attempted redemption, it reasonably may be assumed that no attempt to redeem has been made (and counsel has recently so advised this court). Thus the petitioner, appellant herein, is now entitled to a commissioner's deed regardless of the question whether the shorter or the longer period of redemption would have been applicable to the situation here presented.

The issue having become moot, the appeal is dismissed.



19 Cal.2d 65

DUTTON v. INTERSTATE INV. CORPORATION.

L. A. 17067, 17481.

Supreme Court of California.

Nov. 24, 1941.

1. Frauds, statute of ⇐63(2)

An agreement assigning a fractional interest in oil and hydrocarbons produced under oil and gas lease operates to transfer an interest in real property, and hence must be in writing. Civ.Code, § 1624, subd. 4; Code Civ.Proc. § 1973, subd. 4.

2. Frauds, statute of ⇐56(9)

An agreement to share the profits from a transaction involving real estate, such as agreement that geologist shall receive one-third of net profits ultimately realized by corporation under permit, similar to oil lease, given corporation by city, is not required to be in writing. Civ.Code, § 1624, subd. 4; Code Civ.Proc. § 1973, subd. 4.

3. Frauds, statute of ⇐129(2)

A geologist's full performance of all his obligations under oral contract entitling him to third of net profits ultimately realized by corporation under permit, similar to oil lease, granted corporation by city, operated to remove bar of statute of frauds, if contract was within provision of such statute that agreement not to be performed within year must be in writing. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

4. Frauds, statute of ⇐144

Where permit similar to oil lease was given corporation by city, and corporation's agent had agreed to reduce to writing oral contract with geologist for obtainment of permit and division of profits realized thereunder, corporation could not plead statute

of frauds in geologist's suit for accounting. Civ.Code, § 1624.

5. Appeal and error ⇐1011(1)

In suit for accounting under contract for obtainment of permit to drill for oil from city and for sharing of profits realized thereunder, conflicting evidence as to whether contract was abandoned before it was consummated was for trial court.

6. Appeal and error ⇐994(3), 1012(1)

The credibility of witnesses and the weight to be given their testimony are matters for trial court, and will not be considered on appeal.

7. Mines and minerals ⇐101

Where geologist convinced oil scout that certain land was a valuable oil prospect, scout convinced corporation's agent, and corporation obtained permit from city to drill for oil on such land after its agent had agreed that geologist should have share in profits realized under permit, corporation could not defend geologist's suit for accounting on ground that geologist's methods, in determining whether land was oil bearing, were unscientific.

In Bank.

Appeals from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Suit for accounting by M. C. Dutton against the Interstate Investment Corporation and others. From an interlocutory decree determining that plaintiff had an interest in the profits from an oil venture and a final judgment for plaintiff after an accounting, named defendant appeals.

Affirmed.

Prior opinion, 113 P.2d 492.

Denio, Hart, Taubman & Stimson, of Long Beach, and Sherman & Sherman, W. B. Thomas, and Martin J. Weil, all of Los Angeles, for appellant.

Fogel & Beman, Fogel, Beman & Jones, and Chalmers L. McGaughey, all of Los Angeles, for respondent.

PER CURIAM.

This cause was taken over after decision by the District Court of Appeal of the Fourth Appellate District. Upon further examination of the record, we adopt the opinion of Mr. Justice Marks, with such omissions and additions as hereinafter appear, as and for the decision of this court. It reads:

"There are two appeals in this case which have been consolidated. The first appeal is from an interlocutory decree in which it was determined that plaintiff had an interest in the profits from an oil venture and an accounting was ordered. The second is from the final judgment after the accounting.

"M. C. Dutton describes himself as a practical geologist. He testified that during and prior to 1935 he had spent much time in investigating the possibility that property belonging to the city of Los Angeles near Wilmington might be oil bearing; that after this investigation he formed the opinion that it was oil bearing. Zack N. Neel was an oil scout who had known Dutton for several years and had performed services for the Interstate Investment Corporation and Emmet H. Jones, its president.

"Dutton went to Neel and discussed the probability of the city property being oil bearing and of leasing it for oil development. Under its fixed policy, the city would not lease any of its property for oil development to a lessee who did not have a credit of at least $100,000. Neither Dutton nor Neel had any such credit.

"Neel took the matter to Jones, who became interested in it. Jones saw Neel and Dutton on several occasions. Neel testified that in the course of these discussions, and in the presence of Dutton, he told Jones that they would take him (Jones) in on the 'deal' and the three would divide any profits from the transaction equally. Jones consented to this arrangement. It was decided that the application for the lease would be made by the Interstate Investment Corporation because the three believed that it had the necessary financial responsibility to satisfy the requirements of the city; that Neel and Dutton would attempt to secure the lease and attend to all of the negotiations. Jones agreed to have the contract for the division of the profits reduced to writing. No question is raised as to the authority of Jones to represent and bind the Interstate Investment Corporation in the transaction.

"Dutton and Neel asked Jones for the written contract on several occasions, but Jones delayed producing it from time to time. He finally told them it would be signed after the lease was executed, and on

one occasion gave as a reason for the delay that he did not want either Dutton or Neel to sell any interest in the lease and thus cloud the title of the lessee.

"The negotiations for the lease were conducted chiefly by Neel. They resulted in a permit being given to the Interstate Investment Corporation to drill for, produce, store and take from the described property oil, gas, asphaltum and other hydrocarbons, and for purposes incidental thereto. The permit does not differ in legal effect from the ordinary form of an oil lease. It was dated November 13, 1935, and provided 'that the term of this permit shall be for a period of five (5) years from and after the date this permit becomes effective, and as long thereafter as oil or other hydrocarbons are produced in commercial quantities, it being understood and agreed that the said permit shall automatically terminate at the end of the period twenty (20) years from the effective date hereof unless sooner teminated by agreement of the parties, breach of the conditions of this permit, or as otherwise provided herein.'

"A few days after November 13, 1935, Jones told Neel and Dutton that he would take care of Neel but did not regard Dutton in on the 'deal' and would pay him nothing.

"The foregoing summary is taken largely from the testimony of Neel and was corroborated by Dutton in many respects, although there are some discrepancies in the testimony of the two men. Jones flatly contradicted this evidence in its important particulars. As the trial court found in accordance with the evidence we have outlined we do not deem it necessary to burden this opinion with conflicting evidence given by Jones. Conflicts in the evidence are addressed to the trial judge and are settled by him. On appeal we must disregard conflicts and accept as true the evidence supporting the findings and judgment.

"About March 31, 1936, the Interstate Investment Corporation assigned the permit to the General Petroleum Corporation of California for a cash consideration of $20,000 and a percentage of the hydrocarbons to be produced from the property.

"The Interstate Investment Corporation made a settlement with Neel for his services in securing the permit but has refused to make any settlement with Dutton or to recognize that he has any compensation coming to him or any interest in the profits from the transaction.

"In the hearing on the accounting it appeared that the Interstate Investment Corporation did not have sufficient credit to enable it to satisfy the requirements of the city of Los Angeles. It was found that it 'did secure Frank G. Butler and George P. Taubman, Jr., to make the necessary financial qualifications' and was required to convey to them a sixty per cent interest in the permit; that it paid them sixty per cent, or $12,000, of the $20,000 paid by the General Petroleum Corporation; that it had expended an additional $13,814.72 in connection with the permit and the leased property, leaving a deficit of $5,814.72 which it would be entitled to receive out of future profits from the leased property. It was further found that it would be required to pay Butler and Taubman sixty per cent of future profits, leaving a balance of forty per cent out of which it would be entitled to reimburse itself the $5,814.72, together with 'a reasonable charge for office overhead and expenses incurred in connection with' the permit. It was ordered that from the balance remaining from the forty per cent of the profits to be received from the General Petroleum Corporation one-third be promptly paid to plaintiff.

"Appellant urges that the contract with plaintiff is void because it was not in writing and therefore violates various provisions of the statute of frauds.

[1, 2] "It is first urged that under the contract, Dutton claimed 'to have, own and receive a one-third interest, * * * in a lease of real property, which lease and the one-third interest therein was to extend and continue for a longer period than one year; * * *' and was invalid because it was not in writing. Code Civ.Proc. sec. 1973; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822."

It is clear under recent decisions that an agreement assigning a fractional interest in the oil and hydrocarbons produced under an oil and gas lease operates to transfer an interest in real property. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546; Callahan v. Martin, supra, page 124 of 3 Cal.2d, 43 P.2d 788; 101 A.L.R. 871. Such a transfer of an interest in real property is required by our statutes to be in writing. Civ.Code, sec. 1624(4); Code Civ.Proc. sec. 1973(4); Denio v. Brennecke, 6 Cal.App.2d 678, 45 P.2d 229. Under the facts of the present case, however, as disclosed by the pleadings and by

the findings of the trial court, the agreement did not contemplate that plaintiff was to receive a one-third interest in the oil and gas produced under the lease. The agreement was that he was to receive one-third of the net profits ultimately realized by the Interstate Investment Corporation, and that is the effect of the judgment rendered by the trial court. Such an agreement to share the profits from a transaction involving real estate is not required to be in writing. Arnold v. Humphreys, 138 Cal.App. 637, 33 P.2d 67; see Koyer v. Willmon, 150 Cal. 785, 90 P. 135; Sly v. Abbott, 89 Cal. App. 209, 216, 264 P. 507; Restatement, Contracts, sec. 193.

[3, 4] Appellant next urges that the failure to have the agreement in writing violated the statutory requirement that agreements which are not to be performed within a year must be in writing. Civ. Code, sec. 1624(1); Code Civ.Proc., sec. 1973(1). Assuming that the agreement in the present case falls within this provision of the statute of frauds, the finding of the trial court that Dutton had fully performed all of his obligations under the contract operates to remove the bar of the statute. Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 81, 69 P.2d 155; Hellings v. Wright, 29 Cal.App. 649, 656, 156 P. 365; Restatement, Contracts, sec. 198; 2 Williston, Contracts [Rev.Ed.1936], sec. 504, p. 1471.

"The case of Dougherty v. California Kettleman Oil Royalties, Inc., supra, is so factually similar to the instant case that it must be considered as controlling. It was there said [9 Cal.2d 58, 69 P.2d 167]:

" 'The fact that the agreement between Dougherty and Ochsner rested in parol is of no legal significance in this case. This agreement was fully executed by Dougherty. Assuming the contract could not be performed within a year and therefore fell without the statute of frauds, the circumstances of this case, showing as they do complete performance by Dougherty, clearly create an estoppel to plead the statute. Dougherty's performance was clearly induced by Ochsner's representation that he would sign the contract. This creates an estoppel. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Another complete answer to this point is that under the facts of this case the moment the permit was issued a trust resulted in favor of Dougherty. As to that trust neither Ochsner nor his assignees with notice may successfully plead the statute. Byers v. Doheny, 105 Cal.App. 484, 287 P. 988; Hidden v. Jordan, 21 Cal. 92, 93.'

[5] "Appellant argues that the contract was abandoned by the parties before it was consummated. This contention is based on the testimony of Jones to the effect that several days before November 13, 1935, he told Dutton that he did not consider him in on the 'deal' and would pay him nothing and that Dutton and Neel walked out of the office. Neel testified that this conversation occurred after the city officials had signed the permit. The trial court found in accordance with this evidence which effectively disposes of this contention.

[6] "Appellant makes attacks on the evidentiary support of several findings. These arguments might properly be made to the trier of fact but cannot prevail on appeal as they are directed to the credibility of the witnesses and the weight to be given their testimony.

"Particular attack is made on the finding to the effect that Dutton had devoted considerable time and much energy in satisfying himself that there was an excellent prospect of obtaining oil from the leased property. It is argued that Dutton was not a scientific geologist; that his investigations were made with an instrument of unknown and unestablished value which appellant denominates a 'Doodle-bug'; that the results of his work were a few lines and a few marks on a printed map prepared by others and were of no value.

[7] "This argument lacks merit here. The methods which Dutton used to satisfy himself that the land was a valuable oil prospect are unimportant. He convinced himself of that fact and convinced Neel of it. Neel convinced Jones, and Jones so satisfied the General Petroleum Corporation of it that this company paid $20,000 for an assignment of the permit, agreed to drill wells on the property and to pay appellant thirty per cent of the net receipts from the leased property after the payment of all development costs. No matter how unscientific the methods of Dutton may have been, they set in motion a chain of circumstances that resulted in a contract of apparent value to appellant."

The judgments are affirmed.

48 Cal.App.2d 854

PEOPLE v. SUDDUTH et al.

Cr. 545.

District Court of Appeal, Fourth District, California.

Nov. 25, 1941.

Criminal law ⇐1071, 1104(1), 1130(4)

Where defendant gave oral notice of appeal but no application stating grounds of appeal or designating what portion of phonographic reporter's notes it was desired to have transcribed was filed, no recorder's transcript was prepared or filed, no brief was filed, and no appearance was made, appeal would be dismissed. Rules for Supreme Court and District Courts of Appeal, rule II, § 7.

Appeal from Superior Court, Kern County; K. Van Zante, Judge.

Bertram Sudduth was convicted of assault with a deadly weapon and with robbery, and he appeals. On motion to dismiss the appeal.

Motion granted and appeal dismissed.

Dorris & Fleharty, of Bakersfield, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

The defendants were charged with the crime of assault with a deadly weapon and, in a second count, with robbery. A jury found the defendant Sudduth guilty under both counts and found the defendant Naylor guilty of a simple assault upon the first count and not guilty under the second count. The defendant Naylor was sentenced to six months' imprisonment in the county jail and no notice of appeal was given in his behalf.

The defendant Sudduth was sentenced to the penitentiary on July 15, 1941, and immediately after the pronouncement of judgment he gave oral notice of appeal. No application stating the grounds of the appeal or designating what portion of the phonographic reporter's notes it was desired to have transcribed was filed on behalf of the defendant Sudduth within five days after his notice of appeal, or at any other time. No reporter's transcript has been prepared or filed in this court and no brief on behalf of the appellant has been presented or filed herein.

The matter was regularly placed upon the calendar for November 13, 1941, and no appearance was then made on behalf of the appellant. At that time the attorney-general moved to dismiss the appeal under section 7 of Rule II of the Rules for the Supreme Court and District Courts of Appeal.

The motion is granted and the appeal is dismissed.



48 Cal.App.2d 33

PEOPLE v. CALKINS.

Cr. 3506.

District Court of Appeal, Second District, Division 2, California.

Nov. 25, 1941.

1. Infants ⇐13

The main purpose of juvenile court law is to safeguard children from those influences which would tend to cause them to become delinquent. St.1937, pp. 1021, 1030, 1033, §§ 550, 700, 702.

2. Infants ⇐20

In prosecution on charge of contributing to delinquency of a minor, prosecutor is not required to establish that defendant's acts or omissions resulted in minor's actual entry upon an idle or immoral course of conduct, but rather prosecutor establishes his case when he proves acts or omissions on part of defendant which tend to cause or encourage the minor to lead an idle, dissolute, lewd or immoral life. St.1937, pp. 1021, 1030, 1033, §§ 550, 700, 702.

3. Criminal law ⇐1159(2)

Whether acts of defendant established by the prosecution were such as were branded as criminal by statute making acts or omissions contributing to delinquency of a minor an offense was primarily for determination of the jury, and reviewing court would not interfere with verdict adverse to defendant if jury could reasonably conclude from evidence that defendant was guilty. St.1937, pp. 1021, 1030, 1033, §§ 550, 700, 702.

4. Infants ⇐20

Evidence was sufficient to support conviction on charge of contributing to the delinquency of a minor. St.1937, pp. 1021, 1030, 1033, §§ 550, 700, 702.

5. Criminal law ⇐1171(1)

In prosecution on charge of contributing to delinquency of a minor, prosecuting attorney's argument that for defendant to be in room with a strange child who was not of an age to protect herself required provision to see that child was not in such room with him alone, and that there was duty on defendant's part as citizen to have immediately taken the necessary steps to safeguard name and reputation of minor, did not constitute prejudicial "misconduct". St.1937, pp. 1021, 1030, 1033, §§ 550, 700, 702.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Franklin Sewart Calkins was convicted on a charge of contributing to the delinquency of a minor, and he appeals.

Affirmed.

E. V. McPherson and Gladys Towles Root, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant was convicted at a jury trial on the charge of contributing to the delinquency of a minor. He has appealed from the order denying his motion for a new trial.

It is charged in the information that defendant "did willfully and unlawfully allow and assist one Betty Bradrick to remain away from home and hide from her family for a period of several months, by living at the home of the said defendant, Franklin Sewart Calkins, and the said Betty Bradrick went under the name of Calkins and posed as the step-sister of the said Franklin Sewart Calkins, and the said Franklin Sewart Calkins did deny to the brothers of the said Betty Bradrick that he knew where Betty Bradrick was, when in fact the said Franklin Sewart Calkins had knowledge of the whereabouts of Betty Bradrick at all times; the said Betty Bradrick being a minor of the age of fifteen years and not being in any way related to the said Franklin Sewart Calkins". It is further charged that these acts of defendant "did thereby then and there manifestly tend to and did encourage, cause and contribute to the said Betty Bradrick becoming and remaining such a person as is described in section 700 of the Juvenile Court law, St.1937, p. 1030, to-wit, a person under twenty-one years of age who is leading, or is in danger, from any cause, of leading an idle, lewd, dissolute and immoral life".

It is contended by defendant that the evidence is insufficient to support the conviction. From the evidence presented by the prosecution it appears that Betty Bradrick, a girl 15 years of age, had been living with her mother and older brothers. In June of 1940 she left their home and went to the cottage of defendant, who was then 35 years of age, in a bungalow court at 1720 Lemon street, Alhambra. She stated that she wanted to leave home and that she had long been in love with defendant, who intended to marry her. Defendant told her to return home but she refused to do so and for about six weeks she lived at defendant's cottage. There were three rooms in the cottage, a living room, kitchen and bedroom. Betty did not let her relatives know where she was during the period she stayed with defendant. A man named Wallace lived in the same cottage with defendant and Betty during two weeks of the period in which Betty resided with defendant. Wallace stated that during part of this time he slept in the living room and Betty and defendant slept in the bedroom, the door of the bedroom being closed. Betty assumed the name of Betty Calkins and defendant told Wallace that she was his step-sister. While she was living in defendant's house Betty did the cooking and house cleaning. After about six weeks she left to seek work elsewhere and was "picked-up" after she had been away from her home for about eight months. During this time a police officer and Betty's brother tried to learn of Betty's whereabouts but defendant told them that he did not know her whereabouts.

By section 550 of the Welfare and Institutions Code, chapter 2 of the code is designated as the "Juvenile Court Law". Section 700 of the code provides: "The jurisdiction of the juvenile court extends to any person under the age of twenty-one years who comes within any of the following

descriptions: * * * (k) Who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd, or immoral life." In section 702 of the code it is provided: "Any person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of the subdivisions of section 700 or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of twenty-one years to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of any of the subdivisions of section 700, is guilty of a misdemeanor * * *."

[1, 2] The main purpose of the Juvenile Court law is to prevent the delinquency of children. By this law acts or omissions which tend to cause minors to become delinquent are made criminal. It is the purpose of the statute to safeguard children from those influences which would tend to cause them to become delinquent. It is not necessary for the prosecutor to establish that defendant's acts or omissions resulted in the minor's actual entry upon an idle or immoral course of conduct. The prosecutor establishes his case when he proves acts or omissions on the part of the defendant which tend to cause or encourage the minor to lead an idle, dissolute, lewd or immoral life. People v. McDougal, 74 Cal.App. 666, 241 P. 598; People v. De Leon, 35 Cal.App. 467, 170 P. 173.

[3, 4] The question whether the acts established by the prosecution were such as are branded as criminal by section 702 of the code was primarily for the determination of the jury and a reviewing court may not interfere with the verdict adverse to the defendant if the jury could reasonably conclude from the evidence that the defendant was guilty. People v. McDougal, supra. We are satisfied that the evidence in the present case is sufficient to support the jury's verdict.

[5] Defendant also contends that the prosecuting attorney was guilty of prejudicial misconduct and cites the following statements of the prosecutor in his argument to the jury: "Counsel has indicated that I, in referring to the child being in the room with the man would be to say that a man in a room with a woman is doing an immoral act. No, we are not inferring that, but we do know for a man to be in a room with a strange child who is not of an age to protect herself requires provision to see that that child is not in that room with him alone. * * * Why there was a duty on that man's part as a citizen of this county to have immediately taken the necessary steps to safeguard the name and reputation of that little girl, that there should not even be any suspicion that could be cast in that direction. * * * If we are to take the testimony of that little girl herself that she remained in that home for five or six weeks, where else could that little girl have slept but in the room of the defendant? I submit to you that that alone is sufficient to satisfy the mind of anyone that the acts of this defendant were not those of a gentleman toward a child." Defendant argues that the only inference to be gathered from the statements of the prosecutor is that he was placing upon the defendant the legal duty to safeguard the name and reputation of the minor or he would be answerable. When all of the circumstances shown in evidence are taken into consideration, it must be held that the remarks of the prosecutor are within the limits of legitimate argument. We find no misconduct therein.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

48 Cal.App.2d 40

REHART et al. v. KLOSSNER.

Civ. 2791.

District Court of Appeal, Fourth District, California.

Nov. 26, 1941.

Hearing Denied Jan. 21, 1942.

1. Appeal and error ⇐1036(2)

Where it was stipulated that certain plaintiffs had entire title to property involved in action to quiet title, defendant was not prejudiced by the presence of other plaintiffs in the case.

2. Executors and administrators ⇐129(3)

Where estate had not been distributed, the executrix had the lawful right to bring action to quiet title.

3. Mines and minerals ⇐73

Where oil lease was for a term of 20 years and as long thereafter as oil in paying quantities could be produced from the leased premises, the lessee acquired an interest in the real property under it.

4. Mines and minerals ⇐78(2)

Under oil lease requiring lessee to start drilling by April 5, 1934, and to continue drilling in good faith until a depth of 4,500 feet had been reached unless oil in paying quantities had been produced at a lesser depth, with right to postpone commencement of drilling upon payment of certain sums monthly, no extension to be obtainable after October 5, 1935, otherwise lease was to be automatically terminated, where lessee started drilling before October, 1935, and prosecuted well to a depth of 450 feet, provisions of lease under which it would have been terminated automatically for failure to start drilling never became operative.

5. Mines and minerals ⇐78(2)

Where there had been no drilling on leased land for more than two years and lessee had failed to pay the rentals agreed upon in oil lease, there was an "abandonment" of the lease sufficient to support judgment in favor of plaintiffs in action to quiet title.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

6. Mines and minerals ⇐77

Abandonment will be found more readily in the case of oil and gas leases than in most other cases, and a lease may be abandoned and, when once abandoned by the lessee, he cannot thereafter claim or enforce any right thereunder without first securing consent of the lessor or a renewal of the lease.

7. Mines and minerals ⇐78(1)

The rights granted a lessee under oil and gas leases are for exploration and development and are inchoate until oil or gas is found in quantities warranting operation, and the courts will not permit the lessee to fail in development and hold the lease for speculative or other purposes, except in strict compliance with his contract for a valuable and sufficient consideration other than such development.

8. Quieting title ⇐44(3)

In action to quiet title, evidence showed that lessee had abandoned oil and gas lease by failure to do any drilling for more than two years and by failure to pay agreed rentals, and that such failure was not caused by an act of God.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action to quiet title by Flora E. Rehart and others against Winfred William Klossner. From a judgment for plaintiffs, the defendant appeals.

Judgment affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

J. A. Galvin, of Fillmore, and Henry L. Knoop, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiffs' title to real property in Ventura county. It is a companion case to Rehart v. Klossner, 119 P.2d 148, the opinion in which is this day filed.

C. V. Rehart and Flora E. Rehart are the common source of title of the parties. On January 15, 1934, they executed an oil lease with defendant under which he now claims.

At the commencement of the trial ownership was stipulated as follows: "Flora E. Rehart has an undivided one-fourth interest; Georgia Anna Scott, an undivided one-fourth interest; Stella M. Rehart, as Executrix under the last will of Ray L. Re-

hart, has become, subsequently to the filing of this suit, the owner of an undivided one-fourth interest. The remaining one-fourth interest has not yet been distributed, and is in Stella M. Rehart as Executrix under the last will of Ray L. Rehart." While it is not entirely clear from the record, it would seem that the other plaintiffs are either heirs at law or devisees under the will of Ray L. Rehart, or otherwise have some interest in the property through heirship of a decedent whose estate was not distributed.

Defendant now urges that there has been a misjoinder of parties plaintiff and that the guardian of the minors did not have authority from the probate court to join in this action and therefore had no legal capacity to sue.

[1] Had a demurrer been interposed on the ground of misjoinder of parties plaintiff it seemingly should have been sustained. The record shows no demurrer. Under the stipulation it appears that the entire title to the property was vested in Flora E. Rehart, Georgia Anna Scott, Stella M. Rehart and the Estate of Ray L. Rehart, deceased, represented by his executrix. That being so, defendant suffered no prejudice by the presence of the other plaintiffs in the case because if the owners were entitled to have their titles quieted against defendant he would have remaining no interest in the property. If the judgment gives other plaintiffs an interest in it and if it is erroneous to that extent, the true owners and not defendant are prejudiced by the error and they have not appealed.

[2] We need not consider the right of a guardian to bring an action to quiet the title to the ward's property without first obtaining leave of court to do so. Here the estate of Ray L. Rehart had not been distributed and the executrix brought and had the lawful right to bring this action which is sufficient for the purposes of this case.

Defendant, under various headings and in several different forms, urges that plaintiffs may not recover here because no notice of forfeiture of the lease was given as required by the terms of the lease, as he construes it. Plaintiffs maintain that no notice of forfeiture was required.

[3] The lease is dated January 15, 1934. It is for a term of twenty years and as long thereafter as oil in paying quantities can be produced from the leased premises, so the lessee acquired an interest in the real property under it. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. The lessee was required to start drilling a well by April 5, 1934, and to continue drilling in good faith until a depth of forty-five hundred feet had been reached, unless oil in paying quantities had been found at a lesser depth. There were other drilling requirements not necessary to mention here.

Time was made the essence of the contract and the lessors were given the option of terminating the lease on the breach of its conditions. The right to postpone the commencement of drilling the first well was given to the lessee by his paying to the lessors $150 a month in advance commencing on April 5, 1934, and ending with the payment on October 5, 1934, and $250 per month in advance thereafter, no extension being obtainable after October 5, 1935. If the first well was not started before that date the lease was automatically terminated without any action on the part of the lessors.

The paragraph giving rise to this controversy reads as follows: "In the event that there shall be a breach of or failure to comply with any other term, conditions, covenant, or obligation hereof by the Lessee, the Lessor shall before declaring a forfeiture, give the Lessee a written notice specifying the particulars of such breach or failure, and if the breach or failure is of such character that it can be made good by the Lessee, and the Lessee does begin in good faith to make good the same within thirty (30) days after the service of such notice, and diligently continues the same to completion, or after the expiration of said performance period, after any such default, shall pay to the Lessor the sum of Two Hundred Fifty ($250.00) Dollars, per month in advance, such breach or failure shall be executed (excused), for not longer however, than an aggregate of twelve (12) months after the occurrence of such breach or failure."

About March 15, 1935, defendant made a sublease on three hundred acres of the leased property to R. E. McClelland. He spudded in a well on it on July 18, 1935, and drilled to a depth of 450 feet. In June, 1936, McClelland assigned his sublease to Brewers, who worked on or around the well until the latter part of December, 1936, but did not deepen it. Defendant worked in or around the well in June and

July, 1937, but did not deepen it and it was never drilled to a depth of more than 450 feet.

One of the plaintiffs testified that three of the rental checks that were given her in 1936 were not paid when presented to the bank on which they were drawn and that thereafter defendant paid $1,150; that there was no rental paid after June 14, 1937.

This action was instituted on February 17, 1939. No notice of default or of the forfeiture of the lease was given prior to that time.

[4] Defendant contends that as the drilling of the first well was actually started before October, 1935, and prosecuted to a depth of 450 feet, the provisions of the lease under which it would have been terminated automatically for failure to start drilling the first well never became operative. We agree with this argument.

He argues that the quoted paragraph providing for forfeiture for "failure to comply with any other term, conditions, covenant, or obligation" of the lease required a notice of any default to be given him and gave him thirty days after notice to correct his breach; that as no notice of default was given him the lease was not cancelled; that the closing phrases of the quoted paragraph are modified by the prior requirement for notice and that the twelve months' limitation on time could not commence to run until notice was served, and as no notice was served the twelve months had not expired when this action was filed.

Plaintiffs argue that the phrase "such breach or failure shall be executed (excused), for not longer, however, than an aggregate of twelve (12) months after the occurrence of such breach" is complete in itself and places an absolute limit of twelve months after default in which to correct it without regard to notice so that in twelve months after default the lease was terminated by the default and the failure to rectify it within that time.

The question of the correct construction of the paragraph is a close one. The trial court adopted the one placed on it by plaintiffs. However, we believe the judgment must be affirmed on another ground.

[5] The trial court found that there had been no drilling on the leased lands for more than two years and that defendant had failed to pay the rentals. These findings show an abandonment of the lease and the leased property sufficient to support the judgment.

[6] In the case of Hall v. Augur, 82 Cal.App. 594, 256 P. 232, 234, the oil lease in question there was dated May 5, 1921, and became effective not later than May 30, 1921. There was no forfeiture clause in the lease. The suit to quiet title against it was filed on May 22, 1922, as no drilling operations had been started. In holding that there had been an abandonment, the court said:

"Abandonment will be more readily found in the case of oil and gas leases than in most other cases. In Harris v. Riggs, 63 Ind.App. 201, 112 N.E. 36, it is said: 'Such a lease may be abandoned, and when once abandoned by the lessee, he cannot thereafter claim or enforce any right thereunder without first securing the consent of the lessor or a renewal of the lease. Gadbury v. Ohio, etc., Co., 162 Ind. 9, 16, 67 N.E. 259, 62 L.R.A. 895; Island Coal Co. v. Combs, 152 Ind. 379, 387, 53 N.E. 452; Ohio Oil Co. v. Detamore, 165 Ind. 243, 252, 73 N.E. 906; Bartley v. Phillips, 165 Pa. 325, 30 A. 842; Calhoon v. Neely, 201 Pa. 97, 50 A. 967; Lowther Oil Co. v. Miller, etc., Co., 53 W.Va. 501, 44 S.E. 433, 435, 97 Am.St.Rep. 1027; Van Meter v. Chicago, etc., Co., 88 Iowa 92, 55 N.W. [106], 108; 1 Corpus Juris, page 5 et seq.; 1 Cyc. p. 4 et seq.; Thornton, Law Oil and Gas, § 137.

[7] " 'It has been held and supported by sound reason that abandonment may be more readily found in cases of oil and gas leases than in most other instances. The rights granted under such leases are for exploration and development. The title or interest granted is inchoate until oil or gas is found in quantities warranting operation, and courts will not permit the lessee to fail in development and hold the lease for speculative or other purposes, except in strict compliance with his contract for a valuable and sufficient consideration other than such development. Gadbury v. Ohio, etc., Co., 162 Ind. [9], page 14, 67 N.E. 259, 62 L.R.A. 895; Lowther v. Miller, etc., Co., supra; Huggins v. Daley [4 Cir.], 99 F. 606, 40 C.C.A. 12, 48 L.R.A. 320, 325; Dittman v. Keller, 55 Ind.App. 448, 451, 104 N.E. 40; Risch v. Burch, 175 Ind. 621, 627, 95 N.E. 123; Dill v. Fraze, 169 Ind. 53, 57, 79 N.E. 971; Ramage v. Wilson, 45 Ind.App. 599, 604, 88 N.E. 862.'

"We believe the evidence was sufficient to support the finding of fact by the trial

court that the defendants abandoned whatever right, title, or interest they or either of them, had in and to such lease prior to the assignment of said lease to the Interstate Oil Corporation."

See, also, Rice v. Lee, 44 Cal.App.2d 909, 113 P.2d 235; Carlisle v. Lady, 109 Cal. App. 567, 293 P. 686; Garrison v. Hogan, 112 Cal.App. 525, 297 P. 87; Caswell v. Gardner, 12 Cal.App.2d 597, 55 P.2d 1222.

[8] Under the rules announced in the foregoing cases the evidence here shows such abandonment that the judgment must be affirmed.

Defendant seeks to escape from this conclusion by pointing to a paragraph of the lease wherein it is provided that drilling operations required in the lease may be suspended by the lessee when such operations are prevented by the elements, and points to his own testimony to the effect that a great storm on March 1, 1938, caused a flood that washed out all roads on and to the leased property so that he could not haul in drilling equipment until April, 1939.

On the other hand, a witness for plaintiffs contradicted this evidence. He testified that from September to December 31, 1938, the roads were open; that they were closed for about one week in January, 1939. This evidence supports the finding that the failure to pay rentals or to drill was not caused by an Act of God.

Judgment affirmed.

BARNARD, P. J., and WEST, Justice pro tem, concurred.



48 Cal.App.2d 46

REHART v. KLOSSNER.

Civ. 2792.

District Court of Appeal, Fourth District, California.

Nov. 26, 1941.

Hearing Denied Jan. 21, 1942.

1. Quieting title ⇐44(3)

In action against lessee to quiet title because of failure to pay rentals or prosecute drilling as required by oil lease, evidence showed that lease had been terminated by lessee's failure to pay rent or drill well for nearly six months even if drilling had been theretofore prevented by act of God.

2. Contracts ⇐271

When a party to a contract has been injured by its breach, he may treat the contract as rescinded and recover upon a quantum meruit so far as he has performed, or he may keep the contract alive for the benefit of both parties, being at all times ready and able to perform, or he may treat repudiation as putting an end to the contract for all purposes of performance and sue for the profits he would have realized if he had not been prevented from performing, in which case the contract would be continued in force for that purpose.

3. Quieting title ⇐15

Where, after alleged repudiation of oil lease by lessor, the lessee did nothing and failed to pay the rent or do drilling as required by lease, lessee was in no position to take advantage of alleged breach by lessor in lessor's action to quiet title for failure to pay rentals and to do drilling required by lease.

4. Contracts ⇐313(2)

The expression of an intent not to be bound by a contract is not sufficient to establish "repudiation" of a contract by a party to it.

See Words and Phrases, Permanent Edition, for all other definitions of "Repudiation".

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by Stella M. Rehart against Winfred W. Klossner to quiet title. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Alfred Siemon and Bennett Siemon both of Bakersfield, for appellant.

J. A. Galvin, of Fillmore, and Henry L. Knoop, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment quieting plaintiff's title to real property in Ventura county. This is a companion case to Rehart et al., v. Klossner, 119

P.2d 145, the opinion in which is this day filed, but different property is involved.

Under date of August 15, 1932, R. L. Rehart and Stella M. Rehart, husband and wife, entered into an oil lease with John D. Young on the property in question. Certain terms of the lease were modified by a contract between the same parties dated June 1, 1933. We will summarize the terms of the two instruments as though the amendatory clauses had been contained in the original lease.

Subsequently, R. L. Rehart died and his interest in the leased property passed to his widow, the plaintiff. By assignment Young's interest under the lease passed to defendant.

The lease was for twenty years and as long thereafter as oil or gas be produced in paying quantities from the leased land.

The lease provided that it should terminate on June 10, 1933, or within extension periods provided for in the lease, unless the lessee shall have commenced drilling of a well for oil or gas on the leased land during any of such periods and prosecuted the drilling thereof with due diligence until a depth of 5,000 feet had been reached unless oil or gas be found in paying quantities at a lesser depth.

It was further provided that the lessee might secure an extension of the time for commencement of the drilling until July 10, 1933, by paying the lessors $175 on or before June 10, 1933, and a second extension to August 10, 1933, by paying the lessors $175 on or before July 10, 1933. It was further agreed that the lessee might secure another extension of the time for commencement of drilling for three months by paying the lessors $150 on or before August 10, 1933, and additional three-month extensions by paying the lessors $150 on the tenth day of every third month in advance until August 10, 1938, but not thereafter.

It is therefore clear that the drilling of the first well must have been commenced on or before August 10, 1938, or the lease would be terminated without action on the part of the lessors unless drilling within that period had been excused by some other provision of the lease.

Defendant made payments so that the commencement of the drilling of the first well was extended to May 10, 1938. The last payment was made and accepted on March 11, 1938. No drilling was ever done on the leased premises.

On August 24, 1938, plaintiff notified defendant "that payments for rental have not been kept up, and that drilling of a well was not commenced within the required time"; that the lease required the lessee to quitclaim the property and that "you are hereby notified, that, if this quitclaim deed is not delivered to me, within thirty days, I shall take action to recover the same, at your expense as provided by this lease."

Plaintiff failed to give the quitclaim deed, made no further payments and did not commence the drilling of a well on the leased property. This action to quiet title was filed on February 24, 1939.

Defendant urges that he was relieved from the obligation to commence drilling a well and from making the payments of money under a paragraph of the lease which provided that "the obligations imposed upon the Lessee may be suspended so long as Lessee's compliance is prevented by the elements * * *"; and his evidence that a great storm had washed out all roads on March 1, 1938, so that he could not get onto the leased property until the end of the year 1938, or until April, 1939.

The evidence on the effect of the storm is conflicting. A witness for plaintiff testified as follows: "I am familiar with the location of the Rehart property, and have been employed in the oil fields around Fillmore for about 30 years. At one time I worked for Mr. Klossner on the Turner property, which is north of and adjoins the Rehart property on the south. I was employed in that district in 1938. I remember the rain storm in March, 1938. As a result of that storm the road slid in pretty bad. It was closed six weeks for automobiles. It was opened to my place before the first of May. It was probably five or six months that there was no trucking over it. After the flood, one could start trucking in there in August, 1938. Since that time trucks and heavy equipment could have been hauled from Fillmore onto the Rehart property."

This evidence justifies the conclusion that the effects of the storm did not prevent defendant from starting drilling on the property at least by September 1, 1938.

The obligation fixed on defendant was to commence drilling a well on the prop-

erty on or before June 10, 1933. He was given the option of extending the period for commencing drilling during the limited periods already mentioned by making the required cash payments at the times mentioned. The lease placed no obligation on him to make these payments.

[1] If we assume that the results of the storm of March 1, 1938, were sufficient to suspend the obligation of drilling, then the drilling requirements of the lease again came into full force and effect when the effects of the storm were overcome, and it then became defendant's duty to commence drilling the well. Under the evidence this obligation arose not later than September 1, 1938, or a reasonable time thereafter. He did not tender plaintiff a delay payment on or after that date, if under the terms of the lease he could have done so. He did not commence the drilling of a well on the leased property. He did nothing during the five months and twenty-four days intervening before the suit was filed. Under these facts, the lease was terminated under its clear terms before February 24, 1939.

To escape this conclusion, defendant urges that he was not in default on August 24, 1938, when plaintiff gave him the notice already mentioned; that as he was not in default and as plaintiff repudiated the lease, he was relieved from all his obligations of performance under the lease until plaintiff withdrew her notice. In support of this argument he cites sections 1440 and 1511 of the Civil Code and 6 California Jurisprudence, page 458, Contracts, section 274.

[2] The rule contended for by defendant is better stated in Felton Chemical Co. v. Superior Court, 33 Cal.App.2d 622, 92 P.2d 684, 687, as follows: "Performance by the party not in fault is always excused by the wrongful refusal to perform by the other party. The rights of the party in fault come to an end, but the contract is nevertheless kept in force so as to protect the rights of the innocent party and to enforce the obligations of the delinquent party. Civ.Code, §§ 1511, 1512, 1514."

The rights of the innocent party, where a contract has been repudiated by the other party, is thus clearly stated in O'Connell v. Federal Outfitting Co., 5 Cal.App.2d 327, 42 P.2d 1070, 1072: "When a party to a contract has thus been injured by its breach, he may pursue any of three remedies. 'He may treat the contract as rescinded and may recover upon a quantum meruit so far as he has performed; or he may keep the contract alive, for the benefit of both parties, being at all times ready and able to perform; or, third, he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In this last case, the contract would be continued in force for that purpose.' McConnell v. Corona City Water Co., 149 Cal. 60, 64, 85 P. 929, 930, 8 L.R.A.(N.S.) 1171. Sobelman v. Maier, 203 Cal. 1, 8, 262 P. 1087; 6 Cal.Jur., p. 460, § 274." See, also, Richardson v. Davis, 116 Cal.App. 388, 2 P.2d 860; Kressly v. District Bond Co., 138 Cal.App. 565, 32 P.2d 1112; King Features etc., v. KMTR, etc., 29 Cal.App.2d 247, 84 P.2d 322.

[3] It is clear that defendant did not bring himself within any of these three rules. He did not treat the contract as rescinded and attempt to recover on the quantum meruit, assuming he could do so. He did not treat the repudiation as putting an end to the contract and seek to recover his profits, if any, again assuming he could do so. He did not keep the contract alive for the benefit of both parties, and it is rather clear that he was never in a position to perform under it, but only hoped that he could secure another to perform for him. He simply did nothing and in doing nothing lost his right to perform, assuming that his rights were not terminated prior to September 1, 1938.

[4] We have assumed but not held that the letter from plaintiff to defendant of August 24, 1938, amounted to an absolute and final renunciation and repudiation of the contract by plaintiff, which is necessary, and is not the expression of an intent not to be bound by it, which is not sufficient to establish repudiation of a contract by a party to it. Atkinson v. District Bond Co., 5 Cal.App.2d 738, 43 P.2d 867; Tomboy Gold & Copper Co. v. Marks, 185 Cal. 336, 197 P. 94.

The judgment is affirmed.

BARNARD, P. J., and WEST, Justice pro tem., concurred.

47 Cal.App.2d 818

HITCHCOCK et al. v. LOVELACE et al.

Civ. 2491.

District Court of Appeal, Fourth District, California.

Nov. 19, 1941.

Hearing Denied Jan. 15, 1942.

1. Easements ⇐61(8, 12)

The property affected by alleged easement must be described in pleadings with such certainty as to enable party against whom claim is made to know exactly what portion of his property is claimed to be so affected, and the judgment establishing validity of the claim must be definite and certain as to property affected, but where land has a descriptive name it may be described by such name, and the same rule applies where rights of members of the public in lands of another arise by virtue of user sufficient to conclusively imply a dedication.

2. Highways ⇐159(2)

Where court found that certain roads in which plaintiffs as members of the general public claimed easements were public highways and had been used by the public for more than 35 years and the judgment gave the termini of both roads and the section, township and range within which they passed over defendants' lands, the description was sufficient.

3. Easements ⇐5

The use of a right of way can never ripen into a prescriptive right unless the possession is continuous under claim of right, open, notorious, uninterrupted and adverse for five years.

4. Easements ⇐7(4)

Where road was laid out in 1935 and action to protect alleged easement therein was filed in 1939, use of road for only four years could not ripen into a prescriptive right.

5. Easements ⇐61(12)

In action involving alleged easement in road, judgment that easement applied to defendant's land "to the extent that said new road, if at all, is embraced within the exterior boundaries" of certain parcels was bad for uncertainty.

6. Easements ⇐61(12)

In action to protect alleged easement in way if no portion of way extended over defendant's land, the judgment should be limited to an injunction restraining the creation or maintenance of a public nuisance thereon.

7. Easements ⇐61(9½, 12)

In action for protection of easements in certain trail across defendant's land, finding and judgment that easement existed over and across certain tracts within the exterior boundaries of that certain cattle trail, etc., was bad for uncertainty where there was nothing to indicate where the trail entered or left defendant's land and it did not appear that there was a well-defined pathway known by a descriptive name of such character as to apprise defendant or anyone else just where the exterior boundaries lay over any portion of its course on defendant's land except where part of trail followed a certain road.

8. Highways ⇐159(2)

A finding that a road is a public highway would support the conclusion that plaintiffs as members of the general public had an easement in such highway.

9. Easements ⇐61(9½)

A finding that user by plaintiffs of a way had been open, actual, continuous under claim of right, adverse, and hostile to the true owner's title for a period of five years would support the conclusion that plaintiffs' rights in the way were by prescription.

10. Highways ⇐159(2)

The finding that for more than 35 years the general public, including plaintiffs, and their predecessors in interest, had used and traveled a certain cattle trail did not support the conclusion and judgment that an easement existed by virtue of dedication by owner as a public highway or by virtue of prescription.

11. Waters and water courses ⇐146

Where court found that waters of certain spring had been used by plaintiffs and their predecessors in interest and the general public for more than 35 years, together with free access thereto but the only knowledge ascribed to defendant of such use was for a 3-year period, judgment that easement existed could not be sustained on theory of prescription, since only user for five years will raise the presumption of dedication.

12. Appeal and error ⇐907(3)

On appeal upon the judgment roll alone, appellate court must assume that there was

evidence to support trial court's conclusion that appellees were the owners of easement involved, and the elements of adverseness, openness, notoriety and hostility of the use may be supplied, by the finding that such easement was owned by appellees.

13. Appeal and error ⇐907(3)

Where trial court specifically found that knowledge of owner of user of land and waters of spring by plaintiffs and others had existed for only three years before action was filed, such finding negatived general finding of prescriptive right, which could not be pieced out by presumption in support of trial court's conclusion on appeal upon judgment roll alone.

14. Trial ⇐404(4)

Specific findings must control in case of any inconsistency between a general finding and specific findings.

15. Waters and water courses ⇐107(3)

Finding that all land within one-fourth of a mile of certain spring had for more than 10 years been reserved for public use in accordance with Act of Congress sustained judgment that easement existed in such land in favor of general public though it was not set forth how or in what manner action of federal authorities was taken. 43 U.S.C.A. § 300.

16. Trial ⇐395(6)

A statement of the probative facts upon which a finding depends is unnecessary, since they are included in the findings of the ultimate facts.

17. Appeal and error ⇐931(3)

Where judgment was that spring and surrounding land had been reserved for public use by federal authorities pursuant to statute, presumption was that trial court based its findings and judgment upon proof of legislation and suitable orders pursuant thereto. 43 U.S.C.A. § 300.

18. Appeal and error ⇐1071(1)

Where rights of appellees as members of general public in spring and adjacent land by virtue of reservation thereof by federal government were greater than claimed easement, failure of trial court to limit appellees' rights either as to amounts of water to be taken or times for taking of water was harmless. 43 U.S.C.A. § 300.

Appeal from Superior Court, San Bernardino County; O. K. Morton, Judge.

Action by W. E. Hitchcock and others against Kathleen McN. Lovelace and others to enjoin interference with certain alleged easements. From a judgment for plaintiffs, the named defendant appeals.

Affirmed in part and reversed in part.

Cupp, Hunt & Henderson and Geo. R. Wickham, all of Los Angeles, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

WEST, Justice pro tem.

This is an appeal by the sole appearing defendant Kathleen McN. Lovelace, on the judgment roll, from a judgment decreeing that plaintiffs are the owners of certain easements, rights of way, and rights in, to and over lands of appellant lying adjacent to property of plaintiffs in San Bernardino county and enjoining defendants, their agents, servants or employees from interfering with plaintiffs' use and enjoyment thereof.

The complaint contains several causes of action although the same are not separately stated.

Five separate easements were contended for and decreed by the court, although in their use and enjoyment somewhat connected. To clearly understand them a somewhat detailed statement of facts is essential. This statement is taken from the findings of fact inasmuch as all of the allegations of the complaint were found to be true.

Plaintiffs for more than ten years prior to the commencement of the action had been the owners and in possession of a quarter section of land used by them as a camp for men and livestock incident to the business of raising cattle. This parcel has been and will be referred to herein as parcel 1. Appellant is and since 1932 has been the owner of and for three years before the action was instituted has been in possession of two large parcels contiguous to parcel 1 and lying westerly thereof but extending both to the northwest and southwest of the borders of parcel 1. The southeast corner of one of said parcels, herein referred to as parcel 2, is common with the northwest corner of parcel 1. Appellant's other parcel, herein referred to as parcel 3, is a quarter section lying westerly of parcel 1, together with other lands lying southwesterly of parcel 1 and having a

northeast corner common with the southwest corner of parcel 1.

A natural water course known as Grapevine creek has from time immemorial flowed northerly down Grapevine canyon across parcel 1. For over thirty-five years the general public, including the plaintiffs and their predecessors in interest, have used and traveled a public highway known as Old road or Dead Man's Point road, which extends from the mouth of Grapevine canyon on parcel 1 in a northwesterly direction across parcel 1 intersecting the west line thereof at a point 130 feet south of the common northwesterly corner of parcel 1 and the southeasterly corner of parcel 2 and continuing across parcels 2 and 3 and lands northwesterly of parcel 2 to a main highway which extends easterly and westerly between Victorville and Lucerne valley to the north of the lands of the parties to this action.

Another canyon known as Vader canyon lies westerly of Grapevine canyon and extends southerly to the summit of the San Bernardino mountains and northerly to its mouth which is located on parcel 3. Near the mouth of this canyon waters from time immemorial have risen to the surface and have formed a spring known as Vader Canyon spring, the production of which has been augmented by means of a tunnel driven into the west wall of the Vader canyon. A public highway extends northerly from the head of Vader canyon which is approximately one-quarter of a mile south of the south line of parcel 3 proceeding along the bottom of the canyon across parcels 3 and 2, and joins the old road on parcel 2. For more than thirty-five years the general public, including plaintiffs and their predecessors, have traveled and used Vader Canyon road into the canyon and to the summit of the mountains lying to the south.

In the month of March, 1935, plaintiffs, for the purpose of providing an additional means of travel from the main highway to parcel 1, constructed a road herein referred to as "New Road", extending from said main highway at a point due north of the west line of parcel 1 south in a straight line to the old road at the point where the old road intersects the west line of parcel 1.

For more than thirty-five years the general public, including plaintiffs and their predecessors in interest, have used and traveled a trail referred to herein as the cattle trail, which ascends out of Grapevine canyon on parcel 1 near the mouth of the canyon and extends in a general southwesterly direction into parcel 3 and over the foothill which comprises the east wall of Vader canyon and then proceeds along the east wall of Vader canyon to the bottom of the canyon where it joins with the Vader Canyon road continuing up said Vader canyon along the road to the head of Vader canyon and then continues from the southerly terminus of Vader Canyon road along the walls of Vader canyon to the summit of the mountains. From time to time plaintiffs and their predecessors in interest and also members of the public using the cattle trail have cut away portions of the mountainside on parcel 3 along the walls of Vader canyon to facilitate the passage of livestock and cattle.

The general public, including plaintiffs and their predecessors in interest, have for more than thirty-five years used the waters of Vader Canyon spring for domestic purposes and for the watering of livestock, during all of which time free and uninterrupted access has been had thereto by means of the Vader Canyon road and the cattle trail, and for more than ten years plaintiffs and their predecessors in interest have maintained a trough at the spring for the use of the general public and for plaintiffs' livestock. The trough so maintained was destroyed by the defendants sometime during the year 1937, and upon plaintiffs learning of such destruction they constructed a cement trough at the spring and conveyed waters from the spring by means of pipes to the cement trough. This cement trough was in turn destroyed by defendants, and thereafter defendants have prevented the installation of any facilities for collecting and using said waters.

From time to time since 1936, the defendants have taken steps to interfere with plaintiffs' use of the various roads and have also obstructed the cattle trail and prevented the effective use of the waters from the Vader Canyon spring. Within a year prior to the filing of this action an iron rail was imbedded in the old road near the west line of parcel 2 by defendants and they have constructed barriers on said road on parcel 3 and near the east line thereof. They have also erected signs in the road stating that it was closed and that persons using it would be guilty of trespass. They also constructed fences on Vader Canyon road both north and south of the Vader Canyon spring in the years 1936 and 1937.

In 1937 they constructed a fence across the cattle trail at a point where the trail proceeds along the east wall of Vader canyon and within a year prior to the filing of the action placed obstructions on the new road near its intersection with the north line of parcel 2 and near its intersection with the south line of parcel 2. Their conduct with regard to the Vader Canyon spring and the destruction of the water troughs maintained by plaintiffs has heretofore been alluded to. Defendants have also threatened plaintiffs with bodily harm in the event they should enter upon parcels 2 and 3 or any portion thereof either for the purpose of using any of the roads or the spring or for the purpose of attempting to remove any of the barriers or obstructions, and they have threatened to kill any livestock of the plaintiffs which might enter upon appellant's property and have forbidden the plaintiffs any right to use the roads, trail or spring.

The trial court found that defendants had been in possession of parcels 2 and 3 for three years before the filing of the action and at all times since they had been in possession or claimed the right to the possession of the two parcels, had possessed full knowledge of the use by plaintiffs of the old road, the Vader Canyon road, the new road, the cattle trail, and the waters of Vader Canyon spring.

From these findings it was concluded and the court decreed:

"(c) That the plaintiffs are, and for more than ten years last past have been, the owners of the following easements, rights of way and rights in, to and over said Parcels Two and Three, to-wit:

"(1) An easement and right of way for all highway purposes, including the transportation by vehicles and on foot of persons, livestock and property, over and across those portions of said Parcels Two and Three now and heretofore embraced within the exterior boundaries of that certain highway, sometimes known as Deadman's Point Road, which intersects the east line of said Parcel Three at a point distant south 130 feet from the northeast corner of said Parcel Three, and extends therefrom in a general northwesterly course across said Parcels Three and Two to its junction with that certain east and west public highway which extends from Victorville in said County to Lucerne Valley in said County, and which junction is located near that certain promontory known as Deadman's Point;

"(2) An easement and right of way for all highway purposes, including the transportation by vehicles and on foot of persons, livestock and property over and across those portions of said Parcels Two and Three lying within the exterior boundaries of that certain road sometimes known as Vader Canyon Road which extends in a general northerly and southerly direction in and along the bottom of Vader Canyon from a point distant approximately one-fourth of a mile south of the south line of said Parcel Three to the intersection of said Vader Canyon Road with said Deadman's Point Road in said Parcel Two;

"(3) An easement and right of way for all highway purposes, including the transportation by vehicles and on foot of persons, livestock and property, over and across those portions of said Parcels Two and Three lying within the exterior boundaries of that certain road which extends northerly from the northwest corner of said Parcel One to said east and west public highway;

"(4) An easement and right of way for the passage, travel and movement of persons and livestock on foot over and across those portions of said Parcels Two and Three lying within the exterior boundaries of that certain cattle trail which extends out of Grapevine Canyon in said Parcel One near the mouth of said canyon, and extends in a general southwesterly direction to the top of the foothill comprising the east wall of said Vader Canyon, and thence along the east wall of said Vader Canyon to the bottom of said Vader Canyon and its junction with said Vader Canyon Road;

"(5) An easement in, and the right to take and use the waters from, that certain spring known as Vader Canyon Spring located upon said Parcel Three in said Vader Canyon west of said Vader Canyon Road, together with the right to collect the waters of said Vader Canyon Spring by means of pipes and troughs for domestic uses and the watering of livestock, and together with an easement and right of way for the passage of persons and livestock between said Vader Canyon Spring and said Vader Canyon Spring Road, and together with an easement and right of way for the passage, travel and movement of persons and livestock over and across said Deadman's Point Road, said Vader Canyon Road and said cattle trail to said Vader Canyon Spring for

the purpose of obtaining access to the waters of said Vader Canyon Spring and the waters thereof collected by means of the pipes and troughs aforesaid."

"(e) That that certain cattle trail hereinbefore referred to is, and for more than thirty-five years last past has been, a public easement and used by the public for the passage, travel and movement of persons and livestock on foot;

"(f) That that certain spring hereinbefore referred to as Vader Canyon Spring is, and for more than fifty years last past has been, a water hole and body of water needed and used by the public for watering purposes, and that all land within one-fourth of a mile of said Vader Canyon Spring for more than ten years last past has been and are now reserved for public use in accordance with the provisions of Section 10 of the Act of Congress dated December 29th, 1916, 39 U.S.Stat. 862, 43 U.S.C.A. § 300, and that said Vader Canyon Spring and all lands within one-fourth of a mile thereof for more than ten years last past has been and is now reserved for public use, including the passage, travel and movement of persons, livestock and property, by vehicles and on foot, to and from said spring, and the use of the waters of said spring for domestic purposes and the watering of livestock;

"(g) That the plaintiffs are entitled to a writ of injunction restraining and enjoining the defendants, and each of them, from interfering with the use and enjoyment by the plaintiffs, their servants, agents and employees, of each and all of the easements, rights of way and rights set forth in Paragraphs 'c' and 'd' hereof, including the rights as members of the public to the use of said roads, said cattle trail, said Vader Canyon Spring and the land within one-fourth of a mile thereof, as aforesaid."

The language of the conclusions of law and the judgment have been quoted verbatim inasmuch as the contentions made by appellant are so directly concerned therewith.

The court found that the old road or Deadman's Point road and the Vader Canyon road, were public highways, and no point is made of such finding other than that the descriptions of neither of said roads or highways are set forth with such particularity as to enable appellant to know what portion of her property is so claimed. She refers, as supporting her position that the judgment so far as it pertains to the easements in these highways is void, to the case of Leverone v. Weakley, 155 Cal. 395, at page 398, 101 P. 304, at page 305, in which the Supreme Court said:

[1, 2] "It goes without saying that, where it is sought to have it decreed that real property of a person is subject to a use or easement in favor of another, the property affected must be described in the pleadings with such certainty as to enable the party against whom the claim is made to definitely know exactly what portion of his property is so claimed, and the judgment establishing the validity of the claim must be definite and certain as to the property affected."

This is undoubtedly the established rule and the authorities are uniform in support thereof. Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 233 P. 370; Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675.

However, the above rule is modified to some extent by that which is to the effect that where land has a descriptive name it may be described by such name. That a grant of an estate in real property may be so described is the subject of legislation. Civ.Code, § 1092, and several judicial holdings. Haley v. Amestoy, 44 Cal. 132; Martin v. Lloyd, 94 Cal. 195, 29 P. 491; Murray v. Tulare Irrigation Co., 120 Cal. 311, 49 P. 563, 52 P. 586; Smart v. Peek, 213 Cal. 452, 2 P.2d 380. No valid reason is perceived why a different rule should be applied where the rights of respondents, as members of the public, in lands of the appellant arise by virtue of a user sufficient to conclusively imply a dedication. This court in Gray v. Magee, 133 Cal.App. 653, 24 P.2d 948, 951, had before it the sufficiency of a complaint which alleged that there was a public road extending "from the home of Hugh Magee in a northwesterly direction toward Temecula and in a southerly direction towards Pala", and which complaint described the property allegedly owned by the defendants over which the road passed by section, township and range and alleged that one continuous road from Temecula to Pala was thus formed. It was held there that the complaint sufficiently apprised the defendants of the location of the public road which was claimed to exist. In the instant case the court found that the old road and Vader Canyon road were public highways. They had been used by the public for more than thirty-five years. The termini of both are set forth, and the section,

township and range within which they pass over appellant's lands are set forth. We believe the descriptions of such highways are sufficient to advise appellant of the locations of these roads so far as they pertain to her property.

[3–6] We next pass to a consideration of the easement across parcels 2 and 3 lying within the exterior boundaries of the so-called new road. The roadway was laid out in 1935 by respondents who, it was found, dedicated the same to public use. Whether or not any portion of the road is actually on appellant's property does not appear. The court found that such easement applied to appellant's land "to the extent that said new road, if at all, is embraced within the exterior boundaries of parcels 2 and 3". It is apparent that respondents could dedicate no portion of appellant's lands to public use and it is equally true that an attempt on their part so to do could vest in them no private rights therein. The new road was laid out in 1935 and the complaint in this action was filed in 1939. It is clear, then, that no prescriptive rights were acquired by respondents by virtue of their construction and use of this road. The use of a right of way can never ripen into a prescriptive right unless the possession is continuous, under a claim of right, open, notorious, uninterrupted and adverse for five years. Costello v. Sharp, 65 Cal.App. 152, 223 P. 567; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Barlow v. Frink, 171 Cal. 165, 152 P. 290. Measured by this standard, it is clear that the judgment as to the new road must be reversed. In this connection it may be noted that the description of the easement decreed in the new road is so vague and uncertain as to make impossible of determination where it proceeds. Whether any portion extends over appellant's land is purely conjectural. If it does not, the judgment of the court should in any event have been limited to an injunction restraining the creation or maintenance of a public nuisance thereon.

[7–10] Appellant attacks the findings and judgment with relation to the cattle trail from the point of uncertainty and indefiniteness of description and also contends that the judgment decreed to respondents rights in excess of those established by the findings of fact and conclusions of law. Referring to the first of these contentions, it is obvious by a reference to the easement granted that the description is vague and uncertain in the extreme. There is nothing to indicate where the trail enters upon appellant's property nor where it leaves. It does not appear nor can it be ascertained that a well-defined roadway or pathway exists known by a descriptive name of such a character as to apprise appellant or anyone else just where the exterior boundaries lie over any portion of its course on appellant's land, with the exception of that portion where the cattle trail and the Vader Canyon road follow the same course, although whether the junction of the cattle trail and Vader Canyon road is within or without appellant's property is not disclosed. The judgment granting the easement over the cattle trail must be reversed because of the uncertainty of description. It may be said further that considerable difficulty is encountered in an examination of the court's findings as to whether the easement in the cattle trail is predicated upon a dedication by the owner as a public highway, or by prescription. The conclusion drawn by the court that the trail is a public easement is of doubtful support. A finding that a road is a public highway would support the conclusion that respondents as members of the public had the right which was decreed. Leverone v. Weakley, supra. Likewise, a finding that user of a way has been open, actual, continuous under claim of right, adverse, and hostile to the true owner's title for a period of five years would support the conclusion that respondents' rights are by prescription. Clarke v. Clarke, supra; Barlow v. Frink, supra. Here, however, the findings do not support the conclusions and judgment as to respondents' ownership of the right of way on either theory.

[11–18] An easement in and the right to take and use the waters of Vader Canyon spring and the right to collect the waters of the spring by means of pipes and a trough for domestic use and the watering of livestock, together with an easement and right of way for passage and movement of persons and livestock over and across the old road, Vader Canyon road, and the cattle trail to gain access to said waters was decreed. It was found by the court that these waters had been used by respondents and their predecessors in interest and by the general public for more than thirty-five years for domestic purposes and the watering of livestock and that free and uninterrupted access had been had thereto except when the troughs had been destroyed by appellant. It was also found, although this finding of fact is placed in the conclusions of law, that the spring is a water hole

by virtue of acts of Congress and executive orders pursuant thereto. The decree must be supported either on the theory of prescription or upon the theory that the spring and all land within one-fourth of a mile thereof in all directions is reserved for public use by statute and executive action. It is true that respondents contend that there is a conclusive presumption of dedication arising from the public use over a period of more than five years. Yet the findings nowhere supply the element of knowledge on the part of the owner for such period that the adverse use by respondents was being made. In fact the only knowledge ascribed to appellant as to any of the uses by the public or by respondents of any of the roads or the spring is for a three-year period rather than the five-year period of user which will raise the presumption of dedication based upon adverse use. Hare v. Craig, 206 Cal. 753, 276 P. 336. On the theory of a prescriptive right arising the same objection appears, namely, that there is no finding of the ultimate fact of user over a period of five years with the knowledge of the owner and adverse to such owner. It is true that upon an appeal upon the judgment roll alone we must assume that there was evidence to support the conclusion reached that respondents were the owners of the easement, and the elements of adverseness, openness, notoriety and hostility of the use may be supplied by the finding that such easement is owned by the respondents. But where, as here, it is also specifically found that the knowledge of the owner has come during the possession or during the time appellant claimed the right to possession, and the duration of this possession is affirmatively determined to be three years before the action was filed, then it seems clear that the presumption cannot be relied upon for it contradicts the clear finding which negatives the prescriptive right. Specific findings must control in case of any inconsistency between a general finding and specific findings. Lobb v. Brown, 208 Cal. 476, 281 P. 1010. Therefore, the court's finding that plaintiffs have the easement decreed must be affirmed, if at all, upon the other theory advanced. We believe that the judgment should be upheld as to the spring and the rights of respondents therein for the reason that it was found to be a water hole reserved for public use. Appellant attacks the finding of the trial court in that it is nowhere set forth how or in what manner the action of the proper federal authorities was taken and by which the spring became a body of water needed or used by the public, including respondents. Such was unnecessary. The statement of probative facts upon which a finding depends is unnecessary. Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981. Probative facts are necessarily included in the findings of ultimate facts. Adams v. Crawford, 116 Cal. 495, 48 P. 488. Appellant further contends that the finding with respect to the so-called easement by which respondents have made use of the waters of the spring and have gained access thereto is at variance with the judgment in that the limitation naturally imposed by the time and extent of the past user is not considered in the judgment but that the fair import of the judgment is to give the respondents the unlimited use of all the waters of the spring and that in addition no route, trail, or path is designated by which the respondents and their livestock may reach the spring. But since the judgment is in our opinion properly predicated not upon user but upon reservation to public use under appropriate legislative and executive action, it must be assumed that the trial court based its findings and judgment upon proof of legislation and suitable pursuant orders. Therefore we must take it that the rights of respondents follow the terms of the executive orders by which the public enjoys the use, and in any event, since the benefits accruing to respondents from the water hole are in excess of any rights they would have to take waters from the spring by virtue of their claimed easement, it is difficult to see how appellant has been injured by the failure of the court to limit respondents' rights either as to the amounts of water to be taken or the times when the appropriation might take place.

The judgment, in so far as it decrees that plaintiffs are the owners of easements in the old road or Deadman's Point road, in the Vader Canyon road, and in the waters of Vader Canyon spring, is affirmed. The judgment, as it decrees that plaintiffs are the owners of easements within the exterior boundaries of the new road, in so far as it is embraced within the exterior boundaries of parcels 2 and 3, and as it decrees the easement in the cattle trail, is reversed. Neither party to recover costs of this appeal.

BARNARD, P. J., and MARKS, J., concurred.

48 Cal.App.2d 23

JOHNSTON v. JOHNSTON et al.

Civ. 11846.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1941.

1. Appeal and error ⇐907(3)

Where point raised on appeal was that evidence was insufficient to support a particular finding and no part of the evidence was printed or referred to, District Court of Appeal would assume that facts cited by respondent in support of the findings were proved by competent evidence. Code Civ. Proc. § 953c.

2. Appeal and error ⇐1050(1)

In quiet title action, where only evidence given by husband which might have affected wife's interest was denial of her testimony relating to a conversation in which he was said to have told her that she would have some community interest in property in question, and such testimony was denied by two other competent witnesses, and testimony itself was so uncertain that it could not have been used to support a finding of any certain community interest in wife, even if husband's testimony was improperly admitted, wife was not prejudiced thereby.

3. Appeal and error ⇐969
Trial ⇐26

The continuance of a trial, merely upon assertion of one of parties that she might be able to discover evidence favorable to her, must be left to discretion of trial court, and appellate courts will not interfere with exercise of such discretion except upon a clear showing that it has been abused.

4. Trial ⇐26

Trial court did not abuse its discretion in refusing a continuance to permit defendant to produce an account book with which defendant was fully familiar, having kept it in her own hand, where defendant did not take the stand or make any showing as to what account book might contain or how it might have some bearing upon trial of the issues.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Elizabeth Johnston against Amedee Johnston, Marie Johnston, and another, to quiet title to real property. From a judgment in favor of plaintiff, the defendant Marie Johnston alone appeals.

Affirmed.

Joseph E. Isaacs and Alan H. Critcher, both of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to real property. She joined as defendants her son, Amedee B. Johnston; her daughter, Susan Carolyn Dodd, and Marie Johnston, the divorced wife of Amedee. The first two defendants filed disclaimers, and Marie Johnston alone contested the action and now appeals from the judgment adverse to her.

The controversy relates to a building containing three apartments which the plaintiff acquired in 1924 by means of a trade of other premises which she had acquired in her own right as a widow many years before. The appellant claims some indefinite community interest in the premises. When the apartment house was purchased the plaintiff had the deed run to herself, her daughter, Susan, and her son, Amedee. The plaintiff, her daughter and Mr. Dodd, moved into one of the apartments, Amedee and his wife occupied another, and a third was rented to parties outside of the family. During the time of his occupancy of this apartment Amedee paid to his mother $45 a month as rental. Susan Dodd and her husband paid the same rental for the apartment which they occupied. Amedee and his wife moved to a place in the town of El Verano, and from that time no further sums were paid by him on account of the premises here in litigation. At about the time of the purchase of the apartment house the plaintiff made a voluntary gift of $1,000 each to Mrs. Dodd and to Amedee. After their removal to the town of El Verano the appellant herein started proceedings for a divorce against Amedee and an interlocutory decree of divorce was entered prior to the trial of this action. In that proceeding the trial court found that the parties had a community interest in some household furniture and a one-story bungalow in the town of El Verano, and the wife was awarded the sum of $500 in lieu of all her right to any alimony, and to any interest in the community property. This

decree was affirmed on appeal. Johnston v. Johnston, 33 Cal.App.2d 90, 91 P.2d 142.

During the course of her testimony in the case before us the appellant stated that her husband told her in the presence of the plaintiff and Mrs. Dodd that she was to have a community interest in his share of the apartment house site. This conversation was denied by the plaintiff and by Mrs. Dodd, and then the husband was called to the stand and, over the objection of appellant, was permitted to make the same denial. On cross-examination this witness testified that he had at his home an account book which showed the money taken in and paid out on account of the operations of the apartment house, and that this book was in the handwriting of his former wife. Demand was thereupon made for continuance of the trial in order to have this book produced in evidence, and this demand was denied upon the ground that it did not appear that the account book would disclose anything in relation to the question of community interest or that the defendant "could discover anything from the account".

On this appeal the appellant states three "questions involved": (1) Insufficiency of the evidence to support the finding that she had no interest in the premises; (2) that the trial court erred in permitting her husband to be sworn and examined; (3) that the trial court abused its discretion in refusing a continuance for the purpose of producing the account book.

[1] The first point presented is not supported by the printing of, or reference to, any evidence of any character relating to the interest of the wife in the premises. The respondent has printed and referred to ample evidence to support the finding on this issue, sufficient of which we have referred to in the foregoing statement of facts. Section 953c of the Code of Civil Procedure requires the parties to print in their briefs, or in a supplement appended thereto, such portions of the record as they wish to call to the attention of the court. When the point raised on appeal is that the evidence is insufficient to support a particular finding and no part of the evidence is printed or referred to, the court may assume that facts cited by respondent in support of the finding were proved by competent evidence. 1 Cal.Jur. Ten-Year Supp., pp. 415 et seq.

[2] The question of the capacity of a husband to be sworn and examined as a witness adverse to the interests of his wife under circumstances such as are presented here need not be decided. The only evidence given by the husband which might have affected the interests of the wife was his denial of her testimony relating to a conversation in which he was said to have told her that she would have some community interest in the property. This testimony was already denied by two other competent witnesses. The testimony itself was so uncertain and equivocal that it could not have been used to support a finding of any certain community interest in the appellant. She had made no showing at any stage of the proceeding that her husband had any particular interest in or claim to the premises, but to the contrary, had by her testimony supported the evidence of other witnesses that the only payments made by the husband out of his salary or other community funds went to the mother as rental for the apartment which they occupied, and that all these payments ceased immediately upon their removal to another home. The appellant has not shown and we are unable to perceive how she was prejudiced by any of the testimony of her husband, assuming that it was improperly admitted.

[3, 4] The argument that the trial court abused its discretion in refusing a continuance is without merit. The account book which she states she desired to produce was something with which she was fully familiar, having been kept in her own hand. She did not, however, take the stand or make any showing as to what it might contain or how it might have some bearing upon the trial of the issues. The continuance of a trial merely upon the assertion of one of the parties that he feels that he might be able to discover evidence favorable to him is not a matter of right. It is a matter which must be left to the discretion of the trial court and the appellate courts will not interfere with the exercise of that discretion except upon a clear showing that it has been abused.

The judgment is affirmed.

STURTEVANT, J., and DOOLING, Justice pro tem., concurred.

48 Cal.App.2d 86

PEOPLE v. STODDARD.

Cr. 3489.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1941.

Hearing Denied Dec. 22, 1941.

1. Conspiracy ⇐41

Where several persons conspire to do an unlawful act, each is criminally responsible for the acts of his confederates committed in the prosecution of the unlawful enterprise.

2. Receiving stolen goods ⇐6

Where defendant's confederates arranged with defendant to sell for them accessories stolen from automobiles, but defendant took no actual part in the asportation of the accessories from the dominion of their lawful owners, he was properly accused of having received the accessories which had been stolen by his confederates.

3. Receiving stolen goods ⇐6

Though defendant could not have received from himself the fruits of his own larceny, his failure to participate in the actual asportation of accessories stolen from automobiles by his confederates left him in the position feloniously to receive the stolen property from his confederates.

4. Receiving stolen goods ⇐6

Where defendant's confederates arranged with defendant to sell for them accessories stolen from automobiles, though evidence would have warranted the charge of theft on the theory that defendant was an "accessory" thereto, still he was guilty of receiving stolen property taken and asported by his confederates.

See Words and Phrases, Permanent Edition, for all other definitions of "Accessory".

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Clyde Stoddard was convicted of receiving stolen property, and he appeals from the judgments and from an order denying his motion for a new trial.

Affirmed.

Leigh H. Hill and Morse Craig, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from judgments convicting him of receiving stolen property and from an order denying his motion for a new trial. The basis of his appeal is that since the evidence proved his guilty participation in the thefts, he could not be guilty of receiving what he had stolen.

He was accused of three separate felonies, each of which is receiving property known by him to have been stolen from three separate parties. He was convicted by the jury on all counts. He was sentenced to the state prison for the term prescribed by law, the sentences to run consecutively. After hearing, his motion for a new trial was denied.

The record discloses that one Donald Stewart, in association with Dave Boyle, Bob Jetton, Gordon Foster, George Davis, Max Ferguson and Johnny Gunnels, on or about March 10th, and divers dates prior thereto, were engaged in the business of stripping automobiles of their tires, wheels, radios, tools and other accessories. They participated in some 600 such transactions. During the course of their enterprise, they arranged with defendant to sell for them all of the goods so stolen. Pursuant to such arrangement, many parts of automobiles and accessories were received by defendant from Stewart and his accomplices and sold by defendant for the benefit of all parties concerned. They took from the Ford coupe of Mr. Lamb tires and wheels (count 1). They took from the Pontiac of Mr. Feher tires and wheels (count 2); they took from the Ford coupe of Mr. Winchell an electrical carpentry equipment. Some of the stolen goods were stored by them in a garage on Main street in the city of Los Angeles for the purpose of concealing their stolen goods. Other parts were concealed in a shack on Western avenue. Stewart and associates conferred with defendant about March 10, 1941, for the first time. At that time defendant promised Stewart that he would take over any tires, wheels, radios, fog lights and other stolen parts; that he "would try to get rid of it for us"; that he would pay $7 for each radio; that appellant would give Stewart and his associates orders to fill, designating sizes he wanted and that defendant would pay them $5 for each wheel, tire or fog lamp, reserving $1 thereof for himself. The tires

taken from Mr. Lamb's coupe with other equipment were stored in the Main street garage from which they were delivered to defendant. In a conversation relative to the last-mentioned merchandise, defendant told his confederates that he would try to sell it for them. In order to make delivery of those items to defendant, the latter procured the use of a De Soto automobile with which Stewart and associates transported the goods from the garage to defendant. With reference to the equipment taken from the Winchell car, defendant promised that he would dispose of it for Stewart and associates. They put the tools in Gunnels' car from which they removed them to the De Soto which defendant drove away.

At the time of delivering the Winchell equipment into the De Soto car, defendant promised that he would let them know as to the value on the following day. During the time of his operations with defendant, Stewart received between $700 and $800 from defendant. Other sums were paid to Stewart's associates. Defendant visited the apartment of David Boyle, where he told Mrs. Boyle that he wished to get a certain amount of tires and radios. At that time Boyle promised to get them on the following night. He came to the apartment on another occasion and asked Boyle if he had obtained other radios. Mrs. Boyle witnessed the payment of moneys by defendant to her husband four or five times in their apartment. At each call he designated to Boyle what radios he wished and how many he should get.

Upon the arrest of Stewart in his apartment by the deputy sheriff, Stewart's telephone rang and the deputy answered defendant's inquiry "when he could get the stuff". Pursuant to an engagement thereupon made with defendant by the deputy, another officer was sent to the cocktail bar of the Seminole Hotel where defendant was arrested and brought back to Stewart's apartment. In answer to questions propounded by the officer, defendant denied all knowledge of Stewart and his associates; denied that he had ever seen any of them before and stated that his telephonic inquiry was for the purpose of procuring two guns which the boys had wanted him to sell. They drove him to various places with the view of obtaining further information and finally arrived at a place west of Vermont avenue, which defendant admitted was his residence and thereupon delivered the keys to the garage and the house. The landlady there stated that defendant was living with a woman who was supposed to be his wife; that he had represented himself to be a salesman for some large oil company; and that she had seen numerous cars go into the garage.

[1] Defendant's contention that there was a fatal variance between the pleadings and the proof cannot be sustained. He bluntly argues that the evidence proved a conspiracy on the part of himself and his confederates to steal the effects with the receipt of which he is charged, and that therefore he was a principal and could not have been guilty of stealing from himself. In support of this contention, reliance is placed upon In re Morton, 179 Cal. 510, 177 P. 453, and People v. Williams, 7 Cal.App.2d 600, 46 P.2d 796. Those cases have no application. It is a principle of daily application that where a number of persons conspire to do an unlawful act each is criminally responsible for the acts of his confederates committed in the prosecution of the enterprise for which the combination has been effected. People v. Creeks, 170 Cal. 368, 149 P. 821; People v. Schmidt, 33 Cal.App. 426, 165 P. 555.

[2-4] But the facts before us present an additional angle. Defendant was not charged with grand theft. The accusation brought against him was that of receiving stolen property. In not a single instance of the hundreds of thefts participated in by Stewart and his gang did defendant take from the possession of the owner a single item of the stolen property. Inasmuch as he took no actual part in the asportation of the effects from the dominion of the lawful owners, he was properly accused of having received the property which had been stolen by his confederates. People v. Taylor, 4 Cal.App.2d 214, 40 P.2d 870. While it is true that he could not have received from himself the fruits of his own larceny, yet his failure to participate in the actual asportation left him in the position feloniously to receive the stolen property from his companions in crime. Although the evidence would have warranted the charge of theft upon the theory that the defendant was an accessory thereto, still he was guilty of receiving stolen property taken and asported by his confederates. People v. Day, 30 Cal.App. 762, 763, 159 P. 457.

The judgments and order are affirmed.

McCOMB and WOOD, JJ., concurred.

48 Cal.App.2d 854

WILLIAM R. COCHRAN CO. v. SEFTON INV. CO.

Civ. 2840.

District Court of Appeal, Fourth District, California.

Nov. 25, 1941.

Appeal and error ⇐787

Where money judgment was entered May 19, 1941, and notice of appeal was filed July 19, 1941, and no request for preparation of transcript under statute was filed, and no proposed bill of exceptions had been filed or settled, and no proceedings for settlement of bill of exceptions were pending, and time for instituting proceedings for preparation of bill of exceptions or transcript had expired, and no appearance had been made on behalf of appellant at time motion to dismiss appeal was made, appeal would be dismissed. Code Civ.Proc. § 953a.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action for money judgment by William R. Cochran Co. against the Sefton Investment Co. From a judgment for the defendants, the plaintiff appeals.

Appeal dismissed.

No appearance for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

PER CURIAM.

The respondent, after due notice, has regularly moved to dismiss this appeal. Nothing has been filed in this court except the papers in connection with this motion. It appears from the clerk's certificate that the action was one for a money judgment and that judgment was entered in favor of the defendants on May 19, 1941; that notice of appeal was filed on July 19, 1941; that no request for the preparation of a transcript under the provisions of section 953a of the Code of Civil Procedure has ever been filed; that no proposed bill of exceptions has been filed or settled; that no proceedings for the settlement of a bill of exceptions are pending; and that the time for instituting proceedings for the preparation of a bill of exceptions or of a transcript has expired. No appearance was made on behalf of the appellant at the time the motion was made.

The motion is granted and the appeal is dismissed.



48 Cal.App.2d 27

ZARAGOZA v. ZARAGOZA.

Civ. 11474.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1941.

1. Divorce ⇐245(1)

An award for alimony may be modified as to installments to become due in the future, but as to accrued installments it is "final".

See Words and Phrases, Permanent Edition, for all other definitions of "Final".

2. Divorce ⇐258

Where debts were contracted during coverture, court would assume that husband was primarily liable, in determining whether husband could offset accrued alimony due against amount of such debts.

3. Divorce ⇐245(1)

Where alleged oral agreement to settle property interests of husband and wife in divorce action was not incorporated into interlocutory decree granting alimony, but was in part at least rejected by the court which made a flat award requiring husband to pay $30 a month until further order of the court, the court could not decree ten months later that no payments were due from the husband under the interlocutory decree because of the alleged agreement.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for divorce by Florence Zaragoza against Ignacio T. Zaragoza. From an order holding that defendant was not delinquent in payment of alimony and the

ruling that from a sum theretofore collected by plaintiff as alimony by execution upon defendant's salary there should be deducted sums allowed plaintiff as attorneys' fees and costs, plaintiff appeals.

Reversed.

William E. Barden, of San Francisco, for appellant.

Walter H. Duane, of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal by the plaintiff from an order by the trial court holding that the defendant was not delinquent in payment of alimony to the plaintiff, and ruling that, from a sum theretofore collected by plaintiff as alimony by execution upon the defendant's salary, there should be deducted sums allowed her as attorney's fees and costs.

Plaintiff was awarded a decree of divorce against the defendant on June 15, 1939, and the defendant was ordered to pay her $30 a month from date until the further order of the court. In response to an order to show cause why he should not be adjudged in contempt for failure to comply with the order the defendant appeared and made the showing that prior to the entry of the decree he and plaintiff entered into an oral contract by which he undertook to diligently liquidate bills then due various merchandise creditors, and the plaintiff agreed to waive payment to her of the sum of $30 per month alimony and that when said indebtedness was liquidated the defendant should pay to the plaintiff the sum of $30 a month for the period of one year from the date of the entry of the decree.

It appears from the record in the divorce proceeding that the defendant was a police officer in the employ of the city and county of San Francisco at a salary of $200 per month. The plaintiff was employed at a salary of $18 per week. When it was represented to the court at that time that the parties had agreed to an award of alimony of $25 per month for a period of one year only, the court rejected the offer and ordered that the defendant should pay $30 a month without limitation and until the further order of the court.

Prior to the entry of the order here under attack the defendant moved for a modification of the interlocutory decree and the motion was denied. On the hearing in the contempt proceeding the defendant offered evidence of bills for merchandise incurred by the community, a bank loan, counsel fees and costs paid to plaintiff's attorney in the divorce action, all amounting to more than $300. It was admitted that nothing had been paid plaintiff under the alimony award, and it was contended by the defendant that since ten months had elapsed since the entry of the interlocutory decree the $300 claimed as due under the decree could be offset by this outstanding indebtedness.

[1, 2] On this appeal from the order there is one rule of law which compels a reversal. The alleged oral agreement to settle the property interests of the parties was not incorporated into the interlocutory decree but was, in part at least, rejected by the trial court. That decree made a flat award requiring the defendant to pay $30 a month until the further order of the court. It is the settled rule that an award for alimony may be modified as to installments to become due in the future, but as to accrued installments it is final. Keck v. Keck, 219 Cal. 316, 320, 26 P.2d 300, citing numerous cases. In the Keck case the controversy was over an order attempting to offset accrued alimony payments by an indebtedness due the husband from the wife. Here the record is not clear whether the outstanding debts were contracted by the husband or by the wife, but it is agreed that they were contracted during coverture and we may assume therefore that the husband was primarily liable. In holding that the order allowing the offset was beyond the power of the lower court the Supreme Court on page 321 of 219 Cal., on page 302 of 26 P.2d said: "A subsequent order which relieves the husband from paying accrued alimony in cash as ordered, and discharges said alimony by offsetting it against an indebtedness of the wife to the husband existing at the time of entry of the divorce decree, is a modification as to past due installments, just as is an order requiring the wife to accept in full settlement of accrued alimony less than the full amount due."

[3] There is no substantial difference between the case there presented and the one we have here. The interlocutory decree awarded to plaintiff alimony in the sum of $30 a month until further order of the court. Ten months later the court decreed that no payments were due under the decree because of a private understand-

ing had between the parties before the divorce proceedings were instituted. This is clearly a modification of the decree as entered.

The order is reversed.

STURTEVANT and SPENCE, JJ., concurred.



48 Cal.App.2d 37

RENZETTI v. LOS ANGELES MOTOR COACH CO. et al.

Civ. 13222.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1941.

1. Carriers ⇐316(4)

Under "res ipsa loquitur" doctrine, proof that bus came to complete stop for purpose of discharging and receiving passengers, and that plaintiff placed her foot on first step to enter bus, and that bus suddenly moved ahead when rear end thereof was hit by following automobile, raised an inference that bus company was negligent.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence ⇐121(2)

In personal injury action, evidence, which gave rise to inference under res ipsa loquitur doctrine that defendants were negligent, did not shift the burden of proof from plaintiff to defendants, and it only became necessary for defendants to present evidence to rebut effect of inference.

3. Appeal and error ⇐1012(1)

In action for injuries sustained when passenger placed her foot on first step to enter bus, which had come to stop and which suddenly moved ahead when struck in rear by following automobile, it was trial court's function to weigh all the evidence and to determine therefrom whether inference of negligence, arising under res ipsa loquitur doctrine from happening of accident and surrounding circumstances, had been rebutted, and whether passenger had sustained burden of proving negligence of bus company by preponderance of all the evidence, and what was proximate cause of passenger's injuries.

4. Carriers ⇐320(21, 30)

In action for injuries sustained when passenger placed her foot on first step to enter bus, which had come to stop and which suddenly moved ahead when struck in rear by following automobile, evidence warranted findings that bus company was not negligent, but exercised highest degree of care toward passenger, and that sole proximate cause of movement of bus resulting in injuries was the striking of rear of bus by automobile.

5. Evidence ⇐69

In absence of showing to contrary, driver of bus, which came to stop and which suddenly moved ahead, when struck in rear by following automobile, to injury of plaintiff who was boarding bus, would be presumed to have given the proper arm signals before stopping.

6. Carriers ⇐316(4)

In action for injuries sustained when passenger placed her foot on first step to enter bus, which had come to stop and which suddenly moved ahead when struck in rear by following automobile, bus company was not obligated to prove affirmatively that door or any other part of bus was free from defect, but discharged its obligation when it rebutted inference of negligence which arose from passenger's proof of circumstances of accident.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Edith Renzetti against the Los Angeles Motor Coach Company and others, for injuries allegedly suffered in attempting to board a bus. From a judgment for the defendants, the plaintiff appeals.

Affirmed.

Henry Haves, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered in attempting to board defendants'

bus. The action was tried before the court sitting without a jury, resulting in a judgment for defendants, from which plaintiff appeals.

Defendants' motor bus was being operated on September 4, 1939, along Hollywood boulevard in Los Angeles. It stopped at the corner of Cahuenga boulevard for the purpose of discharging and receiving passengers. The bus was brought to a complete stop, the driver keeping pressure upon the brake to prevent the bus from rolling. The driver then opened the entrance door. Plaintiff stepped from the curb to the bus, and as she placed a foot on the first step to enter, the bus suddenly gave a "jerk", causing plaintiff to fall from the bus. The "jerk" was caused by the impact of an automobile driven by one Ray Douglas upon the rear end of the bus. The automobile had almost come to a stop when, after the bus had stopped, Douglas' foot slipped from the brake and onto the accelerator, causing his automobile to strike against the bus and to move it forward "a couple of feet".

[1-4] Both parties concede that under the doctrine of res ipsa loquitur proof on the part of plaintiff of the happening of the accident and the surrounding circumstances raised the inference of negligence on the part of defendants. The evidence which gave rise to the inference did not, however, shift the burden of proof from plaintiff to defendants. It became necessary for defendants to present evidence only to rebut the effect of the inference. It was the function of the trial court to weigh all the evidence and to determine therefrom whether the inference of negligence had been rebutted and whether plaintiff had sustained the burden of proving the negligence of defendants by a preponderance of all the evidence. It was also the function of the trial court to determine the question of the proximate cause of plaintiff's injuries. Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 101, 29 P.2d 781; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; Raymer v. Vandenbergh, 10 Cal.App.2d 193, 51 P.2d 104; Allbritton v. Interstate Transit Lines, 31 Cal.App.2d 149, 87 P.2d 704. The trial court found that defendants were not negligent but at all times exercised the highest degree of care toward plaintiff; and that the sole proximate cause of the movement of the bus resulting in plaintiff's injuries was "the act of said automobile, so driven by said Ray Douglas, colliding with the rear end of said motor coach". These findings are amply sustained by the evidence.

[5, 6] Plaintiff points to the absence of evidence on the part of defendants that the driver of the bus gave arm signals before stopping and also to the absence of evidence affirmatively showing that the door of the bus was in good condition. In the absence of a showing to the contrary it is to be presumed that the bus driver gave proper arm signals. Nicholson v. Porter, 118 Cal.App. 555, 5 P.2d 659. There was no obligation on the part of defendants to affirmatively prove that the door or any other part of the bus was free from defect. They discharged their obligation when they rebutted the inference of negligence which arose from plaintiff's proof of the circumstances of the accident.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 8

In re WALL'S ESTATE.

WALL v. ANGLO CALIFORNIA NAT. BANK OF SAN FRANCISCO et al.

Civ. 11874.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1941.

Hearing Denied Jan. 21, 1942.

1. Insane persons ⇐33(2)

On appeal from order refusing to grant alleged incompetent's motion for an order declaring null and void an earlier order appointing two guardians of his person and a guardian of his estate, the District Court of Appeal in absence of any showing to the contrary could assume that each guardian duly qualified and commenced to act.

2. Insane persons ⇐33(2)

An alleged incompetent's motion made in a pending proceeding for an order declaring null and void an order made 16 months before appointing two guardians of his per-

son and a guardian of his estate was governed by the rules applicable to "collateral attack", and hence alleged incompetent's appeal from order refusing to grant his motion was required to be determined on the judgment roll alone. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

3. Insane persons ⇐33(2)

On appeal on the judgment roll alone from an order refusing to grant alleged incompetent's motion for an order declaring null and void an earlier order appointing two guardians of his person and a guardian of his estate, it would be presumed that with respect to notice of the applications for guardianship other proof than that contained in the judgment roll was made. Probate Code, § 1461.

4. Insane persons ⇐33(2)

An alleged incompetent appealing on the judgment roll alone from an order refusing to grant his motion for an order declaring null and void an earlier order appointing guardians could not successfully contend that he was not served with a copy of the petition for appointment and that therefore the citation was not served as provided by law, where order appointing guardians recited that due proof had been made and that personal notice of petition was given by citation as required by law. Probate Code, § 1461.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate and guardianship of Patrick Wall, an incompetent person. From an order refusing to grant his motion for an order declaring null and void an earlier order appointing two guardians of his person and appointing the Anglo California National Bank of San Francisco as guardian of his estate, Patrick Wall, an alleged incompetent, by and through Emmet Daly, his guardian ad litem, appeals.

Order affirmed.

Sullivan, Roche & Johnson and John O'Gara, all of San Francisco, for appellant.

Jesse H. Steinhart, John J. Goldberg, and Fred L. Berry, all of San Francisco, for respondents.

STURTEVANT, Justice.

From an order refusing to grant his motion for an order declaring null and void an earlier order appointing two guardians of his person and a guardian of his estate, Patrick Wall, an alleged incompetent, by and through Emmet Daly, his guardian ad litem, has taken this appeal and has brought up the judgment roll.

[1] On April 25, 1939, Stella G. Gentry filed a petition asking the probate court to make an order appointing two persons as guardians of the person of said incompetent and Crocker First National Bank of San Francisco as guardian of the estate of said incompetent person. The court ordered the petition set for hearing and also ordered a citation to be issued and served. The hearing was so set for the 2d day of May, 1939. A citation was issued on the 25th day of April, 1939. It recited:

"By order of the above entitled court, you are hereby notified that Stella G. Gentry has made application that Dr. Ernst A. Victors and Helen Forster be appointed guardians of your person, and that Crocker First National Bank of San Francisco be appointed guardian of your estate, and that Tuesday, the 2nd day of May, 1939, at the hour of 10 o'clock A. M. of said day, in the court room of Department No. 9 of said court, in the City Hall, City and County of San Francisco, State of California, has been set as the time and place for the hearing of said petition, * * *." As shown by the affidavit attached thereto, Jack Poole "* * * served the within citation by showing the said within original to Patrick Wall and delivering a true copy thereof to him on the 25th day of April, 1939, at the City and County of San Francisco". On May 2, 1939, a hearing was had on said petition. On the same day the court made an order. Among others it contains a recital "and due proof having been made that personal notice of said application was given by citation in the manner and at the time required by law and the previous order of this court aforesaid * * *". Continuing the court ordered Beatrix Saunders and Dr. Victors appointed as guardians of the person of said incompetent person and the Anglo California National Bank of San Francisco appointed as guardian of his estate. Letters issued May 3, 1939. Nothing to

the contrary appearing, we may assume each duly qualified and commenced to act.

On September 14, 1940, said incompetent filed his notice of motion to have said order dated May 2, 1939, declared null and void. Said notice recited that his motion would be based "* * * upon the ground that said Superior Court never acquired jurisdiction over the person of said Patrick Wall for the reason that the citation which was issued by the Clerk of said Superior Court on the 25th day of April, 1939, upon the filing of the petition of Stella G. Gentry praying that Dr. Ernst A. Victors and Helen Forster be appointed guardians of the person of said Patrick Wall, and that The Crocker First National Bank of San Francisco be appointed guardian of the estate of said Patrick Wall, was not served in the manner required by law for the service of citations in this that no copy of the said petition of Stella G. Gentry was served upon said Patrick Wall with a copy of said citation. Said motion will be supported by certain of the records and files of said Court which were before said Court at the time of making said order purporting to appoint said guardians on the 2nd day of May, 1939, that is to say by these certain records and files, towit:

"(1) The petition of Stella G. Gentry.

"(2) The said citation.

"(3) The affidavit of service signed by Jack Poole and sworn to on the 26th day of April, 1939, and prior to or on the 2nd day of May, 1939, filed in the office of the Clerk of said Superior Court.

"(4) Said order appointing guardians dated and filed on the 2nd day of May, 1939, in the above entitled matter."

On October 1, 1940, said guardians filed a verified opposition to the granting of said motion. In said pleading, among other things, they alleged notice of the hearing on May 2, 1939, "was duly and regularly made and given by the above entitled court on May 2, 1939, pursuant to the proceedings duly and regularly had as required by law following notice to said above named incompetent within the time and in the manner required by law and the order of said court, by reason whereof the above entitled court did at all of the times herein mentioned have full and proper jurisdiction of the person of said incompetent and to make the said order. All of the foregoing appears on the face of the judgment roll and record of proceedings of the above entitled matter". The motion and opposition were heard on October 1, 1940. The motion was denied and the opposition was sustained on October 30, 1940. The written order thereon was filed November 1, 1940. Among other things it recites: "and documentary evidence having been offered and received on behalf of said guardian ad litem consisting of the petition of Stella G. Gentry for appointment of guardians, on file herein, the citation issued to said Patrick Wall on April 25, 1939, pursuant to the order of this Court, which citation is on file herein, the affidavit of service of said citation signed and sworn to on April 26, 1939, by Jack Poole, on file herein and the order of the above-entitled Court dated May 2, 1939, appointing said guardians of the person and estate of said Patrick Wall, which said order is on file herein, and no other evidence oral or documentary having been offered or received at said hearing, or in support of said motion," and as stated above, the motion was denied and the opposition was sustained. That is the order from which this appeal is taken.

[2-4] The appellant asserts that he was not served with a copy of the *petition* and therefore the *citation* was not served "* * * in the same manner as provided by law for service of summons * * *," (Probate Code, sec. 1461), and the trial court exceeded its jurisdiction. However, the record does not show that he was not served with a copy of the petition. The order appointing guardians recites that "* * * due proof having been made that personal notice of said application was given by citation in the manner and at the time required by law * * *". Poole, in his affidavit, affirmed he served the citation. He did not affirm that he did not serve, and that no one else served, a copy of the petition. The order denying the appellant's motion recites that "* * * documentary evidence consisting of * * *" the documents making up the judgment roll, was received "* * * and no other evidence, oral or documentary, having been received or offered in support of said motion". The appellant's motion was made in a pending proceeding sixteen months after the order dated May 2, 1939, was made. It was not authorized by section 473 of the Code of Civil Procedure. Said motion is governed by the rules applicable to collateral attack and must therefore be determined

upon the judgment roll alone. City of Salinas v. Luke Kow Lee, 217 Cal. 252, 255, 18 P.2d 335. Under such an attack it will be presumed that, as to notice of the applications for guardianship, other proof than that contained in the judgment roll was made. Hahn v. Kelly, 34 Cal. 391, 408, 94 Am.Dec. 742. It follows that as the contention of the appellant is not supported by anything contained in the judgment roll it may not be sustained.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



47 Cal.App.2d 809

In re FLOOD'S ESTATE. FLOOD v. FLOOD.

Civ. 6539.

District Court of Appeal, Third District, California.

Nov. 19, 1941.

Hearing Denied Jan. 15, 1942.

1. Wills ⇐289

The burden of proving that will sought to be probated as a lost will was either in existence at time of testator's death, or had been destroyed fraudulently or by public calamity without his knowledge during his lifetime, was upon proponent of the will. Probate Code, § 350.

2. Wills ⇐233

The words "in existence", as used in statute authorizing probate of a will shown to have been in existence at time of testator's death, or shown to have been destroyed fraudulently or by public calamity in lifetime of testator, without his knowledge, to be proven as a lost or destroyed will, import "unrevoked". Probate Code, § 350.

See Words and Phrases, Permanent Edition, for all other definitions of "In Existence" and "Unrevoked".

3. Wills ⇐302(8)

Where contents of a lost will were attempted to be proven by a copy which attorney retained by testator to draw will testified was a carbon copy of the original, and attorney's testimony was corroborated by a second witness, evidence showed due execution of will, but burden still rested upon proponent to prove that will was in existence at time of testator's death, and, to do it, proponent was required to rebut presumption of revocation. Probate Code, § 350.

4. Wills ⇐306

Where evidence shows that instrument cannot be found, and that when last seen or known to exist it was in custody or possession of decedent, the conclusion of law is that writing was destroyed by decedent, and that he acted with intention of effecting a revocation thereof, and nothing else appearing, the admission of the writing to probate as a lost or destroyed will must be denied. Probate Code, § 350.

5. Wills ⇐290

The rule that a will last seen and known to have been in possession of testator will be presumed to have been revoked does not refer to possession at time of death, but only requires that when it was last seen or known to exist, it was in his possession. Probate Code, § 350.

6. Wills ⇐290

The presumption of revocation of a will last seen and known to have been in possession of testator, if applicable to the facts, will prevail over statutory presumption that a thing once proved to exist continues as long as is usual with things of that nature. Probate Code, § 350; Code Civ.Proc. § 1963, subd. 32.

7. Wills ⇐290

Where evidence showed that will sought to be probated as a lost or destroyed will was last seen in testator's possession nearly two years before his death and it could not thereafter be found, and no proof was made of facts from which it could be inferred that will was still in existence and which would overcome the presumption of revocation, evidence was insufficient to sustain judgment admitting will to probate. Probate Code, § 350.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding in the matter of the estate of Emil Flood, deceased, wherein Jennie Flood filed a contest to the probate of a lost will of the deceased, opposed by Caryl

Flood, executor. From a judgment admitting lost will to probate and appointing an executor, Jennie Flood appeals.

Reversed.

Wilcox & Rodin, Albert H. Rodin, and Gilbert Moody, all of Turlock, for contestant and appellant.

Harold L. Hjelm, of Turlock, for respondent.

TUTTLE, Justice.

This is an appeal from a judgment admitting a lost will to probate, and appointing an executor.

Appellant is the widow of the decedent, Emil Flood. By the terms of said will she will receive $1,000, plus one-ninth of the residue of the estate. If her husband died intestate, she would succeed to one-half of his property.

The will was admitted to probate under the provisions of section 350 of the Probate Code, which reads in part as follows:

"No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge; * * *."

[1, 2] Appellant's sole contention is that the evidence is insufficient to justify the trial court in making the order.

The burden of proving that the will which respondent seeks to probate was either in existence at the time the testator died, or had been destroyed fraudulently or by public calamity without his knowledge during his lifetime, was upon respondents as proponents of the will. In re Estate of LeSure, 21 Cal.App.2d 73, 68 P.2d 313. There is no suggestion of fraud in the case, nor proof of a public calamity. The only question is whether or not there is sufficient evidence in the record to justify a finding that the will was lost, and that it was in existence at the time of death. This may sound contradictory, but it is obvious the words "in existence" import "unrevoked".

On September 9, 1938, the testator was visiting relatives at Newman Grove, Nebraska. His wife was then visiting at a point further east. On that day he called upon an attorney in said town, and executed a will, a carbon copy of which was retained by said attorney. The wife of testator (appellant herein) returned to Nebraska on October 1, 1938. The following testimony by appellant states what took place just prior to their departure to California:

"Q. Did anything take place there at all, at his brother's place there, in regard to a will? A. Yes. Monday morning he was all ready to go, the car was packed, I was dressing, and he tossed a paper over on the bed and he said—he said, 'Here's my will.' I said, 'What will?' 'My will, here's the will,' he said. I said, 'What will?' 'My will.' I tossed it back to him, I said, 'I can't read that now. Take care of it; put it away and take care of it.' And that is the last I saw of it."

In October of 1938, the will was again discussed by them, according to the following testimony of appellant:

"A. No, he came and said he couldn't find it.

"Q. That he couldn't find it in the suitcase? A. Yes.

"Q. Did you help him look for it? A. Yes, I says, 'I will have to go back, look in the suitcase again.' He did.

"Q. Really, the first chance you had at Turlock, he did open the suitcase and empty it; he came to you and said, 'It's not there.' Then that is the time he said, 'Well, it must be at Charlie's.' A. Yes, that is the time he said, 'I suppose it is at Charlie's.' ('Charlie's' referred to his brother's place at Newman Grove, Nebraska, where Flood had showed the will to his wife.)"

The will was next discussed, according to appellant, in the manner disclosed by her testimony, as follows:

"A. Well, I said to him once, I said, 'Did you write to Charlie about it?' He said, 'No.' Then another time I said, 'Did you make a new will?' And then he said 'No.' That is all.

"Q. What was the general attitude when you talked to him about those matters, about the will, what did he seem to appear? A. Well, he seemed to not care, he seemed indifferent. That is why I didn't talk to him about it."

The testator died June 16, 1940. Search for a will was made in his house, at his bank in Turlock, California, in his brother Charlie's house in Nebraska, and in the office of the County Judge of that State. No will was found.

[3] The contents of the lost will were attempted to be proven by a copy which the attorney testified (by way of affidavit) was a carbon copy of the original. Proof of due execution of the original was made. Such testimony was corroborated by a second witness. We think that the evidence shows due execution of a will on September 9, 1938, and that the record shows full compliance with the following portion of section 350 of the Probate Code: "No will shall be proven as a lost or destroyed will * * * unless its provisions are clearly and distinctly proved by at least two credible witnesses."

The foregoing was only a portion of the proof required by the statute. The burden still rested upon respondent to prove that the will was still in existence at the time of death. To do this, respondent was required to rebut the presumption of revocation.

[4] Appellant contends that the facts bring the case within the rule stated in 27 Cal.Jur., page 807, section 141: "Where the evidence shows that the instrument cannot be found, and that when last seen or known to exist it was in the custody or possession of the decedent, the conclusion of law is that the writing was destroyed by the decedent, and that he acted with the intention of effecting a revocation thereof. Nothing else appearing, the admission of the writing to probate as a lost or destroyed will must be denied."

We are in accord with appellant's view. In Re Estate of Ross, 199 Cal. 641, 250 P. 676, 678, where an order establishing a lost will was reversed, the situation was identical. The court there states the facts as follows: "It was established beyond question that the will was last seen and known to have been in the possession of the deceased on April 19, 1923; that from that date until the day of her death she was in the possession of her physical and mental faculties; and that the will could not be found after her death. From these facts the presumption arises that the will was destroyed by the testatrix with the intention of revoking the same. [In re] Estate of Johnston, 188 Cal. 336, 206 P. 628; [In re] Estate of Sweetman, 185 Cal. 27, 195 P. 918; Griffith v. Higinbotom, 262 Ill. 126, 104 N.E. 233, Ann.Cas1915B, 250. See note, 50 L.R.A.(N.S.) 864."

[5] Respondent contends that "there is not a single word in the record that the decedent was in the exclusive custody and possession of the will at all, *at any time near his death*". The rule relating to the presumption does not refer to possession at the time of death. It only requires that when it was *last seen or known to exist* it was in his possession. In Re Estate of Smith (discussed later), the presumption was applied, although the last time the will was seen in the possession of the testatrix was several years prior to her death.

[6] Respondent, to meet the foregoing presumption, relies upon another presumption, which is found in subdivision 32 of section 1963 of the Code of Civil Procedure: "That a thing once proved to exist continues as long as is usual with things of that nature." In re Estate of Sweetman, supra, is in accord with the view of respondent. However, in Re Estate of Ross, supra, the holding in the Sweetman estate is expressly overruled, in the following language appearing at the end of a discussion of that case: "But if the opinion in that case be deemed to hold that when the facts which raise the presumption of revocation are shown such presumption is met and rebutted by the presumption of continuing existence, as announced in subdivision 32 of section 1963, or that the latter presumption, coupled with proof of the existence of the will at some time prior to death, supplies the proof of the existence of the will at the time of death, as required by said section 1339, we are not in accord with that conclusion and the case is overruled to that extent."

In Re Estate of Smith, 140 Cal.App. 508, 35 P.2d 335, an order of the trial court establishing a lost will was reversed upon the insufficiency of the evidence. There, the will was last seen in the possession of the testator, on August 16, 1929. She died on August 8, 1932. The court held that the presumption of revocation must prevail.

[7] The undisputed evidence shows that the will was last seen in the possession of the decedent on or about October 1, 1938. It could not be found. No proof was made of facts from which it could be inferred that the will was still in existence and which would overcome the presumption of revocation. The evidence is therefore insufficient to sustain the judgment.

The judgment is reversed.

THOMPSON, Acting P. J., concurred.

In re PLATT'S ESTATE.*

Civ. 11797.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1941.

Hearing Granted Jan. 15, 1942.

1. Trusts ⇐134
Wills ⇐684(7)

Where testator's residuary estate was given to trustee with direction to pay $250 a month from income to widow during widowhood, to pay excess income up to $250 a month to son and with direction to equally divide income over $500 a month between widow during widowhood and son, title of trustee dated from testator's death, but monthly payments could not commence prior to time income was available to trustee for disbursement.

2. Trusts ⇐280

Ordinarily, beneficiary has no right to receive payments under terms of trust instrument until the trust property is distributed to trustees.

3. Trusts ⇐280

In absence of an express direction fixing time when income from a legacy held in trust and payable over a period of time may be paid, executors are under no duty to make payments, and trustees cannot be compelled to make payments prior to the distribution of trust property to them, so that beneficiary's remedy prior to distribution of trust property to trustees is confined to asking probate court to distribute a portion of trust funds to trustees to be used in making payments to beneficiary.

4. Wills ⇐684(7)

In determining whether $250 a month directed to be paid by testamentary trustee to testator's widow was for her support and maintenance and therefore payable during probate period, the fact that the widow, who had no independent income, was entirely maintained and supported by the testator during her married life, was an important circumstance to consider but was not necessarily controlling.

5. Executors and administrators ⇐314(12)

Conclusion of trial court, in determining whether monthly payment of trust income directed to be made to testator's widow was for her support and maintenance and therefore payable during period of probate, will be sustained if reasonable.

6. Trusts ⇐280

Where payments are to be made for support of beneficiary of testamentary trust, it may be presumed that payments should accrue from date of testator's death, but the inference or presumption is not conclusive. Probate Code, §§ 28, 141.

7. Executors and administrators ⇐314(12)

Where testator gave residuary estate to trustee with direction to pay income therefrom in amount of $250 a month to widow during widowhood and income in excess thereof to son up to sum of $250 a month and that income over $500 a month was to be divided equally between widow during widowhood and son, probate court's conclusion that testator did not intend that payments should be made to widow during period of settlement of estate in order to provide for her maintenance, and that payments which trustee was ordered to make to widow should commence from and after date of distribution of estate to trustee, was reasonable and would not be disturbed on appeal. Probate Code, §§ 28, 105, 141, 143, 162.

8. Wills ⇐435

The fact that will was drawn by attorney of testator could be considered in determining that terms embodied in will were selected with care to truly express the intent of the testator.

9. Wills ⇐684(7)

The fact that widow was entirely maintained and supported by testator during her married life with him and had no independent property or income was not in itself determinative of question whether payments which testator directed should be made to widow from trust income were payable from date of testator's death, if from the words of the will taking into view the circumstances under which it was made a contrary reasonable conclusion could be reached. Probate Code, §§ 103, 105, 160, 163.

10. Executors and administrators ⇐314(12)
Wills ⇐487(1)

Evidence regarding matter of actual receipt of insurance benefits by testator's widow and actual receipt of family allowance by her was not properly admissible to prove intent of testator regarding whether payments from trust income to widow should commence at time of testator's death or at date of distribution of estate to trustee, but

* Subsequent opinion 131 P.2d 825.

admission of the evidence was not prejudicial to the widow.

11. Wills ⇐684(7)

Where testator gave residuary estate to trustee with direction to pay $250 a month from trust income to widow during her widowhood and to pay son any surplus up to sum of $250 a month and directed income over $500 a month to be divided equally between widow during widowhood and son, under decree of probate court directing trustee to estimate regular net income for each year and to divide such amount into 12 equal installments and upon such basis to pay $250 per month to widow and balance, if any, to son, but that when there was any deficiency in payments to widow the trustee, regardless of any accounting period, should consider deficiency as a charge upon future income, the payment of income was not restricted to fixed accounting period, since the probate court simply adopted a practical method of dividing additional income.

12. Executors and administrators ⇐314(12)

Where testator gave residuary estate to trustee with direction to pay $250 a month from trust income to widow during her widowhood and to pay son any surplus up to sum of $250 a month and directed income over $500 a month to be divided equally between widow during widowhood and son, probate court's conclusion that deficiencies in monthly payments to widow should be made up from subsequent income was reasonable and appellate court was powerless to interfere therewith.

PETERS, P. J., dissenting in part.

Appeals from Superior Court, San Mateo County; A. R. Cotton, Judge.

Proceeding in the matter of the estate of Howard Chester Platt, deceased. From portions of the orders settling first and final account and decree of distribution and from an order amendatory thereof, Betty E. Platt and Howard C. Platt, Jr., separately appeal.

Affirmed.

Oscar Samuels and Tevis Jacobs, both of San Francisco (Harry R. Fields, of San Francisco, of counsel), for Betty E. Platt.

Herbert E. Wenig, of San Francisco, for Howard C. Platt, Jr.

WARD, Justice.

Two appeals are prosecuted from portions of the order settling first and final account and decree of distribution, and an order amendatory thereof, in the matter of the estate of Howard Chester Platt, deceased. One appeal is by decedent's widow, Betty E. Platt; the other, by his only son, by a former marriage, Howard C. Platt. It may be convenient herein to refer to Betty E. Platt, appellant in one appeal and respondent in the other, as the wife or widow; and to Howard C. Platt, Jr., likewise appellant and respondent, as the son. Both appeals are taken upon a transcript on appeal in the form of a bill of exceptions containing the will, order settling first and final account and decree of distribution, an order amendatory thereof and specifications of error, said transcript being stipulated by the respective parties to be correct and so certified by the court.

Under the terms of a will dated December 8, 1937, wherein the wife and son were named as executors, without bond, the widow was given, devised and bequeathed the family home, its furnishings and two automobiles; the son, all articles of wearing apparel. The rest, residue and remainder of the estate was given, devised and bequeathed to the Wells Fargo Bank & Union Trust Company, in trust for the following uses and purposes. The investment and reinvestment in its discretion of the principal thereof, income therefrom to be paid the wife in an amount of $250 a month until her remarriage. Should the income exceed such amount, the trustee was directed to pay to the son any surplus thereover up to the sum of $250 a month. Income over $500 a month was to be divided equally between the wife, until she remarried, and the son. Provision was made that should the wife remarry she should receive the definite sum of fifty dollars a month so long as she lived. Upon her remarriage, and until her death, all income from the trust in excess of the $50 a month was to go to the son. On the death of the wife, the trust was to cease and terminate, the entire income and principal therefrom passing to the son, his heirs, administrators, executors and assigns. The trust also provided: "Notwithstanding anything herein to the contrary, my said trustee may, in its discretion, advance to any beneficiary to whom

net income is payable as aforesaid, such additional sum or sums out of the principal of the trust estate allocated to such beneficiary as may reasonably be required to pay for the necessaries of life," etc.

It appears that in the petition for final distribution and settlement of the first and final account, the co-executors, the immediate beneficiaries, requested the probate court to interpret the terms of the trust instrument and to instruct the trustee in the carrying out of such terms as pertain to the priority in right of the widow to payments, the method of making them and accounting, and the date from which the trustee should commence such payments. This necessitated an interpretation of the trust provisions of the will, which might have been accomplished without independent evidence. However, each side introduced evidence, oral and documentary, and the respective parties stipulated that certain facts were true. The widow appeals from certain findings of fact upon the claim that some of the evidence introduced was not material to the issue. The argument is not made that all of the evidence was inadmissible, but only a portion thereof, which will be hereafter mentioned. The trial court considered the terms of the will and the extrinsic evidence introduced. On appeal the same course will be followed.

The court found that Howard Chester Platt, the western manager of a large, nationally known commercial company, died on May 23, 1938; that on June 13, 1938, in connection with the probate of a will drawn by his attorney, and executed by testator on December 8, 1937, $400 a month was fixed as a family allowance for the widow; that such allowance totaled the sum of $4,000 during the approximate ten months' period of administration of the estate; that the family home, held in joint tenancy, appraised with its furnishings at $22,500, vested in the widow; that as co-executor she received the sum of $710; that in addition to benefits under the terms of the will, upon decedent's death she received approximately $8,500 from two life insurance policies.

The decree directed the trustee to hold, manage and control securities and properties coming into its possession; to sell, convey and exchange them, and to invest and reinvest the principal thereof, all as in its best judgment was deemed advisable; and from the income thereof to pay the wife, during her lifetime or until her remarriage, the sum of $250 a month. It further directed that whenever there was a deficiency in such payments, "regardless of any accounting period", such deficiency should be considered as a charge upon future income of the trust, and that until the deficiency was paid, no payments should be made to the son or his heirs. It also directed that the trustee estimate the regular net income of each trust year or accounting period from and after the operative date of the decree of distribution, and divide said estimated income into twelve equal instalments. It was ordered that the balance of such instalments remaining after payment of the amount due monthly to the widow, be paid to the son in accordance with the terms of the will, and that any excess of undistributed net income be divided equally between them, but that any deficiency in payments to the son should not be treated as a charge upon income of any future trust year. The court determined that the trust was *not* a trust for the maintenance of the widow *during the administration of the estate,* and that she was not entitled to payments, as fixed by the trust instrument, from the estate or trust prior to the date of distribution thereof to the trustee.

The appeal by the widow involves the question whether income during the period of administration is payable to her at the rate of $250 per month from the date of the death of the testator. It is her contention that the trust is created at the date of the testator's death, and that whether is embraces the whole or the residue of the estate, unless it is specifically otherwise provided in the will, she, as beneficiary, would be entitled to the actual income from the date of the testator's death, even were the trust not for support and maintenance; but that where it is, the rule applies with special cogency. It is further contended that the beneficiary had no independent means and was supported entirely by the testator; that it is to be presumed that any provision made for monthly payments from income is intended as support and maintenance, and that it may not be inferred the testator intended an interval to elapse during which the beneficiary would receive no support.

[1, 2] The latter contention, relative to the "interval" may be disposed of immediately. A beneficiary would not actually receive payments of income earned dur-

ing administration until the trust fund reached the hands and control of the trustee. Even then, whether income could be paid at that time would depend upon the facts in each case, namely, whether actual income had accrued during administration or whether the corpus of the estate required investment to produce it. In the present case it may be conceded that the title of the trustee dates from the death of the testator. However, the trust provisions direct the monthly payments to the beneficiaries out of income from investments and reinvestments. Whatever the date may be from which payments commence, it cannot be prior to the time income is available to the trustee for disbursement. "Ordinarily, it is said, the beneficiary has no right to receive payments under the terms of the trust instrument until the trust property is distributed to the trustees." In re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586, 589.

In support of her contention that, even assuming her share of the income is not for support and maintenance, unless a will provides otherwise the life tenant of a testamentary trust is nevertheless entitled to income commencing from the date of the testator's death, appellant widow urges that if the right of the life tenant to the income does not commence until distribution, her legacy is decreased by the amount so withheld and eventually reaching the remainderman though an enhanced trust corpus. It is also argued that possible delay in probate proceedings is a further reason why the rule contended for should be applicable in this case. The widow overlooks the fact that delay in probate proceedings, with a possible resultant family allowance in excess of payments allowed her under the trust instrument, as here, together with additional expenses of a prolonged period of administration, could result in a dissipation of the corpus of the estate, leaving the remainderman with an abridged or no interest. The widow also seems to overlook the fact that whenever the payments to her commence, under the definite terms of this particular trust, the payments, if any, to the son likewise commence.

[3] The matter of the absence of an express direction fixing the time when the income from a legacy held in trust and payable over a period of time may be paid, has been considered in Re Estate of Marre, supra, where, at page 590 of 114 P.2d a remedy has been suggested to obviate an enhancement or depreciation of the corpus of a trust, and we quote: "It is true that during the administration of the estate, and prior to the distribution of the trust property to appellants, the beneficiary could not have brought action to compel payment against either the trustees or the executors of the estate. In re Mackay's [Estate], supra [107 Cal. 303, 40 P. 558]; [In re] Estate of Dare, supra, [196 Cal. 29, 235 P. 725]. The executors were under no duty to make payments and the trustees could not be compelled to make payment prior to the distribution of the trust property to them. The beneficiary's remedy during that period is confined to asking the probate court to distribute a portion of the trust funds to the trustees to be used for his support. See In re Mackay's [Estate], supra, 107 Cal. page 307, 40 P. 558; [In re] Estate of McGirl, supra, 125 Cal.App. [310], page 313, 13 P. 2d 746."

[4] The most important question presented on this appeal concerns the intent of the testator as to whether the $250 a month directed to be paid to the widow was for her support and maintenance and consequently payable during the period of probate. The fact that appellant widow, who had no independent income, was entirely maintained and supported by the testator during her married life with him is an important circumstance to consider but is not necessarily controlling.

[5] In addition to cases decided in this state, which we will consider hereafter, each side has cited cases from other jurisdictions to sustain various points on appeal. The widow refers to In re Leitsch's Will, 185 Wis. 257, 201 N.W. 284, 37 A. L.R. 547; Grainger's Ex'rs and Trustees v. Pennebaker, 247 Ky. 324, 56 S.W.2d 1007; In re Stanfield's Estate, 135 N.Y. 292, 31 N.E. 1013, and Restatement of the Law of Trusts, section 234. The son calls attention to an opinion written by Mr. Justice Holmes, Hawaiian Trust Co. v. Von Holt, 216 U.S. 367, 30 S.Ct. 303, 54 L.Ed. 519; also to In re Berbling's Ex'rs, 134 Misc. 730, 236 N.Y.S. 367; Brown v. Knapp, 79 N.Y. 136; Thorn v. Garner, 113 N.Y. 198, 21 N.E. 149; Lyon v. Industrial School, etc., 127 N.Y. 402, 28 N. E. 17. Notwithstanding the diverse views of those courts on the particular phases of the law, almost uniformly in this and other jurisdictions the trial court's con-

clusion, if reasonable, has been sustained. Sufficient has been said in the California decisions to settle the law on the question before us.

The facts in the present case are different from those in the California cases cited by appellant widow. In Re Estate of Dare, 196 Cal. 29, 235 P. 725, 729, an adopted daughter, who had not been otherwise provided for as was the widow in the present case, was named to receive all of the income and after a period of years all the remainder of trust property. As supporting its conclusion, the court there quoted from 40 Cyc., under the caption of "Income from Residuary Fund", to the effect that if no time is prescribed in the will, the use of the income is to be computed from the death of the testator. In support of the same conclusion, the court cited Crew v. Pratt, 119 Cal. 131, 51 P. 44, relative to the disposition of an annuity. No annuity is involved in the present case. In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193. In Re Estate of Rider, 199 Cal. 742, 251 P. 805, 807, the court construed the will and intention of the testator as bestowing on his widow as maintenance all the income from the date of his death. It is interesting to note that in such case there was not only an intention that the widow should be cared for from the date of testator's death, but that her debts and liabilities, funeral expenses, etc., should be paid before the remainder of the trust fund should be paid to other beneficiaries. The executor, acting both in that capacity and as trustee, without bonds, made, and the probate court approved, payments of income prior to distribution. Subsequently the probate court directed the executor to account for all sums of money so paid. This seems to be the vital point on that appeal. The court stated that under the circumstances of the case the "orders * * * approving said accounts were conclusive and binding upon the parties interested in the estate". In Re Estate of Duffill, 180 Cal 748, 183 P. 337 and in Re Estate of Gartenlaub, 185 Cal. 375, 197 P. 90, 24 A.L.R. 1, it was held that in connection with income from corporation stock to be paid one for life and to another as remainderman, the remainderman is entitled to a valuation of the stock at the date of the creation of the trust, that is, the date of death of the testator. Upon the authority of In re Mackay's Estate, 107 Cal. 303, 40 P. 558, it was determined in Re Estate of McGirl, 125 Cal.App. 310, 13 P.2d 746 that a bequest was for maintenance and that it was appropriate that one who had taken care of decedent should receive the income from a trust fund from the time of the testator's death.

In the present trust the widow was not to become a remainderman, the son or his issue being named as such, and in case the son died without issue, the entire principal and income was to be paid to decedent's sister. In the Dare case the daughter alone had an interest in the income. Unlike the Rider case, where until her death the widow was to receive the entire income from a trust, the widow here was to receive only a portion thereof, nor is there here a similar manifest intention of maintenance during probate as appears in the Rider case. In the present case the son remainderman does not contend that the valuation of the holdings of the trust shall be fixed as of the date of the creation of the trust (In re Estate of Duffill, supra; In re Estate of Gartenlaub, supra); and the widow is not, nor could it be contemplated by the testator that she might be an object of charity. In re Estate of Mackay, supra. Also, there is no necessity in this case for provision of funds without which an education would have to be discontinued. In re Estate of Marre, supra.

In Re Estate of Mackay, supra, it was held that a legacy "for maintenance" bears interest from the date of death of the testator. In re Estate of Ballou, 181 Cal. 61, 183 P. 440, approved the holding in Re Estate of Mackay, and further held that the receipt of a family allowance is immaterial in determining whether a provision in a will is in fact a legacy for maintenance. In the Mackay case, however, the legatee upon the death of the testator was dependent upon charity, no provision having been made for her support other than the income from a trust fund.

All of the cases brought to our attention holding in effect that under the particular facts of each a beneficiary of a trust who has been supported by a testator, and who is to receive income from such trust, be placed in the category of a legatee for maintenance, with interest upon such legacy from the testator's death (Prob.Code, sec. 162, embracing the provisions of former Civ.Code, sec. 1369),

are based primarily upon the holding in Re Estate of Mackay, supra, but in that case at page 308 of 107 Cal., at page 559 of 40 P., the court said: "The testator's intention in the clause of the will containing the legacy in question must be ascertained 'from the words of the will, taking into view the circumstances under which it was made, *exclusive of his oral declarations.*' Civ.Code, § 1318." See Prob.Code, sec. 105.

Respondent calls attention to other decisions. In re Estate of Brown, 143 Cal. 450, 77 P. 160, is somewhat similar factually to the present case, but the beneficiary there was not a spouse. In that case, pages 454, 455, of 143 Cal., page 162 of 77 P., the court said: "Reliance is placed upon the decision in the case of In re Mackay's Estate, 107 Cal. [303], 308, 40 P. 558, in which it was held that although the will did not expressly declare that the legacy was for the maintenance of the legatee, yet, if the evidence showed that the legatee had been supported by the testator for many years prior to his death, it would be construed to be a legacy for maintenance. The essential element present in that case, however, is lacking in this. The petition alleged, as before stated, that for many years prior to the death of the testatrix, the petitioner was dependent upon the deceased for her support and maintenance. The court, however, fails to find this fact, but does find that the petitioner was for many years prior to the death of the testatrix a confirmed cripple, and had been in the monthly receipt of sums from the testatrix varying from $20 to $10 per month. In addition to these specific facts, the court found expressly that the legacy bequeathed to the petitioner is not a legacy for maintenance. This was the ultimate fact upon which the decision of the case depended, so far as the right to interest from the death of the deceased was concerned. The specific facts found do not necessarily show that it was a legacy for maintenance. The deceased may have had many reasons for making the monthly payments, other than the reason that it was necessary for her support. * * * But the bequest in this case was not of the interest or income of a certain sum to be paid by the executors of the estate. The testatrix bequeathed the sum of five thousand dollars to certain trustees, and the monthly income was to be paid by the trustees, and not by the executors. Necessarily, the trustees could not begin payment until they received the fund and invested it so as to produce an income. The intention of the testatrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees who were to make the payments. The distinction is thus stated: 'Where he absolutely gives the beneficiary a given income, and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such cases is to be estimated from the death of the testator.* * * But where the bequest is only of the income to be obtained from a certain specified fund, * * * it is held that the beneficiary can receive only the actual income when received from such fund.' Page on Wills, § 601." See In re Estate of Lockhart, 21 Cal.App.2d 574, 69 P.2d 1001; In re Estate of Bourn, supra; Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870; In re Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349. In Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397, in construing a clause similar to one in the present trust instrument in respect to a "share" in the income derived from investment by the trustee, the court declared *that it was not an annuity but a gift of income* and said (page 145 of 8 Cal.2d, page 398 of 64 P.2d): "In Re Estate of Brown, 143 Cal. 450, 77 P. 160, and Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870, language almost identical with that employed by the probate court in the decree of distribution was held to constitute a gift from income. It was also held that necessarily the payments could not begin until the trustees had received the fund and invested it."

[6] The Supreme Court in the Marre case was content to state that it may be "presumed" payments for a beneficiary's support should accrue from the date of death. However, the inference or the presumption is not conclusive, but controvertible. There is no statutory presumption applicable in this case. Ordinarily a testamentary disposition is presumed to vest at the testator's death (Prob.Code, sec. 28), unless a contrary intention is expressed in the will. In the present case the corpus from which income was to be derived was expressly given, devised and bequeathed to a bank, in trust, with directions to fulfill certain definite purposes. The legacies depend upon an uncertain

event (Prob.Code, sec. 141); that is, the possibility of the corpus of the trust yielding income. The amount of payment to the widow is uncertain. The total income from the trust might be paid her and even then be insufficient to meet the $250 a month due her, or she and the son might, under the terms of the will, in the event the income should be in excess of $500 a month, divide an uncertain amount. "A testamentary disposition when vested [in the present case in the bank], cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose." Prob.Code, sec. 143. Ownership by the legatees, the widow and the son, could be enjoyed only upon the occurrence of precise contingencies. In Re Estate of Blake, 157 Cal. 448, 108 P. 287, the testator devised the legal title to his trustees with payment of income to certain beneficiaries. At pages 460, 466 of 157 Cal., at page 292 of 108 P. the court said: "The meaning of this provision is plain. The trustees simply took the legal title to the trust property to the extent that it was necessary for the fulfillment of their trust duties. There is nothing in it whereby any title was passed to the beneficiaries." The "rule of presumption to be indulged in only when there is no other language employed by the testator showing a contrary intention". See, also, In re Estate of Reith, 144 Cal. 314, 77 P. 942; In re Estate of Klein, 23 Cal.App.2d 708, 74 P.2d 79; In re Estate of Watson, supra; San Diego Trust, etc., Bank v. Heustis, 121 Cal.App. 675, 10 P. 2d 158. The intent of the testator controls. In re Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052; In re Estate of Bourn, supra; In re Estate of Watson, supra. In the Marre case, the court said (page 589 of 114 P.2d): "The absence of an express direction that the payments were to accrue from the date of her death does not establish conclusively, however, that the testatrix had no such intent. The intention of the testatrix is the determining factor (Prob.Code, sec. 163), and that intent is to be gathered from the instrument as a whole. Prob.Code, sec. 103; [In re] Estate of Peabody, 154 Cal. 173, 178, 97 P. 184." Whatever the rule may be in other jurisdictions the theory advanced by appellant widow has not been adopted in this state. In Re Estate of Bourn, supra, 25 Cal.App.2d page 600, 78 P.2d 193, page 198, the court said: "* * * and it is a well-established principle of law that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable." Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; In re Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049; In re Estate of Burnett, 42 Cal.App.2d 427, 109 P.2d 26; Coviello v. Moco Fruit Co., Inc., 42 Cal.App.2d 637, 109 P.2d 765.

[7] The probate court in the present case found that the testator "did not intend that the payments should be paid to her [the widow] *for or during the period of the settlement of the estate* in order to provide for her maintenance and support *during said period*" (italics added); that "It was the intention of the testator that the payments which he ordered the trustee to pay to his widow, Betty E. Platt, were to be paid to her from and after the date of the distribution of the estate to the trustee. Testator did not intend that the payments should commence from the date of his death or that the said trustee or his executors should be charged with the duty of making the payments commencing from the date of his death"; that "Testator intended that Betty E. Platt should have a family allowance from his estate for her maintenance and support during the period of the settlement of his estate".

[8] If the testator intended that family allowance should be maintenance for the widow during the period of administration of his estate, it is reasonable to conclude that he did not intend her to receive the $250 additional. The terms of the will indicate an intention that the property of the estate be placed in trust, to be invested and reinvested in the discretion of the trustee, and that the income therefrom be paid in a designated manner to the widow and the son. Until income was received by the trustee, it could not be distributed. That the testator realized that the payments to the beneficiaries under certain contingencies might not be sufficient for the necessaries of life is demonstrated by his insertion of a clause in the trust instrument permitting the trustee to advance from the principal reasonable amounts to cover such contingency. However, in this regard, un-

til it obtained control of the corpus of the estate, the trustee could be of no assistance in supplying the necessaries of life to the widow. In re Estate of Watson, supra. Assuming that the trustee had petitioned that part of the estate be transferred to it in order to make the specified payments during administration of the estate, still an interval would have elapsed in which the widow would be without funds. The testator was a business man. That he knew the value of the assets of his estate is demonstrated by the amounts he directed to be paid to the widow and the son, which were approximately the return that could be expected from the investment of his holdings. Testator had acted as executor of his mother's will and, it may be assumed, was somewhat familiar with probate proceedings. The present will was drawn by his attorney. This is a circumstance to consider in determining that the terms embodied in the will were selected with care to truly express the intent of the testator. In re Estate of Bourn, supra. The trial court had a right to infer that the attorney and this business testator were familiar with the right of a widow to a family allowance, and understood and intended that payments under the trust provisions should not be made until subsequent to the time the trustee received the principal and obtained income sufficient to pay the widow.

[9] It may be admitted that under certain language in Re Estate of Dare, supra, the probate court might have determined that it was the intention of the testator that his widow should receive payments as specified from the date of his death if she had no other immediate source of income. The fact that the respective parties herein stipulated that the widow "was entirely maintained and supported by testator during her married life with him and had no independent property or income" is not in itself determinative of the question presented if from the "words of the will, taking into view the circumstances under which it was made" (Prob.Code, sec. 105), a contrary reasonable conclusion may be reached. In Re Estate of Gartenlaub, supra, 185 Cal. page 379, 197 P. page 92, 24 A.L.R. 1, the court said: "The apparent conflicts in the decisions can be largely reconciled, however, by taking into account the great variety of circumstances out of which they arose." Whatever the circumstances may be, the general rule is that a bequest of income accrues from the testator's death (Prob.Code, sec. 160), but this rule is controlled by the intention expressed by the testator (Prob.Code, sec. 163), considering the instrument as a whole. (Prob. Code, sec. 103.) In re Estate of Marre, supra.

The terms of the will evince an intention not only to protect the widow, but likewise, the son. The widow was given priority in payments, but, irrespective of the date of the commencement of payment, if the amount of income exceeded $250 a month the son would be entitled to a part thereof as of the same date. As noted before, testator knew, and the wording of the trust instrument indicates,. that he intended that the income payment to the son should approximate the amount paid the widow. The priority given the widow indicates testator's recognition that she was his first obligation, with due consideration given to the son. During probate proceedings the income of the estate exceeded $2,500; in fact the court found that for several years prior to the death of testator it had amounted to $5,000 a year. Apparently a part of such income received during administration of the estate was used in payment of the family allowance to the widow, taxes, probate costs, etc.; the sum of $1,100 only was turned over to the trustee as income at the end of the period of administration, the court directing that such sum be distributed as income of said trust. If the date of commencement of payments to the widow should be advanced to the date of the testator's death, approximately $2,500 would be due the widow, and perhaps a like amount to the son. This would diminish the income fund of the trust, perhaps to the detriment of the son.

[10] Appellant widow specifies as error the admission of certain evidence over her objection. A great part of such evidence, the correctness of which is not disputed, was in fact a part of the probate record. That which may not have been, for instance, the matter of *actual* receipt of insurance benefits, or the actual receipt of the family allowance by her was not properly admissible to prove the intent of the testator but may not be classified as prejudicial. The fact that in an insurance policy he had named the widow as beneficiary could be properly considered as a circumstance indicating that he had made ample provision for her immediate support, and that the trust payments could well await receipt of income by the trustee following

distribution of the fund to it, thereby affording greater security of payment to both beneficiaries.

Briefly, construing the will in its entirety, giving, devising and bequeathing a home and furnishings to the widow; fixing, by the trust provision, a stated amount to be paid to her, monthly if possible; the evident intention that the son if possible should receive an equal amount; the fact that the widow was not the remainderman; the fixing of a definite sum for life in the event she should remarry; the provision that the trustee could advance to the beneficiaries out of the principal any sum in its discretion "for necessaries of life", and the fact that the will specifically provided that the payments were to be made from investments, leads us to conclude that a construction that the trust created by it was not one for the maintenance of the widow during the probate of the estate *is not unreasonable.*

When the above narrated "circumstances under which it was made" are taken "into view", namely, that the testator had some knowledge of probate proceedings; that he was a business man with full knowledge of the total *income* to be derived from his assets, as evidenced by his fixing of amounts to be paid his widow, in a preferred position, and to his son; that the trust instrument was prepared under his direction by testator's attorney (whom it must be assumed knew that the widow would be entitled to a family allowance and to fees as an executrix); also, that the wife was named as sole beneficiary in the insurance policies, we must conclude that the probate court was justified in decreeing that the widow was not entitled to income from the trust for the months prior to the date of distribution of the estate.

In the matter of the appeal by the testator's son, the will provided: "If there is any income in addition to the sums mentioned * * *, the said surplus income over and above the sum of Five Hundred ($500.00) Dollars per month shall be divided in equal shares between my said wife, Betty Eldred Platt, until she remarries, and my said son, Howard Charles Platt;"

The question presented by appellant son may be stated as follows: In the event that in any month the widow should receive $250 from the income, and the son a like amount, would the surplus, if any, be divided equally between them, or would such surplus be available to cover a deficiency in prior monthly payments to the widow? The probate court decreed that the trustee should estimate the regular net income for each trust year and divide such amount into twelve equal installments; that upon such basis the widow should be paid $250 per month, and the balance, if any, be paid to the son "provided that no payment shall be made to Howard C. Platt, Jr., or his heirs, while a deficiency exists in the payments granted Betty E. Platt and provided, further, that any deficiency in the payments to Howard C. Platt, Jr., or his heirs, is not to be treated by the trustee as a charge upon the income of any future trust year". It was further decreed that: "The trustee shall strike a balance at the end of the trust year. Provided that Betty E. Platt has received the sum of Three Thousand Dollars ($3,000) in the trust year and no deficiency exists in the payments provided for her, the trustee shall pay at the expiration of the trust year the undistributed net income, if any, to Howard C. Platt, Jr., or his heirs, in an amount sufficient to make the amount received by him during the year total the sum of Three Thousand Dollars ($3,000). The excess of the undistributed net income above Six Thousand Dollars ($6,000) shall be paid equally to Betty E. Platt and Howard C. Platt, Jr., or his heirs".

[11] Appellant son contends that the income payments are thus fixed by the annual income received. The will simply provides for the payments "per month". There is no reference to an annual period. It may be conceded that it is customary to have an annual accounting as the decree provides in the present proceeding. The probate court simply adopted a practical method of dividing additional income. In re Estate of Duffill, supra; In re Estate of Smead, 16 Cal.2d 204, 105 P.2d 589. A period fixed for mere accounting purposes does not restrict the payments of income to the fixed accounting period in the face of a provision in the will that the payments shall be made per month. The decree covers any seeming inconsistency between the accounting period and the direct provision of the will as follows: "To Betty E. Platt from the income of the trust, the sum of Two Hundred Fifty Dollars ($250) each month during her life or until her remarriage. When ever there is any deficiency in the said payments to Betty E. Platt the trustee, *regardless of any accounting period,* shall consider such deficiency as a

charge upon the future income of the trust, and until such deficiency is paid no payments shall be made to Howard C. Platt, Jr., or his heirs." (Italics added.)

[12] In their respective briefs, the son and the widow set forth numerous contingencies that may arise; the remarriage of the widow, her death, the death of the son, deficiency in the amount due the widow; that no income may be available to the son; amount of surplus payable monthly as distinguished from annually, and other possibilities of either remote or likely occurrence. Through tenuous analyses of the provisions of the will, and the terms of the decree, it is sought by each beneficiary to demonstrate an intent of the testator favorable to him or her. No decision in California exactly in point has been called to our attention. There have been such, however, from other jurisdictions but we do not deem it necessary to comment further upon them due to the different factual backgrounds. It is sufficient to say that we cannot agree with the contention of the son that the provisions of the trust "clearly and unambiguously provide that the payments [to the widow] are to be made only out of the income received in the trust *year*". (Italics added.) It does not appear that a yearly accounting is inconsistent with making up monthly deficiencies. The terms of the will as a whole, portions of which have heretofore been referred to or quoted, and the related surrounding circumstances, justify a conclusion that deficiencies in monthly payments to the widow should be made up from subsequent income.

On each appeal, assuming that the will admits of the construction for which the respective appellants contend, it is certainly susceptible also of the interpretation which the respective respondents as such place upon it. If there is any ambiguity in the terms of the document, still the facts as found by the trial court do not compel the conclusion, as a matter of law, on the widow's appeal that the income was to be paid from the date of the death of the testator; or, on the son's appeal, that the widow's right was not to be cumulative. Under the circumstances, an appellate court is powerless to interfere. Furthermore, the trial court's construction seems to be the correct conclusion.

The portions of the order settling first and final account and decree of distribution, and an order amendatory thereof, appealed from by the widow Betty E. Platt, and by the son Howard C. Platt, Jr., are, and each of them is, affirmed.

KNIGHT, J., concurred.

PETERS, Presiding Justice (dissenting in part).

I concur in that part of the opinion affirming the portion of the decree determining that the right of the widow is cumulative, but I dissent from that portion of the opinion holding that the right of the widow to income did not date from the death of decedent.

The problem involved on the appeal of Betty E. Platt can be simply stated: Where a will creates a trust and provides for the payment of a specified portion of the income thereof to the widow, and a portion over said amount to the testator's son, and the son is named as remainderman, and the will contains no positive direction as to when such income is to start, does the right to such income date from the death of the testator or from the date of distribution? Although the problem can be thus simply stated its solution is by no means easy, because of the apparently irreconcilable language used in some of the prior decisions in this state. However, it seems to me that if certain fundamental principles are kept in mind, the conclusion must follow that if the will is silent on this point, and if there are no surrounding circumstances that compel a contrary conclusion, the right of a life tenant to income of a trust accrues from the death of the testator.

It is elementary law, of course, that in the absence of a contrary intent expressed in the will the title to a bequest or legacy dates from the date of the death of the testator. It therefore follows that the title of the trustee, in the instant case, dated from that time. In re Estate of Wellings, 197 Cal. 189, 240 P. 21. It is equally true that the title of the life tenant to her bequest should date from the death of the testator. This rule is merely part of the general rule applicable to all legacies that title to a legacy is presumed to vest at death. Probate Code, secs. 28, 300.

If it should be held that the right of the life tenant to the income does not commence until the date of the decree of distribution, obviously the portion of the income earned by the trust estate between the date of death and the date of the decree of distribution would be deducted from the

interest of the life tenant and given to the remainderman through an enhanced trust corpus. It is undoubtedly for this reason that the great majority of courts to which this problem has been presented, have held that unless otherwise specifically provided in the will, the income of a trust should be paid to the life tenant from the date of death. The general rule is thus stated in section 234 of the Restatement of the Law of Trusts:

"Except as otherwise provided by the terms of the trust, if property is held in trust to pay the income to a beneficiary for a designated period and thereafter to pay the principal to another beneficiary,

"(a) where the trust is created by will, the former beneficiary is entitled to income from the date of the death of the testator, * * *

"*Comment on Clause* (a):

"*a.* Where a trust is created by will and by the terms of the trust the income is payable to a beneficiary for a designated period, the beneficiary is entitled to income from the date of the death of the testator, unless it is otherwise provided in the will. The rule here stated is applicable to trusts created by a specific devise or legacy, by a general pecuniary legacy, and by a residuary devise or bequest; and it is immaterial whether the same person is designated as executor and trustee.* * *

"*f. Residuary devise or bequest.* If the subject matter of the trust is the whole or the residue of the testator's estate, the beneficiary entitled to income, unless it is otherwise provided in the will, is entitled to the actual income received by the executor or trustee from the date of the death of the testator, * * *".

As stated in In re Leitsch's Will, 185 Wis. 257, 201 N.W. 284, 285, 37 A.L.R. 547, this rule "is supported by well-nigh universal authority". The Kentucky Supreme Court in Grainger's Ex'rs and Trustees v. Pennebaker, 247 Ky. 324, 56 S.W.2d 1007, 1010, citing many text writers and many cases stated that the rule is "supported by a practical unanimity of the text-writers and the courts* * *".

These cases, and the many authorities cited therein, demonstrate that none of the provisions of the present will support the finding of the trial court that the testator intended the right to income should date from the decree of distribution. They consider the argument advanced in the majority opinion that since the trustee's right to possession dates from distribution, and that, since the trust provides that the trustees shall pay the income to the life tenant, obviously no income could actually be paid by the trustees to the life tenant until after distribution, and directly hold that such argument does not show an intent that the life tenant should not receive the accrued income at distribution. Every provision contained in the present will has been considered by other courts and found not to override the presumption that the testator intended the right to income to accrue from the time of his death. It must be conceded, therefore, that under the rule in force in other states, if all that was properly before the court in the present case was the will, that then, under such rule, it would be held, as a matter of law, that the finding of intent is unsupported.

This conclusion would undoubtedly also follow in this state if the trust for the widow is one for maintenance. This was expressly settled by the Estate of Dare, 196 Cal. 29, at page 38, 235 P. 725, at page 728, where the court stated: "This brings us to the next inquiry, which is, conceding these provisions in the decedent's will to amount to a bequest for maintenance, to what date did its intended inception relate —that of the testatrix's death, or that of the investment of the trust in the hands of the trustee? By both reason and authority we are compelled to the conclusion that the respondent's right to the income to be derived from the trust properties must be held to have relation to the death of the testatrix. As to the reason of the situation, it would seem to follow that if, as we hold, the provision in said will and in the trust clauses thereof were intended by the testatrix to be in the nature of a bequest for the maintenance of her adopted daughter who, as has been shown, had no other means of support except that of her own exertions, and, also, as has been shown, such adopted daughter had heretofore been supported and maintained by her adopting parents during their lifetime, such intention ought to have relation to a time from and after the death of the testatrix, since by that means only could continuity of such maintenance be assured. This conclusion would derive additional and very cogent support from the fact that the adopted daughter of the testatrix is made primarily the sole beneficiary of the entire substance of the residue of the said estate

under the terms of said trust. The foregoing reasoning and conclusion are fully supported by the authorities dealing with similar or analogous situations. In 40 Cyc., under the caption of 'Income from Residuary Fund,' it is stated as 'settled by the great weight of authority that in the case of a life estate in a residuary fund or in some aliquot portion thereof, if no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue as afterwards ascertained, to be computed from the death of the testator.' The cases cited in support of this statement fully sustain it. [Citing many cases.]"

This conclusion was recently reaffirmed by the Supreme Court in Re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586. In that case the decedent created a testamentary trust of the residue of her estate, with a direction that the trustees pay out of the income of the trust estate such part thereof as the trustees might determine for the care, maintenance, education and support of her grandson, the balance of the net income to be paid to the testatrix's daughter. Following distribution the grandson sought to compel the trustees to pay to, or for, him expenses incurred in his support, maintenance and education prior to the entry of the decree of distribution. The Supreme Court held that the grandson was entitled to maintenance during distribution. The court placed its decision squarely on the Estate of Dare, supra. See, also, In re Estate of Rider, 199 Cal. 742, 251 P. 805.

In the present case, the court did not determine whether or not the trust was one for maintenance. It found that it was the intention of the testator that payments should be made to the widow from the date of distribution. Based on this finding, it is then found that the testator "did not intend that the payments should be paid to her for or during the period of the settlement of the estate in order to provide for her maintenance and support during said period". That is not a finding that the purpose of the trust was not for her maintenance. In fact, there would have been no evidence to support such a finding had one been made. The evidence shows that the widow is thirty-eight years of age and that she married the testator in 1931. The will was executed in 1937. The parties stipulated that "she was entirely maintained and supported by testator during her married life with him, and had no independent property or income". In view of this state of the evidence the only finding that could have been made on this issue is that the trust, regardless of when the right to income accrued, was intended as one for maintenance. See In re Estate of Ballou, 181 Cal. 61, 183 P. 440, where the evidence was substantially similar to that in the instant case and where the Supreme Court reversed a finding that the legacy there involved was not intended as a legacy for maintenance. Moreover, there was a provision in the trust in the instant case reducing the amount payable to the widow upon her remarriage. That definitely indicates that the testator intended the $250 monthly payments to be for her support, but believed that if she remarried, and thus gained some other means of support, the income to the son should be increased by decreasing that payable to the widow. In re Estate of Fitzgerald, 161 Cal. 319, 119 P. 96, 49 L.R.A.,N.S., 615; In re Harris, 61 Misc. 563, 116 N.Y.S. 270.

However, it is not necessary to base the conclusion that the right to income vested as of the time of death solely upon the ground that the trust was one for maintenance. As I read the cases, whether or not the trust is one for maintenance, in the absence of language in the will compelling a contrary conclusion or in the absence of other evidence demonstrating a contrary intent, the presumption is that the right of the life tenant accrues as of the time of death. This is important in this case. This is so because it is a conceded fact that the trust for the son is not one for his maintenance. If it should be held that the trust for the widow was for her maintenance, and for that reason alone she was entitled to her $250 a month during the ten months of the administration of the estate, but that the son's trust was not for his maintenance, it would mean that the widow would receive $2,500, and the son nothing. The trial court found that the income during administration "exceeded" $2,500. At the oral argument, and in letters to this court, counsel conceded that the actual income was "in the neighborhood of $5,000". If I am correct that both life tenants, regardless of whether their respective trusts were intended for their

maintenance or not, are entitled to income from the date of death, under the facts of this case the widow would receive $2,500 and so would the son. This conclusion would follow if it should be held that it will be presumed that the "title" of the life tenant vests upon the death of the testator.

As already pointed out, this "title" theory is accepted by the overwhelming number of other states, and is incorporated in the Restatement of the Law of Trusts above-quoted. As I read the California cases some of them at least have adopted that rule for this state. In the Estate of Gartenlaub, 185 Cal. 375, at page 383, 197 P. 90, at page 93, 24 A.L.R. 1, it is stated: "The doctrine generally adopted by the courts of America, and recognized by this court in [Re] Estate of Duffill [180 Cal. 748], 183 P. 337, is that, where corporate stock forms a part of a trust estate, the income of which is to be paid to one for life with remainder to another, what the remainderman is entitled to is the value of the stock as of the date of the creation of the trust—that is, the testator's death. Any accumulations beyond that date are distributable as profits. [Citing many cases.]" See, also, In re Estate of Duffill, 180 Cal. 748, 183 P. 337; In re Estate of McGirl, 125 Cal.App. 310, 13 P.2d 746; In re Estate of Ballou, 181 Cal. 61, 183 P. 440; In re Estate of Whitney, 171 Cal. 750, 154 P. 855.

In opposition to this rule the respondent and the majority opinion rely on certain language in the following cases: In re Estate of Lockhart, 21 Cal.App.2d 574, 69 P. 2d 1001; In re Estate of Bourn, 25 Cal. App.2d 590, 78 P.2d 193; In re Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349; Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870; Fraser v. Carman-Ryles, 8 Cal.2d 143, 64 P.2d 397; In re Estate of Brown, 143 Cal. 450, 77 P. 160. It must be conceded that the holding in Clayes v. Nutter is contrary to the contentions of appellant. It must also be conceded that there is language in some of the other cases cited which, if separated from its context, supports respondent's position. However, several of the cases did not involve the problem of the right to income before distribution at all. The Lockhart case involved the right to income between the administrator of the life tenant's estate after her death, and the remainderman. The Bourn case turned on the question of the interpretation of the word "annuity" and upon whether a certain bequest was an annuity. The question as to whether the life tenant's right to income accrued from the date of the death of the testator was not involved. In the Watson and Fraser cases, supra, apparently the question as to the right of the life tenant to income prior to distribution was involved, but the life tenants, so far as the opinions disclose, apparently based their case solely on the contention that the bequests there involved constituted annuities. It was assumed that if they were not annuities the right to income would not accrue until distribution. The points heretofore discussed in this dissent are not mentioned in the opinions. In the Brown case the trust consisted of an uninvested sum of money which the trustees were required to invest. Obviously, no income except interest could accrue until the money was distributed to the trustees and invested by them. In the instant case the residue of the estate consisted almost entirely of stocks and bonds, the income from which amounted to about $5,000 per year. However, in fairness to respondent, it should be stated that the theory of the Brown case would seem to be contrary to the theory announced in the Marre, Dare and Rider cases, supra.

In view of this state of the authorities, it is clear that there are cases supporting the appellant, and others supporting respondent. It is quite significant, however, that in every case where the arguments favoring appellant's contentions have been fully considered, the position taken by appellant in the instant case has been sustained. It certainly cannot be contended that the authorities in this state compel the conclusion contended for by respondent. Under such circumstances, we should now adopt the rule that seems to us to be the fair and just rule to be applied to such cases. As already pointed out, the overwhelming weight of authority outside the state, and the Restatement, are contrary to respondent's contentions. For some well-reasoned cases from outside California, see In re Leitsch's Will, 185 Wis. 257, 201 N. W. 284, 37 A.L.R. 547; Grainger's Ex'rs and Trustees v. Pennebaker, 247 Ky. 324, 56 S.W.2d 1007; In re Stanfield's Estate, 135 N.Y. 292, 31 N.E. 1013; Kinney v. Uglow, 163 Or. 539, 98 P.2d 1006. The reasoning of these cases seems to me so

compelling, that, in the absence of controlling authority to the contrary, this state should now adopt the majority rule.

From what has heretofore been said, it is my conclusion that the proper rule in such cases is that in the absence of compelling language in the will to the contrary, it will be presumed that the testator intended that the right of the life tenant to income should accrue from the date of his death. It is also clear to me that there is not one word in the present will that can be held reasonably to indicate that the testator's intent was that the right to income should not accrue until distribution. The most that can be said is that the will is silent on this point. So far as the will is concerned, therefore, the presumption heretofore mentioned should control.

It must be conceded that this whole problem depends upon the intent of the testator. If he expresses such intent, that expression is, of course, controlling. But if the will is silent as to intent, and if there is no other evidence of intent, the law presumes that by his silence the testator has expressed the intent of having the right to income vest at his death. It may be conceded that intent may be shown by the surrounding circumstances. The majority opinion, and the trial court, place great reliance on the evidence of surrounding circumstances in the present case. What are these so-called surrounding circumstances? First, it is pointed out that the widow had the right to apply for a family allowance during administration, and that such allowance was applied for and secured. It is stated that the testator must be presumed to have known this fact, and that, therefore, it may be inferred that he intended the right to income should not accrue while the right to a family allowance existed. This reasoning, in my opinion, is unsound. The will made no mention of putting the widow to an election. Either the right to apply for a family allowance does or does not show an intent as to when the right to income shall accrue. It certainly cannot be held that in each case it depends upon the whim or caprice of a trial court as to whether such fact shows such an intent. If silence in the will shows an intent to have the right accrue from the date of death, and if the testator is presumed to know of the right of a widow to a family allowance, and if the testator in fact had this problem in mind, why would he have not specifically provided in his will that the right to income accrued on distribution, if that was in fact his intent? How can the presumption above adverted to be held to be overcome by such a tenuous circumstance? The point is that the circumstance that the widow had the right to ask for a family allowance has no relevancy at all in determining the intent of the testator. In Re Estate of Ballou, supra, it was argued that because the child there involved was entitled to receive a family allowance, this supported the finding that the testator did not intend the legacy to bear interest from the testator's death. At page 65 of 181 Cal., at page 441 of 183 P. the court stated: "That the legatee, as a minor child of deceased, was in fact allowed, and did in fact receive, a family allowance pending administration, as well as a homestead, we must likewise regard as immaterial on this appeal. Obviously such matters can have no bearing on the question of the character of the legacy, and are material, if at all, only upon some such theory as that by accepting certain benefits given her as the child of the deceased by statute, she has elected to take those benefits in place of certain benefits given her by the will. There is, however, nothing in the will upon which it may be claimed that the child was put to an election in this matter, and, this being so, her receipt of the benefits accorded her by the law as a child of deceased from the funds of the estate in no way affects her rights as a legatee. See [In re] Estate of Cowell, 164 Cal. 636, 130 P. 209." That reasoning is equally applicable in the instant case.

It is also pointed out that prior to his death the testator named his wife as a joint tenant of the family residence, valued at $22,500, and that he named her beneficiary of certain policies of insurance on his life. How can these circumstances support the finding of intent? What relevancy have they to the present question? Can it be held that because of these facts the testator expressed or demonstrated an intent that no right to income accrued until distribution? The testator had no way of knowing whether administration would take ten months, as it actually did, or many years as it actually has in many cases. Should it be held that because the testator knew that his widow had a joint tenancy interest in the residence (which cost $200 per month to maintain) and would receive certain life insurance (which totaled $8,500) that he intended she should receive no

income during administration no matter how long that might be? The will discloses a clear intent on the part of the testator to take care of his wife. He recognized throughout that her care and maintenance had prior claims on his bounty. The rights of the son were made secondary. It seems to me that to hold that the circumstances mentioned support the finding of the trial court as to intent is to do violence to the obvious intent of this testator. I am willing to concede that the question of intent is a question of fact, and that if there is any evidence or any reasonable inference from the evidence that will support the trial court's finding, this court must, and should, sustain the trial court. The point is, that there is no evidence and no inference from the evidence that supports the finding in question. Under such circumstance, the presumption heretofore mentioned should prevail. I believe that this portion of the decree should be reversed.



48 Cal.App.2d 29

FORRESTER v. CITY OF LOS ANGELES et al.

Civ. 13323.

District Court of Appeal, Second District, Division 2, California.

Nov. 25, 1941.

Hearing Denied Jan. 21, 1942.

Judgment ⇐747(5)

A plaintiff was not entitled to judgment quieting title to triangular piece of property used by city for park purposes, where such piece was embodied within tract of land the title to which was quieted in city and not in plaintiff by judgment rendered in 1914, and evidence was insufficient to show that plaintiff had acquired a right to the piece not possessed by plaintiff at time of 1914 judgment.

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Action to quiet title to land by Marie Forrester against City of Los Angeles, and others. From a judgment in favor of the defendants, the plaintiff appeals.

Affirmed.

John C. Campbell, Frank L. Simons, and E. H. Delorey, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for respondent City of Los Angeles.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment in a suit to quiet title.

By her amended complaint plaintiff claims to be the owner of and seeks to quiet title to a triangular piece of property used by defendant city for park purposes as a part of Elysian Park. She describes it as "that portion of the Forrester Tract (as per map recorded in Book 78, at page 30 of Miscellaneous Records of Los Angeles County, California), lying between the northwesterly prolongation of the northeasterly line of Bishop's Road extending northwesterly from Savoy Street and the northeasterly line of the lands deeded to Manuel Requena by the City of Los Angeles, a municipal corporation, as per deed recorded in Book 33 at page 146 of Deeds, records of Los Angeles County, California". There had been a prior action brought by this defendant city against this plaintiff and Cal Forrester, her husband. As shown by plaintiff's brief in this case, it appears that the city in 1909 had filed suit against the Forresters to quiet title to land known as the Forrester Tract, and in 1914 the city recovered judgment which became final. That was Los Angeles Superior Court Case No. 67601, pursuant to which a writ of assistance was issued (City of Los Angeles v. Forrester, 12 Cal.App.2d 146, 55 P.2d 277), and the city was put into possession of the land. Plaintiff bases her claim in this suit on the theory (1) that at the time of the prior suit to quiet title the Forresters had not in fact been the owners of the entire Forrester Tract, but (2) that a certain triangular piece of that tract, which is the subject of this suit, was then owned not by the Forresters but by the Roman Catholic bishop, who was not a party to the action in 1909, and the triangular piece was not affected by the judgment in 1914 in that case;

(3) that in 1919 the bishop executed and delivered to this plaintiff a quitclaim deed to the triangular property. This had been part of an old cemetery which in 1857 defendant city had deeded to one Manuel Requena, who in turn deeded it to the Roman Catholic bishop, who was the predecessor in interest of the bishop from whom plaintiff received the quitclaim deed.

The legal description of the entire Forrester Tract was included in the judgment in 1914. It is apparent from the record that if plaintiff has any right to judgment in this case it is because there was a piece of land embraced within the land described in the 1914 judgment which was part of the Forrester Tract but which neither she nor her husband owned at that time; because if she or her husband owned the entire Forrester Tract at that time they cannot now hope for a favorable judgment.

The piece of land which plaintiff attempts to describe in her complaint is not set out by metes and bounds but is alleged to be "between the northwesterly prolongation of the northeasterly line of Bishop's Road extending northwesterly from Savoy Street and the northeasterly line of the lands deeded to Manuel Requena by the City of Los Angeles" as per Book 33, page 146 of Deeds. With the question of whether there is somewhere such a triangular piece of property we are not concerned; nor was the trial court required to determine whether or not the quitclaim deed introduced in evidence in this case might be of value in a suit against some other defendant. The sole question for its determination was whether by reason of some newly acquired right to a portion of the Forrester Tract—a right which she did not have at the time of the judgment in 1914—plaintiff is now entitled to a judgment quieting title to a triangular piece of property within the Forrester Tract, as against defendants. The trial court decided against her claim of right and gave judgment for defendants covering exactly the same property as that covered by the judgment in 1914, describing it in precisely the same manner by metes and bounds, so as unmistakably to dispose of any claim plaintiff might have to any portion of the Forrester Tract by virtue of any alleged rights arising after 1914.

The question presented by this appeal is whether the evidence supports the findings of the trial court adverse to plaintiff. Plaintiff in her brief states that she has referred to only such testimony as she deemed essential to prove her prima facie case by a preponderance of the evidence, and has sought to aid our deliberations by attaching to her opening brief a sketch purporting to show her theory of the case, which, however, is not part of the record and was not produced at the trial. We have deemed it requisite to read the entire transcript of the testimony and to examine all the exhibits to determine whether the record discloses any basis of recovery for plaintiff. Two witnesses only were called and testified at length for several days, and numerous maps were introduced into evidence. The witnesses were engineers or surveyors who obviously testified at a disadvantage due to the fact that early maps, upon which plaintiff of necessity was obliged to predicate any recovery, were indefinite as to the location of the old cemetery or the property of Manuel Requena. They could not put their finger on the map and show at this time just where the triangular piece is located which is claimed by plaintiff under the quitclaim deed of 1919. They could produce old maps and make calculations as to the probable or possible location of such a piece of land, but their calculations were based upon assumptions as to courses and streets, and it appears that the various maps were not in agreement on those matters. Plaintiff did not offer proof of a recent survey in support of her case. We therefore conclude that the record is sufficient to support the findings and judgment of the trial court which holds, in effect, that since in 1914 title to the entire Forrester Tract was quieted in the city and against the Forresters, and since plaintiff has not established her claim in this suit, the proper ruling is again to quiet title in the city to precisely the same land as that described in the judgment in 1914.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

RAPS v. RAPS.*

Civ. 11842.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1941.

Hearing Granted Jan. 21, 1942.

1. Divorce ⇐83

Before husband, after former wife's death, could take further proceedings in divorce action to have final decree of divorce obtained by former wife set aside, it was necessary to have a living representative of the deceased wife substituted as a party in the action. Code Civ.Proc. § 385.

2. Notice ⇐10

Under statute, providing for the service of notices and other papers upon the party or attorney, such service, in order to be effectual, must be made upon the party or attorney of record. Code Civ.Proc. § 1010.

3. Divorce ⇐165(5)

Where both the plaintiff in divorce action and her attorney of record were deceased at the time defendant filed notice of motion to set aside final decree of divorce, no valid service of such notice could be had without substitution of either a party or an attorney of record, since the relation of attorney and client terminates upon the death of the client and under statute if client lives and attorney dies, there must be a substitution of another attorney of record before further proceedings are had. Code Civ.Proc. §§ 286, 385, 1010.

4. Judgment ⇐12

Any judgment or order entered against a deceased party is void on its face.

5. Motions ⇐22

A notice of motion given to the attorney of one who is not a party to proceeding conferred no jurisdiction upon the court.

6. Divorce ⇐167

Where divorced husband, after former wife's death, sought to have final decree of divorce obtained by wife set aside, instead of proceeding in divorce action by substitution of a party for deceased and motion therein to set aside final decree, divorced husband could maintain a direct suit against executrix of the estate of deceased former wife to set aside the decree. Code Civ.Proc. § 385.

* Subsequent opinion 119 P.2d 187.

7. Divorce ⇐81

Where divorced husband after former wife's death sought to vacate final decree of divorce by a notice of motion filed in divorce action, the fact that attorney for executrix of estate of deceased former wife requested a continuance because of the absence of executrix from the state and the granting of two days' delay did not constitute a "general appearance" so as to "waive" the necessity for a substitution of party plaintiff and legal service of process. Code Civ.Proc. § 385.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance" and "Waive".

8. Appearance ⇐8(1)

Where facts, other than those enumerated by statute, are relied upon as showing an "appearance", such facts must amount to a request for affirmative relief, amounting to a showing of a purpose of obtaining a ruling or order of the court going to the merits of the case.

9. Divorce ⇐165(1)

Where divorced husband after former wife's death filed notice of motion to vacate final decree of divorce, but neither the executrix of the estate of deceased former wife nor any other person was substituted for deceased as a party in the action, court did not have jurisdiction of either the person or of the subject matter. Code Civ.Proc. § 385.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Suit for a divorce by Rose Raps against Elias Raps, wherein a final decree of divorce was granted. From an order granting defendant's motion to vacate final decree of divorce, Fanny Abrahamson, executrix of the estate of Rose Raps, deceased, appeals.

Order reversed.

Stella Donovan, of San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order granting a motion to vacate a final decree of divorce.

The record is incomplete in many respects, and we find more of the facts stated in the briefs and in the oral argument than in the certified transcript. We will endeavor to state the facts first which appear of record or which are conceded. On March 1, 1926, Rose Raps, as plaintiff, was granted an interlocutory decree of divorce from Elias Raps on the grounds of his wilful neglect. On March 4, 1927, the final decree was entered upon motion of the plaintiff's attorney. On June 12, 1938, Rose Raps died and Fanny Abrahamson was duly appointed executrix of her estate. On June 21, 1939, the defendant filed a notice of motion to set aside both decrees upon the grounds that the parties had become reconciled and were living together as husband and wife at the time of the entry of the two decrees. The motion was granted as to the final decree alone. In all the proceedings relating to the divorce Rose Raps was represented by a Mr. More, who has since deceased. It is stated by counsel, and not controverted, that at all times during the proceedings on the motion the executrix was in the state of Maryland.

The "negative" showing from the certified transcript is that at no time during the course of the proceedings was the executrix of the deceased party substituted as a party of record, and at no time was her attorney, or any other attorney, substituted for Mr. More who appeared as attorney of record in the divorce proceedings. The executrix was not served with the notice of motion, or with any other form of process as required by statute and made no written appearance or opposition to the motion. The motion was addressed to her "as executrix" and served upon her attorney in the probate proceeding. Her attorney appeared and asked for a continuance to enable her to communicate with the absent executrix, and appeared at the hearing to object to the jurisdiction. She made no opposition to the motion other than the bare statement: "I want to raise a preliminary point of law, that the court has no jurisdiction to hear this motion to set aside the interlocutory and final decrees after twelve years." She states, and it is not controverted, that her main objection voiced at the hearing was that her client had not been served and was unable to be present because absent from the state. The reporter's transcript, which consists of but one typewritten page, contained two insertions in brackets reading: "[Discussion between counsel]" and "[Discussion between Court and counsel]".

On this appeal the executrix founds her case on the failure to grant her her "day in court" because certain well defined statutory requirements were not followed. The respondent rests his case upon the asserted carelessness of appellant's counsel in failing to make suitable objections at the proper time. There is not the slightest doubt that the respondent had no legal right to proceed in the manner which he did, and the only foundation for the controversy on this appeal is whether the appellant should be denied her legal rights solely because of the manner in which the proceedings were conducted.

[1-3] The proper method of procedure is plainly outlined in the Code of Civil Procedure. When a party to an action dies the court may allow the "action * * * to be continued" by or against his representative or successor in interest. § 385. When an attorney dies the party he represented "must, *before any further proceedings are had against him*" be required to appoint another attorney. § 286. There is no uncertainty in this language. If the respondent herein desired to take further proceedings in the divorce action it was necessary to have substituted a living representative of the deceased party. Section 1010 provides that service of notices and other papers may be made upon the "party or attorney". The clear meaning of this provision is that service is good if made upon the party or attorney of record, and manifestly, if both are deceased, no valid service could be made upon either, and hence substitution of either a party or an attorney of record must be made before a valid service of notice can be had. This is so because if a party dies the relation of attorney and client terminates, if the party lives and his attorney dies, there must be a substitution under section 286.

The rule was announced in Judson v. Love, 35 Cal. 463, 468, where the court said in answer to the argument that the executor of the will may lawfully perform every act incident to his office and is therefore in the same position as any other party litigant: "Suppose this be admitted, it does not follow, that the service of the notice of intention to move for a new trial or appeal on him is effectual. * * * he is still not a party to the suit till he is made so in due form. He must be brought into the

suit *as a party* before he can be affected by any proceedings in the suit. * * * *and he must be duly notified of the fact of his being made a party before he can be affected by notices or proceedings in the action.* Till he is made a party to the suit as executor, he is as much a stranger to the proceedings. * * * as if he were not the executor." (Emphasis ours.) The rule of the case has been followed in Sheldon v. Dalton, 57 Cal. 19; Pedlar v. Stroud, 116 Cal. 461, 48 P. 371; De Leonis v. Walsh, 140 Cal. 175, 179, 73 P. 813; Scoville v. Keglor, 27 Cal.App.2d 17, 26, 80 P.2d 162; Boyd v. Lancaster, 32 Cal.App. 2d 574, 578, 90 P.2d 317; Maxon v. Avery, 32 Cal.App.2d 300, 302, 89 P.2d 684; Lynch v. Bencini, 17 Cal.2d 521, 533, 110 P.2d 662.

[4, 5] The same rule was applied to defunct corporations, before the change in the statute, and in Crossman v. Vivienda Water Co., 150 Cal. 575, 580, 89 P. 335, 337, it was held that when the corporate entity has been dissolved it is incapable of suing or being sued in its corporate name. "It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text writers agree, and their statement is supported by an overwhelming weight of authority." And in the same case it was said on page 581 of 150 Cal., on page 337 of 89 P.: "If section 385, Code Civ.Proc., providing that an action does not abate by the death or any disability of a party, if the cause of action survives, is applicable to the case of a corporation, it does not authorize the continuance of the action against the corporation itself, but allows the action to be continued only against the 'representative or successor in interest,' brought in on motion. McCulloch v. Norwood, 58 N.Y. 562, 568. See, also, Judson v. Love, 35 Cal. 463." By the same reasoning the authorities are in accord that any judgment or order entered against a deceased party is void on its face and that, until proper substitution is made, the court is without power to proceed. By the same reasoning it follows that a notice of motion given to the attorney of one who is not a party to the proceeding confers no jurisdiction upon the court.

[6] Briefly the situation confronting the trial court when the motion was presented was this: The suit for a divorce was dead, the party plaintiff was dead, and the only attorney of record was dead. The case could not be revived without the substitution of a party, and the notice of motion could not be served upon an attorney until he was duly substituted for the one deceased. But, of course, though this procedure might seem burdensome, the injured party has the simple remedy of a direct suit against the executrix to set aside the decree. 9 Cal.Jur., p. 748.

[7, 8] The respondent relies upon McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110. It is not in point. In that case the executor of the deceased party and a legatee under the will requested leave to appear and intervene as parties to an investigation being made by the court of an alleged fraudulent decree. The record here does not disclose that any investigation was contemplated or made by the court, while the representative of the deceased party appeared to protest a hearing in her absence. The authorities holding that a special appearance will be held to be general if the party attacks the jurisdiction of both the person and subject matter are not in point. The record here discloses that the notice of motion to vacate the decree was filed on June 21, 1939, noticed for June 27th, and continued to June 29th at the request of counsel for appellant. She states, and it is not denied, that this request was based upon the fact that the executrix was in Maryland, had not been served with notice, and that she was unable to procure her attendance at the hearing, or to proceed in her absence. The request for a continuance, and the granting of two days' delay, under these circumstances, was not a general appearance waiving the substitution of parties and legal service of process. On a similar question, this court, in Chilcote v. Pacific Air Transport, 24 Cal.App.2d 32, 34, 74 P.2d 300, 301, said: "Section 1014 of the Code of Civil Procedure provides: 'A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him.' The record before us does not show that the defendants answered, demurred, or filed a written appearance. Said section is not

exclusive but, if other facts are relied on as showing an appearance, such facts must amount to a request for affirmative relief. Altpeter v. Postal Telegraph-Cable Co., 26 Cal.App. 705, 713, 148 P. 241. No showing is made that the defendants made such a request. They asked the plaintiff for and obtained a stipulation extending their time to plead. That fact did not constitute a general appearance. Powers v. Braley, 75 Cal. 237, 17 P. 197. They also obtained from the court an order to the same effect but such fact did not constitute a general appearance. Davenport v. Superior Court, 183 Cal. 506, 509, 191 P. 911, 913. The acts claimed to constitute a general appearance must amount to a showing of a 'purpose of obtaining any ruling or order of the court going to the merits of the case.' Davenport v. Superior Court, supra. Here, there was no such showing."

[9] Here there was no party who could appear if he desired to do so until he had been made a party as required by the code. The attorney for the executrix was a stranger to the action and came into court representing a stranger. It is clear, therefore, that upon the record before us, the court did not have jurisdiction of either the person or of the subject matter.

The order is reversed.

SPENCE, J., and DOOLING, J. pro tem., concurred.



47 Cal.App.2d 801

PEOPLE v. JEFFRIES.

Cr. 3490.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1941.

1. Criminal law ⇐1144(13)

The District Court of Appeal must state the evidence most favorably to the prosecution, following a guilty verdict.

2. Criminal law ⇐369(1)

The testimony of police officer concerning conversation with defendant relating to prior conviction should not have been admitted, as against contention that conversation contained admissions not amounting to confession of guilt and was therefore competent as tending to show guilt, where defendant stoutly denied his guilt and maintained his innocence throughout conversations and made no admissions, and confessed prior conviction before commencement of trial. Pen. Code, § 1093, subd. 1, and § 1158.

3. Criminal law ⇐369(2)

Evidence which is relevant to issue on trial may be admissible notwithstanding that evidence may incidentally disclose guilt of defendant of some offense other than the one for which he is on trial.

4. Criminal law ⇐1202(4)

The intention of statute providing that where indictment for felony charges previous conviction and defendant confesses the previous conviction, the clerk in reading indictment shall omit everything relating to previous conviction, is that when defendant admits a prior conviction charged in indictment, knowledge of such charge shall be withheld from jury and no evidence concerning previous conviction shall be admitted. Pen.Code, § 1093, subd. 1.

5. Criminal law ⇐1202(4)

Under statutes dealing with previous convictions, if upon arraignment the defendant denies prior conviction alleged in indictment, that issue, as well as issue raised by plea of not guilty to principal charge, must be submitted to jury, but if upon arraignment or prior to commencement of trial, defendant admits previous conviction, all information concerning prior conviction must be withheld from jury. Pen.Code, § 1093, subd. 1, and § 1158.

6. Indictment and information ⇐114

The object in view in charging previous conviction is not for purpose of evidence as to commission of offense on which defendant is to be tried, but is for information of court in determining punishment to be imposed in case of conviction. Pen.Code, §§ 666, 667.

7. Witnesses ⇐337(5)

Where defendant accused of grand theft and charged with prior felony conviction, voluntarily became witness in his own behalf, prosecution was justified in eliciting from him on cross examination, by way of impeachment, that he had suffered such prior felony

conviction. Code Civ.Proc. § 2051; Penal Code, § 487.

8. Criminal law ⇐1169(3)

A defendant accused of grand theft and charged with prior felony conviction could not complain that testimony of police officer concerning conversation with defendant relating to prior conviction was erroneous and prejudicial, inasmuch as defendant had confessed prior conviction before commencement of trial, where defendant voluntarily became a witness in his own behalf and prosecution properly elicited from him on cross-examination by way of impeachment that he had suffered such prior felony conviction. Pen. Code, § 1093, subd. 1, and § 1158; Code Civ. Proc. § 2051.

9. Automobiles ⇐319
Larceny ⇐3(4), 12

A person may be guilty under statute relating to theft and unlawful driving or taking of vehicle, if he takes an automobile though he intends only to deprive temporarily the owner of such automobile of possession thereof and though he does or does not have intent to steal the automobile, whereas "grand theft" requires felonious taking of property of another. Vehicle Code, § 503, St. 1935, p. 174; Pen.Code, § 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

10. Criminal law ⇐878(3)

The acquittal of defendant of theft and unlawful driving or taking of automobile did not absolve defendant of guilt of grand theft, where offenses charged were distinctly different and district attorney was simply endeavoring to set forth the taking of a single automobile in different ways so as to bring case within provisions of either statute relating to grand theft or statute relating to theft of automobile, as the evidence might warrant. Pen.Code, §§ 487, 954; Vehicle Code, § 503, St.1935, p. 174.

11. Larceny ⇐57, 62(2)

In grand theft prosecution, evidence that defendant was driving automobile in question, and that owner had parked automobile in auto park and had not given defendant or anyone else permission to take automobile therefrom, was sufficient to show that defendant took automobile without owner's consent and with the felonious intent to deprive owner of her property. Pen.Code, §§ 21, 487.

12. Larceny ⇐68(2)

In grand theft prosecution, whether there is evidence of felonious intent is question for jury. Pen.Code, §§ 21, 487.

13. Criminal law ⇐1159(1)

The appellate court will not substitute its conclusion for that of jury on question of felonious intent warranting conviction of grand theft, unless jury's determination violates rule of reason. Pen.Code, §§ 21, 487.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Leroy James Jeffries was convicted for grand theft and from the judgment of conviction and an order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

Leroy James Jeffries, in pro. per., for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was charged in count 1 of an amended information with the crime of grand theft and in count 2 with violating section 503 of the Vehicle Code, St.1935, p. 174. The amended information also charged the defendant with a prior felony conviction, which before the commencement of the trial, he admitted. Following trial by jury defendant was found guilty of grand theft and acquitted of the charge contained in count 2. This appeal is from the judgment and the order denying his motion for a new trial.

[1] Stating the evidence most favorably to the prosecution, as we are required to do following a guilty verdict, we find in the record testimony that late on the night of March 5, 1941, Mr. James Sturdivant and two friends were driving in an automobile south on Flower street in the city of Los Angeles. As they approached the intersection of Flower and Sixth street an Oldsmobile sedan, which Mr. Sturdivant testified was driven by the defendant, made a wide swing around the intersection and struck Mr. Sturdivant's automobile. The driver of the Oldsmobile did not stop, but proceeded north on Flower street to Fifth street, where he made a right turn and proceeded about a half block, where he stopped the car and stepped out on to the curb. In the

meantime Mr. Sturdivant hailed a passing automobile and rode to the point where appellant had parked. As this witness came up, according to his testimony, appellant was just getting out of the Oldsmobile. Sturdivant approached the defendant and asked him what he was going to do about the damage to the former's automobile, whereupon the defendant answered that he would take care of it and inquired how much he owed Mr. Sturdivant. Defendant then inquired where the automobile was parked, and after being told the defendant said, "Well, let's go down there," to which Mr. Sturdivant replied, "All right." Thereupon two police officers drove up and asked who was driving the Oldsmobile, to which Mr. Sturdivant replied, "This fellow here", but upon his turning round he discovered the defendant had fled. It appears from the record that the police officers had noticed the Oldsmobile at the intersection of Fifth and Flower, at which time they observed that the left front fender of the car was damaged and that the car was running on the rim, traveling at the rate of between 20 and 25 miles per hour as it turned on Fifth street. The officers then noticed the complaining witness pursuing the Oldsmobile in another car. As the officers approached, they observed the defendant walk away, and subsequently break into a run. Officer Kleinfelt pursued him, but was unable to overtake him. In the meantime Mr. Sturdivant, together with the other officer, drove around in the police car to Sixth street, where Mr. Sturdivant saw the defendant walking. The officer parked the police car, walked over to the defendant and took hold of his arm, whereupon the defendant jerked away and again started to run. He was pursued and overtaken by Mr. Sturdivant, who held him until the officer came up. The evidence further indicates that the Oldsmobile car had been stolen from a parking lot earlier that evening. The two witnesses who were with Mr. Sturdivant were unable to identify the defendant, but Mr. Sturdivant was positive in his identification, as were the police officers who observed him while he was driving at the intersection of Fifth and Flower streets.

The defendant was the only defense witness. He testified that he had not been driving any automobile on the night in question and had not been in any accident; that he had just arrived in town and had started to walk to his brother's house in Beverly Hills, but discovered it was too far, and was on his way back to board a street car when he was arrested.

Appellant first urges a reversal on the ground that the trial court committed prejudicial error by admitting into evidence certain testimony of a police officer as to a conversation he had with appellant. In that connection the following is disclosed by the record:

"Q. Will you tell us what was said relative to his driving the automobile? A. I asked the defendant what his story was regarding taking this Oldsmobile. He said, 'This is a bum beef.' He said, 'I don't even drive a car.' He said, 'I didn't steal this car.' I asked him how he came to break away from the police officers and run, and he stated when he saw the policemen it frightened him, and he broke away and ran from them. I asked him—I told him that the witnesses had stated that he was the driver, and he told me that he was too smart to steal an automobile, that he had just gotten in town the day before—the same day that he was picked up, and that he had did a rap in—

"Mr. McPherson (Defendant's Counsel): Now, just a minute. I am going to object to that on the grounds it is calling for immaterial evidence and I will ask it be stricken, any of the conversation other than on this case.

"The Court: The motion is denied.

"A. He stated that he was too smart to steal an automobile, and that he had just arrived in town, and that he had did a rap in Huntsville, Texas, that it was a bum beef that he got into that time, and that he did three years for armed robbery, too, on a bum beef for someone else, and that he had did time in the county jail for burglary, and that he was too smart to steal an automobile when he first got into town. He started—

"Q. By Mr. Loucks (Deputy District Attorney): Is that all you can now recall? A. Well, yes. There was some other conversation regarding who he was in trouble with in Texas, but that would not be material.

"Mr. Loucks: That is all. You may cross-examine."

[2-6] The foregoing evidence was neither competent nor material, and should not have been admitted. The attorney-general contends that the testimony was admissible because the conversation contained admissions by the defendant not

amounting to a confession of guilt, in which event, as in the case of a defendant who remains mute in the face of accusatory statements, such evidence is competent as tending to show guilt. However, a reading of the testimony at once indicates that instead of remaining silent or making any admissions the defendant stoutly denied his guilt and maintained his innocence throughout the entire conversation with the officer. True, where evidence is relevant and material to the issue on trial, it may be admissible notwithstanding that it may incidentally disclose the guilt of a defendant of some offense other than the one for which he is on trial. But in the instant case the challenged testimony had no relevancy or materiality to the issues before the court. When the defendant denied his guilt and made no admissions, the evidence lost its probative value. The testimony was clearly violative of the provisions of subdivision 1 of section 1093 of the Penal Code. The clear intention of the foregoing provision of the Penal Code is that when the defendant admits a prior conviction charged in the information, knowledge of such charge shall be withheld from the jury and no evidence concerning the same shall be admitted. Noteworthy also is the fact that section 1158 of the Penal Code provides that whenever the fact of a previous conviction of another offense is charged in an indictment or information, the jury, if they find a verdict of guilty of the offense with which he is charged, must also, unless the defendant admits the charge, find whether or not he has suffered such prior conviction. From these provisions it is clear that if upon arraignment the defendant denies the prior conviction alleged in the indictment or information, that issue, as well as the issue raised by his plea of not guilty to the principal charge, must be submitted to the jury; but if upon arraignment or prior to the commencement of the trial the defendant admits the previous conviction, all information concerning a prior conviction must be withheld from the jury. It must be remembered that the object in view in charging a previous conviction is not for the purpose of evidence as to the commission of the offense upon which the defendant is to be tried, but for the information of the court in determining the punishment to be imposed in case of conviction. This is clearly shown by sections 666 and 667 of the Penal Code. In People v. Sansome, 84 Cal. 449, 24 P. 143, it was held that "The evident purpose of the provision of the Code above quoted" (Pen.Code, § 1093, subd. 1) "was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of a criminal offense, and this is based upon well-settled and familiar principles of law and right". In the case now before us, the defendant having prior to his trial confessed the prior conviction or pleaded guilty thereto, there was no issue as to the prior conviction to which the testimony of the officer was applicable. It was not an admission tending to show that he had committed the offense upon which he was being tried and was wholly inadmissible as evidence tending to prove the commission of that offense, while it thwarted the very purpose of the code provision which requires the omission of all reference to the prior conviction when the defendant has admitted the same.

[7, 8] That the admission of the evidence objected to was not only erroneous, but highly prejudicial to the defendant, cannot be denied, but such prejudice was removed when, while the defendant was testifying as a witness in his own behalf, the following questions were properly asked him pursuant to the provisions of section 2051 of the Code of Civil Procedure, and to which he gave the answers herein set forth:

"Q. You have been convicted of a felony in Texas? A. Yes.

"Q. That was for burglary? A. It was for robbery with firearms and burglary. I was a juvenile at the time."

In view of appellant's decision voluntarily to become a witness in his own behalf, the prosecution was justified in eliciting from him on cross-examination, by way of impeachment, that he had suffered such prior felony conviction. Such being the case, he cannot now be heard to complain of any prejudice occurring from evidence of that fact having been presented to the jury.

Appellant next urges that the verdict finding him guilty of grand theft is contrary to law, for the reason that his acquittal on the charge of violating section 503 of the Vehicle Code operated as a finding by the jury that he was not guilty of the elements necessary to constitute the crime of grand theft. Appellant asserts

that the offense charged in count 2 is one necessarily included in the crime charged in count 1; that, as appellant presents the matter in his brief, "one can be guilty of the charge in count 2 (the lesser offense) without having necessarily committed the offense charged in count 1, but the converse is not true, for if one were guilty of grand theft of an automobile, he is likewise guilty of violation of section 503, Vehicle Code, for the same 'felonious taking', the essential element that must be proved and is the foundation of the charge of grand theft, will support a conviction of section 503, Vehicle Code. And in the same way, if one is not guilty of violating section 503, Vehicle Code, then he could not be guilty of grand theft for both charges involve the one act and depend on the same evidence for conviction."

[9, 10] Appellant's contention that the verdicts in the instant case, finding him guilty of grand theft as charged in count 1 of the information and not guilty of violating section 503 of the Vehicle Code as set forth in count 2, are inconsistent, cannot be sustained. Both as to the ingredients necessary to constitute the separate offenses charged and as to the punishment provided upon conviction, the statutes are different and proscribe separate offenses. Under section 503 of the Vehicle Code, a person may be guilty thereunder if he takes an automobile though he intends only to temporarily deprive the owner of such automobile of the possession thereof, and whether the taking is "with or without intent to steal the same", whereas grand theft requires a felonious taking of the property of another. Both in substance and in form the offenses charged are distinctly different. The allegations of the information in the instant case indicate that the district attorney was simply endeavoring to set forth the same transaction, viz., the taking of a single automobile, in different ways, so as to bring the case within the provisions of either section 487 of the Penal Code or section 503 of the Vehicle Code, as the evidence on the trial might show it to have been. Section 954 of the Penal Code provides that an indictment or information "may charge two or more different offenses connected together in their commission". That is exactly what was done in the case before us. The offenses charged were different offenses, and the acquittal of the charge on one does not operate to absolve the defendant of guilt on the other.

[11-13] As a final ground of appeal, appellant asserts that the prosecution failed to prove a felonious intent upon his part in the taking of the automobile. This claim is without merit. Although defendant testified that he at no time took or was in possession of the automobile, there was positive and creditable testimony given by two witnesses that he was driving the automobile in question. The testimony of the owner of the stolen property was that she had parked her car in an auto park and had not given appellant or any one else permission to take the same therefrom. Consequently, the triers of fact were justified in inferring and concluding that appellant took the automobile without the owner's consent and with the felonious intent to deprive such owner of her property. The intent with which an act is done is manifested by and may be inferred from, among other things, all the circumstances connected with the transaction or offense charged, Pen.Code, § 21, and whether there is evidence of felonious intent is for the jury to determine. It is only when the jury's determination violates the rule of reason that an appellate tribunal will substitute its conclusion for that arrived at by the "constitutional as well as the statutory arbiter thereof." People v. Deininger, 36 Cal.App.2d 649, 652, 98 P.2d 526, 527.

For the foregoing reasons, the judgment and the order appealed from are, and each is affirmed.

YORK, P. J., and DORAN, J., concurred.

47 Cal.App.2d 814

WALLACE v. OTIS.

Civ. 6699.

District Court of Appeal, Third District, California.

Nov. 19, 1941.

1. Judgment ⇐251(1)

A judgment which exceeds the issues litigated is "coram non judice" and void.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Non Judice".

2. Judgment ⇐251(1)

Where action for damages respecting location of boundary line on which defendant had erected a party wall under agreement with plaintiff was brought on theory of defendant's fraudulent representations as to location of line, judgment for plaintiff on theory of damage for trespass was void as not within the issues.

3. Trespass ⇐46(2)

In action for damages for fraudulent representations respecting location of boundary line resulting in agreement authorizing defendant to construct party wall for his building which did not extend entire depth of lot, and in which action evidence disclosed that all owners of lots in the block had for several years considered that their side lines were parallel to a side street intersecting street in front of their lots at an angle of about 94 degrees, whereas deeds called for side lines at right angles to the front street, judgment for plaintiff for entire triangular strip resulting from divergence of the two lines could not be sustained, in absence of evidence that plaintiff ever consented to defendant's possession of any portion of the whole triangular area.

Appeal from Superior Court, Sutter County; Arthur Coats, Judge.

Action by O. W. Wallace against George Fred Otis to recover damages arising out of fraudulent representations alleged to have been made in respect to the location of the boundary line between the adjoining lots of the parties. Judgment for plaintiff, and defendant appeals.

Reversed.

Rich & Weis, of Marysville, and Richard H. Fuidge, of San Francisco, for appellant.

Manwell & Manwell, of Marysville, for respondent.

TUTTLE, Justice.

This action was brought to recover damages arising out of fraudulent representations alleged to have been made in respect to the location of the boundary line between the adjoining lots of the parties. Findings were made in favor of plaintiff, and he was awarded damages in the sum of $600. It was also adjudged that plaintiff was the owner of a strip of land lying between said lots. The appeal is from the judgment.

[1] It is contended that the findings and judgment are not within the issues. A judgment which exceeds the issues litigated is coram non judice and void. Baar v. Smith, 201 Cal. 87, 255 P. 827. The complaint here alleged ownership of a lot in Yuba City, to be in plaintiff; that defendant, who owned the adjoining lot, in 1923, falsely represented to plaintiff that a survey showed the dividing line between the lots of the parties to be along the west wall of a building which defendant proposed to construct upon his property; that as a matter of fact the true line, according to the calls of plaintiff's deed, was some six feet east of said line; that relying upon said representations, plaintiff consented to the erection of a concrete building along said proposed line; that thereafter plaintiff discovered the location of the true boundary line. Damages in the sum of $3,500 was asked. The answer sets up several special defenses. The first is an agreement between the parties which reads as follows:

"This agreement made and entered into by and between George Fred Otis and W. O. Wallis, both of Yuba City, California, this 24th day of August, 1923,

"Witnesseth:

"It being to their mutual benefit, they have agreed to build a party wall on the line between their respective properties on the south side of Bridge Street.

"George Fred Otis is to furnish all of the labor and material and pay for the said wall. Said wall is to be a 8" stone tile wall extending center of wall on the property line 70 feet back from Bridge Street, in Yuba City, Calif.,

"Also, it is agreed that on completion of said wall W. O. Wallis agrees to pay one-half of the expense of making of wall which amounts to $296.00. Also W. O. Wallis has the right of joining to said wall with a building at any time.

"Signed: Geo. Fred Otis
"Signed: O. W. Wallace."

The other defenses are laches, estoppel and statute of limitations.

Plaintiff and defendant are the owners of adjoining lots, whose northern frontage is on Bridge street, which runs east and west. There are several lots in the block, to the west of their properties. The lot on the extreme west has its westerly line on Plumas street. The angle of the intersection of said streets, at the northwest corner of the block, is 94 degrees, 19 minutes. In 1923, and for sometime prior thereto, the side lines of the several lots were parallel to Plumas street. That is, the owners had always considered that their side lines were thus located. Each of said lines was therefore not at right angles to Bridge street, but met the line of said street at an angle of 94 degrees, 19 minutes. On the other hand, the deeds of each lot owner called for side lines at right angles to Bridge street. Upon discovery of this situation, several of the lot owners adjusted their side lines by mutual consent to conform to their deeds. Plaintiff and defendant had not followed this course. Such was the situation in 1923, when defendant commenced construction of a concrete building on the west line of his lot, this being the old boundary line which ran at an angle of 94 degrees, 19 minutes to the south line of Bridge street. A surveyor was then employed by both parties to run the west side line which, according to the deeds, would intersect the southerly line of Bridge street at a right angle. As a result, the parties entered into the agreement mentioned above.

It would thus appear that the only issue was in respect to the strip of land which is covered by the concrete building of defendant. This is only a portion of the triangular strip along the entire west side line, existing as a result of changing the angle at the south line of Bridge street. The entire strip runs from a point at the front of the lots 132 feet to the rear line, where the base of the triangle is 10.02 feet in length. The building runs back some 70 feet, and thus covers only a portion of the triangular area. The pleadings do not indicate any controversy whatever over the rear portion of such area. Upon the latter portion of the lot a building was erected many years ago, and it was there in 1923, standing practically on the line of the said concrete building which was erected by defendant in 1923 on the front of defendant's lot.

[2] The court made no findings upon the issue of fraud, the sole basis for the action. It found that, as to the portion of the lot covered by the concrete building, plaintiff's cause of action was barred by section 337, subdivision 2 of the Code of Civil Procedure. As to the remainder of the triangular strip, the court found that while defendant was in possession thereof from 1923 to 1938, such possession was by consent of plaintiff, and that consent was withdrawn in the latter year, and defendant was therefore a trespasser, and that plaintiff had been damaged in the sum of $600.

It appears that while plaintiff's cause of action was predicated upon fraud alone, judgment was rendered upon the theory and assumption that the action was one to recover damage for trespass. Turning to the testimony, we find that the substance of plaintiff's own testimony and that of his wife was that the location of the true line between their lots was misrepresented by defendant.

We find nothing in the pleadings or in the remainder of the record which would indicate that the issues determined by the findings were ever litigated. It therefore follows that the judgment is void.

[3] If it be conceded that the issues determined were presented in any manner, the judgment would have to be reversed for the reason that there is no evidence to sustain a finding that plaintiff ever consented to possession by defendant of any portion of the whole triangular area. Such is the contention of appellant, and our attention has not been called to any evidence of that character. On the other hand, there is evidence that the line of the new building was considered by both parties to have been the boundary between the two lots. The agreement relating to the party wall, executed in 1923, recites that such wall is on the line between their respective properties on the south side of Bridge street. If it was on the line, the only reasonable inference to be drawn is that they referred to the entire west line

of defendant's property, and not merely to the portion of the line covered by the new building.

The judgment is reversed.

THOMPSON, Acting P. J., concurred.



48 Cal.App.2d 1

ABRAMS et al. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11847.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1941.

1. Constitutional law ⇐24

The constitutional provision that taxes on personalty unsecured by realty shall be based upon tax rate levied upon realty for preceding tax year superseded the statutes which provided for repayment to taxpayers of excess over rate fixed, effect of constitutional provision being to determine definitely the rate applicable to personalty unsecured by realty before such taxes are collected. Pol.Code, §§ 3823, 3824; Const. art. 13, § 9a, adopted in 1924.

2. Taxation ⇐537

Where personalty unsecured by realty was taxed for year 1933–34 at rate in effect for previous year and subsequently tax rate for 1933–34 was established at a lower rate, taxpayer could not recover difference between lower and higher rates in view of constitutional provision that taxes on personalty unsecured by realty shall be collected at rate fixed on realty for preceding tax year. Pol.Code, §§ 3823, 3824; Const. art. 13, § 9a, adopted in 1924.

3. Taxation ⇐350

The term "assessment", within constitutional provision that taxes levied upon personalty unsecured by realty shall be based upon tax rate levied on realty for preceding tax year and that nothing in provision shall prohibit equalization each year of the assessment on personalty in manner provided by law, refers back to use of same term in prior section providing for state and county boards of equalization, and merely means that personalty so taxed at last year's rate must be "assessed", that is, valued or appraised for tax purposes on basis of its then value and not its value as of the year before. Const. art. 13, § 9, and § 9a, adopted in 1924.

An "assessment", strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district, and, as the word is more commonly employed, an assessment consists of two processes, listing persons properly to be taxed, and of estimating the sums which are to be the guide of an apportionment of the tax between them.

See Words and Phrases, Permanent Edition, for all other definitions of "Assessed" and "Assessment".

4. Taxation ⇐305, 451

The phrase "equalization of the assessment", within constitutional provision that taxes levied on personalty unsecured by realty shall be based upon tax rate levied on realty for preceding tax year and that nothing in provision shall prohibit equaliaztion of assessment on personalty in manner provided by law, means adjusting the value of property listed to conform to its true value and has no reference to rate to be applied against such assessed valuation, and hence the phrase cannot apply to method adopted in statute for adjusting excess rates as distinguished from excess valuations. Pol.Code, § 3824; Const. art. 13, § 9a, adopted in 1924.

See Words and Phrases, Permanent Edition, for all other definitions of "Equalization of the Assessment".

5. Constitutional law ⇐16

The arguments made in favor of constitutional change are properly admissible in evidence to determine whether a constitutional amendment has superseded theretofore applicable statutes.

6. Taxation ⇐42(1)

Taxpayers may be treated differently if they are of different classes, and a law sufficiently meets the constitutional requirement of "equal protection of the laws" if it acts uniformly upon the whole of any single class of individuals or objects, and the clas-

sification is founded upon some natural, intrinsic or constitutional distinction. U.S.C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law".

7. Constitutional law ⇐229(1)
Taxation ⇐37

The constitutional provision as construed to mean that taxes levied on personalty unsecured by realty shall be based upon tax rate levied on realty for preceding tax year is not violative of "equal protection of the laws" clause of Federal Constitution on ground that provision imposed a different rate on personalty unsecured by realty, since there is a natural, intrinsic, and constitutional difference between secured and unsecured taxes. Const.Cal. art. 13, § 9a, adopted in 1924; U.S.C.A.Const. Amend. 14, § 1.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by A. L. Abrams and others against the City and County of San Francisco to recover alleged excess taxes collected by defendant. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellants.

John J. O'Toole, City Atty. and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from a judgment in favor of defendant in an action brought to recover alleged excess taxes collected by defendant for the fiscal year 1933–1934.

The action was originally filed in the municipal court and the complaint was in 736 counts representing the claims of 736 plaintiffs. A judgment was entered in favor of defendant in said municipal court but, on appeal to the appellate department of the superior court, it was held the municipal court was without jurisdiction and the cause was ordered transferred to the superior court for trial. Upon the trial in the superior court, judgment was entered for defendant and from said judgment, plaintiffs prosecute this appeal.

The learned trial judge filed an opinion in the trial court, which opinion has been brought up with the record on this appeal. Said opinion correctly sets forth the facts and we are of the view that it properly disposes of all the questions discussed therein. We therefore adopt a portion of that opinion as a portion of the opinion on this appeal. The portion so adopted reads as follows:

"In the year 1933–34 plaintiffs were the owners of certain personal property, but owned no real property at all in this City and County. Consequently such property was taxed for that year at the rate in effect for the previous year, which was $3.96 per $100 assessed valuation. The legality of the collection at the time it was made is admitted. Subsequently the tax rate for 1933–34 was fixed and established at $3.48. It is plaintiffs' contention that the City and County must refund the difference between the amount collected under the 1932–1933 rate of $3.96 and the amount that would have been collected under the rate ultimately fixed for 1933–34, of $3.48. This contention is based on Secs. 3823 and 3824, Political Code, the pertinent parts of which read as follows:

"Sec. 3823—'In the enforcement of the provisions of section 3820 of this code the assessor shall be governed, as to the amount of taxes to be collected by him on property mentioned in said section, by * * * the county rate * * * for the locality in which such property is taxable for the previous year * * *.'

"Sec. 3824—'When the rate is fixed for the year in which such collection is made, then, if a sum in excess of the rate has been collected, such excess shall not be apportioned to the state, but the whole thereof shall remain in the county treasury, and must be repaid by the county treasurer to the person from whom the collection was made * * *'

"Both sections were enacted in 1872, and were amended for the last time in 1921.

"In answer to this contention the defendant relies upon Sec. 9a of Art. XIII of the Constitution of California, which read when adopted in 1924 and continued to read until amended in 1936, as follows:

" 'The taxes levied upon personal property for any current tax year where the same is not secured by real estate shall be based upon the tax rate levied upon real property for the preceding tax year. Nothing in

this section shall be construed to prohibit the equalization each year of the assessment on personal property in the manner now or hereafter provided by law.'

"It is defendants' claim, in other words, that the adoption of this constitutional provision superseded the said Political Code sections that were unquestionably theretofore applicable. Whether it did, or not, is the sole question presented for decision.

"Up to 1924, when the constitutional amendment was adopted, all property real and personal within the county was taxed at the same rate, which was fixed by the Board of Supervisors some time between July 1st, when the fiscal year began, and September 1st. Sec. 3714, Political Code. In general, property taxes were collected after the rate was fixed. But in the case of *personal property taxes unsecured by real property,* the assessor was authorized to collect such taxes on the first Monday of March, which was before the tax rate for that fiscal year had been established. Sec. 3820, Political Code. That being so it was necessary that the assessor should be governed in making his levy and collection by *some* rate and Sec. 3823 supplied this (initial) rate when it provided for the application of the tax rate for the previous year. Therefore, Sec. 3824 provided for a refund in case a lower rate had been ultimately set, and an excess had thus been collected, and Sec. 3825 provided for the collection of the deficiency where a higher rate had been finally set, and the full amount of the tax had not been collected.

[1] "But Sec. 9a does away with the necessity of collecting taxes in advance on a rate to be determined in the future. The first sentence of the section makes it clear in my opinion that taxes on personal property unsecured by real estate shall be levied and collected, at a rate fixed, once for all, and definitely and that such rate should be the tax rate for the preceding tax year. The effect of this section is to determine definitely and for good the rate applicable to personal property unsecured by real estate before such taxes are collected. Thus, since the correct rate will, of necessity, always be applied, there never will be any need to adjust collections on that score, on a plus or minus basis.

[2] "Under Sec. 9a, the correct rate to be applied to plaintiffs' personal property for the fiscal year 1933–34 was not $3.48 (fixed by the Board of Supervisors later in the year) but the rate applied against real property for the last preceding year ($3.96). Therefore, since the defendant applied the correct rate, there was no overpayment of personal property taxes as charged in plaintiffs' complaint.

"But plaintiffs contend that the above sections of the Political Code were nevertheless continued in force by the very constitutional provision relied upon by the defendant, their argument being that Sec. 3824 provides a method of equalizing assessments on personal property, and that Sec. 9a, expressly provides that 'Nothing in this section shall be construed to prohibit the equalization each year of the assessment on personal property in the manner now or hereafter provided by law'.

[3] "The trouble with this argument lies in calling the above described method (whereby the assessor was enabled to collect in advance property taxes upon a rate to be decided upon in the future) a method of 'equalizing' an assessment. Although the term 'assessment' is subject to various interpretations, its meaning in Sec. 9a seems to be clear enough. It would seem that the term, as used in Sec. 9a, refers back to the use of the same term in Sec. 9 of the same Article. The latter section provides for State and County Boards of Equalization 'whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; * * * to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll; * * *'. In other words, Sec. 9a merely means that although taxes are to be levied on unsecured personal property at the rate applied against real estate for the last preceding year, the same rule shall not apply to assessed valuation, but that the personal property so taxed at last year's rate must be *assessed* (*i. e.*, 'valued' or 'appraised' for tax purposes) on the basis of its then value and not its value as of the year before. If such assessment does not conform to the true value of the property the county board of equalization is authorized to equalize the assessment to make it conform to its true value. In other words, the constitutional change was addressed to *rate* alone.

"The term 'assessment' as used in Secs. 9 and 9a is in accord with the common usage of that term. In Flinn v. Zerbe, 40 Cal.

App. 294, 296, 180 P. 650, 651, the court cited a definition of 'assessment' from Cooley on Taxation to the effect that 'an assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists of two processes, listing persons properly to be taxed, and of estimating the sums which are to be the guide of an apportionment of the tax between them'.

[4] "From the foregoing it would appear that 'equalization * * * of the assessment' as used in Sec. 9a means no more than adjusting the value of the property listed to conform to its real and true value. It has no reference to the rate to be applied against such assessed valuation. Therefore, the term cannot apply to the method adopted in Sec. 3824, for adjusting excess rates as distinguished from excess valuations.

[5] "From the foregoing it is apparent in my opinion that the meaning of Sec. 9a is clear on its face. That being so, it would seem to be unnecessary to resort, as an extrinsic aid to construction, to the arguments made in favor of the constitutional change. An examination of those arguments, however, indicates that it was the intent of the proponents of the measure to completely supersede Sec. 3824 and Sec. 3825. That such arguments are properly admissible in evidence is not open to doubt. City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A.L.R. 1425; Cypress Lawn Cemetery Ass'n v. City and county of San Francisco, 211 Cal. 387, 392, 295 P. 813. These arguments pointed out that under Secs. 3824 and 3825, whenever any change was made in the tax rate, the county authorities would be put to the needless trouble of either refunding the excess taxes collected, or collecting the resulting deficiency with the countless computations which these processes would entail. Usually the sums involved were so small (illustrated by the comparatively small demands in these 736 causes of action) as not to justify the effort or expense and the reasons set forth in favor of the constitutional change not only fortify but clinch the conclusion reached in the first part of this memorandum."

[6, 7] There is but one additional point raised on this appeal. Plaintiffs contend that if the above construction is placed upon said section 9a of Article XIII, then said section is violative of the "equal protection of the laws" clause of the Federal Constitution. Article XIV, Sec. 1. Plaintiffs state that the last mentioned clause "would render unconstitutional any construction of the amendment whereby there was a different rate on personal property for secured as distinguished from unsecured". But taxpayers may be treated differently if they are of different classes and a law sufficiently meets the constitutional requirement if it acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic or constitutional distinction. Fullerton Oil Co. v. Johnson, 2 Cal.2d 162, 39 P.2d 796; In re Weisberg, 215 Cal. 624, 12 P.2d 446; Heron v. Riley, 209 Cal. 507, 289 P. 160; People v. England, 140 Cal.App. 310, 35 P.2d 565. There can be no doubt that there is a natural, intrinsic and constitutional difference between secured and unsecured taxes. Rode v. Siebe, 119 Cal. 518, 521, 51 P. 869, 39 L.R.A. 342.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



PUCCETTI v. GIROLA et al.*

Civ. 11476.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1941.

Hearing Granted Jan. 21, 1942.

1. Corporations ⇐47
Execution ⇐272(1)

Where corporation which changed its name organized a company whose officers deposited their salaries in bank in name of corporation by its old name, and such amounts were assigned to an assignee who canceled all claims against corporation which by its new name issued quitclaim deeds, and property conveyed by such deeds was thereafter conveyed by sheriff's deed after execution sale to a judgment creditor of corporation by its old name, and there was no claim that change of name was not legally

* Subsequent opinion 128 P.2d 13.

accomplished, judgment creditor had "constructive notice" of change of name and hence could not claim benefit of statute requiring a grantor who has changed his name to state the name in which he had acquired the realty conveyed since judgment creditor was not a "bona fide purchaser for value". Civ.Code, § 1096.

See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser For Value" and "Constructive Notice".

2. Execution ⇐271

The doctrine of "caveat emptor" applies to execution sales made upon valid judgments, purchaser assuming all the risk of defects in debtor's title, whether he purchases with or without notice.

See Words and Phrases, Permanent Edition, for all other definitions of "Caveat Emptor".

3. Fraudulent conveyances ⇐295(1), 297

In action by holder of sheriff's deed to quiet title to land as against holder of quitclaim deeds, evidence sustained finding that quitclaim deeds were not fraudulent and that grantor was not insolvent at time of executing such deeds. Civ.Code, § 1228.

4. Fraudulent conveyances ⇐156(1), 162(1)

Where a transfer of realty was made for a valuable consideration, person seeking to set aside the conveyance on ground of fraudulent intent must establish grantee's participation in such fraudulent intent or at least grantee's knowledge thereof. Civ. Code, § 1228.

5. Fraudulent conveyances ⇐57(4)

That executions were returned nulla bona on dates including September, 1934, to July, 1937, did not constitute evidence of "insolvency" on April 29, 1932, when quitclaim deeds were executed so as to justify setting aside such deeds on ground that they were fraudulent conveyances. Civ.Code, § 1228.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvency".

6. Mortgages ⇐151(5)

Where to secure a loan grantee under quitclaim deeds delivered a note and executed a mortgage on land conveyed by quitclaim deeds, and a sheriff's certificate under which a judgment creditor claimed the land was executed thereafter, such claim was required to yield to the title of the mortgagee.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Alberto Puccetti against Madeline Girola and others to quiet title to certain lots. From a judgment for defendants, plaintiff appealed. Upon his death Gemma Puccetti, as administratrix, etc., was substituted as plaintiff and appellant.

Affirmed.

Jesse G. Benson, of Oakland, for appellant.

John J. Beck, of Los Angeles, for respondent Girola.

John C. Altman, of San Francisco (Willard L. Ellis, of San Francisco, of counsel), for respondent State Finance Co.

Donahue, Richards & Hamlin, of Oakland, for respondent Bank of America.

STURTEVANT, Justice.

Alberto Puccetti commenced an action against numerous persons, natural and artificial, to quiet title to certain lots located in Oakland. Some defendants appeared and answered, other defendants appeared and answered and filed cross-complaints. The action was tried before the court sitting without a jury. The court made findings of fact in favor of the defendants. Alberto Puccetti appealed from the judgment and brought up typewritten transcripts. After the transcripts were filed, and after some of the briefs had been filed, he died. Later Gemma Puccetti, his widow, was, as administratrix, substituted as plaintiff and appellant. In the interest of clarity and to directly reply to statements in the briefs, we will treat the subjects involved as though the original plaintiff were still alive. Additional facts will be stated as it becomes necessary.

Of the numerous defendants named in the plaintiff's complaint, the rights between the plaintiff and three of those defendants are the sole issues in dispute as shown by the record. We will take up first the controversy between the plaintiff and the defendant Madeline Girola.

Girola Bros. was a corporation. Later it changed its name to Madalay, Inc. It was engaged in selling corporate securities. The record discloses that among others it organized and became the owner

of Continental Seaboard Corporation. Of the last-named corporation Henry Girola was president and was paid a salary of $2,500 per month; Joseph Girola was a director and was paid $1,000 per month; Josephine Girola was assistant secretary and was paid $750 per month. Those several persons caused their salaries to be paid into a fund which was deposited in a bank in the name of Girola Bros. for the benefit of the depositors. On April 29, 1932, the amount due each of the depositors was ascertained and said amounts were assigned to the defendant Madeline Girola. Having received said assignments she cancelled all claims against Girola Bros., whose name had been changed to Madalay, Inc. In consideration of said assignment Madalay, Inc., executed quitclaim deeds to the several lots, the title to which is involved in this action. On November 1, 1933, in action No. 227,406, in which Alberto Puccetti was plaintiff and Girola Bros., a corporation, and numerous other persons natural and artificial, were defendants, a default judgment was entered in the sum of $5,100, together with costs in the sum of $18 and interest from January 2, 1929. On September 22, 1937, an execution was issued and was levied against the title and interest of Henry Girola and Girola Bros., a corporation, in and to the property described in the plaintiff's complaint. The property was sold under execution pursuant to said levy on November 8, 1937, and bid in by Alberto Puccetti. The sheriff's certificate of sale was recorded on November 9, 1937. Later, on December 3, 1938, the sheriff issued his deed. The plaintiff claims under said sheriff's deed. The defendant Madeline Girola claims under said quitclaim deeds.

[1, 2] The plaintiff makes the attack that the quitclaim deeds were made by Madalay, Inc., and did not recite the fact that Girola Bros., Inc., had changed its name to Madalay, Inc. Civ.Code, sec. 1096. However, there is no claim that the change of name was not legally accomplished. It therefore became a matter of public record and the plaintiff had constructive notice thereof long before the sheriff's certificate of sale, dated November 8, 1937, upon which he bases his claim of title. Having such knowledge plaintiff may not claim the benefits of section 1096 of the Civil Code because he was not a bona fide purchaser for value. Beattie v. Crewdson, 124 Cal. 577, 57 P. 463; III Freeman on Executions, 3d Ed., sec. 344. Moreover, it is the settled law of this state that the doctrine of caveat emptor applies to execution sales made upon valid judgments. The purchaser assumes all the risk of defects in the debtor's title, whether he purchases with or without notice. If the judgment debtor had a good title the purchaser got it; if a partial title he got that; or if no title he got nothing. Breeze v. Brooks, 71 Cal. 169, 181, 9 P. 670, 11 P. 885; III Freeman on Executions, 3d Ed., sec. 335.

[3, 4] The plaintiff alleged, and now contends, that the said quitclaim deeds were fraudulent conveyances and were made without any consideration. The most that can be said is that on said issues the evidence was conflicting. The trial court made a finding to the effect that the said quitclaim deeds were not fraudulent conveyances. It also made a finding that the grantor was not insolvent. An examination of the record discloses that both of said findings are sustained by the evidence. Moreover, where the transfer, as here, was made for a valuable consideration the person seeking to set aside the conveyance on the ground of fraudulent intent must establish the participation of the grantee in such fraudulent intent or at least with having knowledge thereof. Civ.Code, sec. 1228; 12 Cal.Jur. p. 1058. In that connection the testimony of Madeline Girola is clear that she had no fraudulent intent and that she had no knowledge of such intent on the part of any member of her family participating in the transaction.

[5] The plaintiff alleged and now contends that, as to him, the said quitclaim deeds were made without consideration and at a time when the grantor was insolvent. Continuing he claims that the findings to the contrary are not supported by the evidence and that, as to him, said deeds are void. As to the material elements there was no conflict. Girola Bros. was a family corporation. All of the stock was owned by a son named Henry. All of the officers were members of the family. Girola Bros. organized Continental Seaboard Corporation. All of the stock was owned by Girola Bros., a corporation. Henry was president, Joseph was a director, and Josephine was assistant secretary. All were paid salaries. The salaries so paid were pooled in a fund in the name of Girola Bros. and in its name the fund was banked. As early as January 2, 1929, Girola Bros. became in-

debted to the plaintiff on a fraudulent sale of shares of corporate stock. That debt was reduced to a judgment on November 1, 1933. On September 22, 1937, execution was issued against the title of Henry Girola and Girola Bros., a corporation, in and to the property in suit. It was recorded October 5, 1937. Under that writ the property was sold to plaintiff. The sheriff's certificate was recorded November 9, 1937, in the office of the recorder of Alameda county. The deeds to Madeline Girola were executed April 29, 1932. At the time the deeds were about to be made Girola Bros. was the owner of the lands in suit. It also held the above-mentioned salary fund amounting to $54,423.72. At that time the salary fund was assigned to Madeline Girola. Immediately thereafter deeds to said land were made to her. In consideration thereof she reassigned to Girola Bros. the balance of said salary fund amounting to over $54,000. That fund the plaintiff claims had been purloined from the funds of Continental Seaboard Corporation. It will suffice to state the evidence does not show such to be the fact. If the plaintiff would make such a claim he should have introduced evidence to prove it. The burden was on him. As the record stands, the title to the fund rested in Girola Bros., a corporation, after said deeds were executed. It owed no other debts so far as the record shows except to its officers. The plaintiff claims that at said time Girola Bros. was insolvent. He quotes the record showing certain executions were returned nulla bona and he argues such facts were evidence of insolvency. But those executions were returned on dates including September, 1934, to July, 1937. They were not evidence of insolvency April 29, 1932, the date the deeds were executed to Madeline Girola. There is no other evidence that Girola Bros. became insolvent April 29, 1932, nor prior thereto.

The trial court made a finding the deeds from Girola Bros. (Madalay, Inc.) were not made with intent to hinder or delay creditors of the grantor. The plaintiff asserts said finding is not sustained by the evidence. The point may not be sustained. As shown above there was no evidence that Girola Bros. was insolvent at the time the deeds were made, nor that it had any creditors except its officers. There was evidence that other persons were asserting certain claims but that evidence was not connected. There was evidence that Continental Seaboard Corporation paid its officers large salaries; but there was evidence the corporations did business amounting to millions of dollars and there was no evidence that the salaries were excessive. There was some evidence of dissatisfaction on the part of holders of the securities issued by the Continental Seaboard Corporation, but there was no evidence connecting such facts with any issue in the instant case which would have supported a finding contrary to the finding now under attack.

From what has been said above it is clear the trial court did not err in rendering a judgment in favor of the defendant Madeline Girola.

As to the Bank of America National Trust and Savings Association, it is likewise clear that the court did not err. That defendant holds a deed of trust executed on October 14, 1929, which was given to secure a loan in the sum of $30,000 and on which $20,000 remained due and payable at the date of the trial. It was stipulated by the parties, and the court found, that the bank's claim is a good and subsisting lien and will remain so regardless of the outcome of said action.

[6] As to the defendant the State Finance Company, a corporation, the record discloses that after Madeline Girola obtained title, Joseph Girola applied to State Finance Company to release certain moneys held by it to secure the payment of obligations incurred by Capital Credit Company, one of the interlocking corporations operated by the Girola family. Without knowledge of any of the facts hereinabove recited, State Finance Company made a loan of $3,500. To secure the repayment of that loan Madeline Girola delivered to said company her promissory note in the sum of $10,000 and executed a mortgage to secure the same. That note and mortgage were executed on August 18, 1937. The sheriff's certificate under which the plaintiff claimed was executed November 8, 1937. Under these facts the plaintiff's claim must yield to the title of the State Finance Company. Fly v. Cline, 49 Cal.App. 414, 423, 193 P. 615; Scott v. Purcell, 7 Blackf., Ind., 66, 39 Am.Dec. 453.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and DOOLING, J. pro tem., concurred.

47 Cal.App.2d 848

CHAPMAN v. AGGELER et al.

Civ. 12968.

District Court of Appeal, Second District, Division 1, California.

Nov. 22, 1941.

Hearing Denied Jan. 19, 1942.

1. Lotteries ⇐21

The statutes defining lottery and creating misdemeanor of drawing lottery do not prohibit possession of slot machines or even of lottery devices, but their net effect is to prescribe punishment for operating or drawing lottery, not for owning or possessing a machine which may be operated as a lottery. Pen.Code, §§ 319, 320.

2. Gaming ⇐68(3)

The statute providing that person having possession of slot machine, which is operated or played by placing or depositing therein coins, checks, etc., is guilty of misdemeanor, does not make it a crime to possess a slot machine which may be operated as a lottery or gaming device. Pen.Code, § 330a.

3. Constitutional law ⇐70(1)
Statutes ⇐241(1)

Statutes, especially penal statutes, must be given strict interpretation and applied as written, and they cannot be extended by judicial interpretation.

4. Statutes ⇐183

Courts may not indulge in mere speculation that legislature meant something other or less than what it said in statute and may not depart from literal construction thereof unless reasonably assured that legislature meant to say something different from what it appears to have said.

5. Gaming ⇐94(1)

To sustain conviction of violating statute denouncing offense of possessing slot machine, which is operated or played by placing coins, checks, etc., therein, or as result of operation of which any merchandise, money, representative or articles of value is won or lost, depending on hazard or chance, it is necessary to charge and prove that accused was in possession or control of a machine or device which not only could be, but actually was, operated as a gaming device in manner described by statute. Pen. Code, § 330a.

6. Gaming ⇐68(3)

The clause, "upon the result of the action of which money or other valuable thing is staked", in statute denouncing offense of possessing slot machine, is not merely descriptive, but a limitation in fact and law on scope of statute, and literally determines that sole purpose thereof is to prohibit gambling by such devices, not to suppress gambling devices and absolutely prohibit possession of any slot machine, though never used for gambling. Pen.Code, § 330a.

See Words and Phrases, Permanent Edition, for all other definitions of "Upon the Result of the Action of Which Money or Other Valuable Thing is Staked".

7. Courts ⇐92

An opinion of Supreme Court of another state, on appeal from conviction of keeping slot machine for gambling purposes, that purpose of statute making ownership or keeping of such machines a criminal offense, without qualification as to purpose of such ownership or keeping, and providing for their seizure and destruction, was not only to suppress use of such gambling devices or keeping thereof for gambling purposes, but also to prohibit ownership or keeping thereof, was "dictum", in absence of language in statute clearly showing that mere ownership of such machines was made an offense without qualification as to purpose thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

8. Statutes ⇐183

When a statute can be given full effect by adhering to its language as written, resort to speculation in construction thereof is improper.

9. Gaming ⇐68(3)

The statute adding merchandise, articles of value, and tokens to "money, checks, credits or other representative of value" set forth in previous statute as stakes prohibited in operation of gambling devices, including slot machines, and prohibiting possession or control of slot machines used as gaming devices, is not superfluous, though construed as inapplicable to possession of slot machines never used for gambling, as it adds something to state law prohibiting gaming. Pen.Code, §§ 330, 330a.

10. Lotteries ⇐3

A slot machine, unloaded with coins or tokens and not in use as gaming device, is

not a "lottery" under state law or city ordinance prohibiting possession of any lottery device. Pen.Code, §§ 319, 320.

See Words and Phrases, Permanent Edition, for all other definitions of "Lottery".

11. Gaming ⇐61

In action to recover vending machines, seized by city police department as potential evidence when plaintiff was arrested and charged with possessing lottery devices, where trial court made no findings on paragraphs of defendant's answer and affirmative defense, alleging that such machines were adapted and intended for use in distributing property and things of value by lot or chance in violation of state lottery laws, that possession thereof constituted violation of municipal code, that machines were also slot machines, operation of which violated certain statutes, and that they were constructed and adapted for use as gaming equipment and not for any beneficial purpose, court erred in finding that plaintiff was not entitled to possession thereof. Pen. Code, §§ 320, 330a.

12. Gaming ⇐61

In action for return of vending machines, seized by city police department, to plaintiff after his acquittal on charge of violating city ordinance prohibiting possession of lottery devices, an order, included in judgment for defendants, that such machines be broken up and destroyed, exceeded superior court's authority, in absence of provision for forfeiture in Penal Code chapter containing section denouncing offense of possessing slot machines used as gambling devices. Pen.Code, §§ 325, 330 et seq., 330a, 677.

13. Gaming ⇐61

The statute authorizing courts to order destruction of machines or devices, possession or control of which is penalized by state laws prohibiting lotteries or gambling, is inapplicable in action for return of vending machines, seized by city police department, to plaintiff after his acquittal on charge of violating city ordinance prohibiting possession of lottery devices, in absence of evidence that such machines were operated as gambling devices, as bare possession or control of slot machines is not penalized by statute. Pen.Code, §§ 330a, 335a.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Claim and delivery action by Abe Chapman against Leo Aggeler, Judge of the Municipal Court of the City of Los Angeles, and others to recover vending machines taken from plaintiff's possession by the police department of such city. Judgment for defendants, and plaintiff appeals.

Reversed and remanded, with instructions.

Hearing denied; CURTIS, J., dissenting.

Clifford Thoms, of Los Angeles, and Robert P. Dockeray, of Burbank, for appellant.

J. H. O'Connor, Co. Counsel, and Ned Marr, Deputy Co. Counsel, both of Los Angeles, for respondent Leo Aggeler, Judge of Municipal Court.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland and Edwin F. Shinn, Deputy City Attys., all of Los Angeles, for respondent Arthur C. Hohmann, Chief of Police.

DESMOND, Justice pro tem.

According to appellant, "This is an appeal from a judgment against appellant, Abe Chapman, in a claim and delivery action for the recovery of approximately 214 vending machines taken from the possession of appellant by the Police Department of the City of Los Angeles on or about the 17th day of November, 1936. Said machines were taken from a private warehouse located at 400 South Boylston Street, Los Angeles, California; were the property of appellant, and at the time of their seizure were not in use and contained no money or merchandise.

"The judgment provides that appellant do not recover possession of said vending machines, nor any sum of money for their detention, and further provides: 'that all of the articles described in said Second Amended Complaint be broken up and destroyed by the defendant, Arthur C. Hohmann, Chief of Police of the City of Los Angeles, so completely as to render them incapable of use for gaming purposes, and file in this Court as a part of the record in this case satisfactory proof of such destruction.'"

We judge from respondents' brief that the only exception they take to the foregoing statement relates to the description of the machines in question as "vending machines". That term they consider in the highest degree euphemistic, contending that the machines are in fact gambling machines, properly in the custody of the po-

lice, awaiting execution of the death sentence imposed by the order of the trial judge.

The machines were seized by the police department (whether with or without a search warrant not appearing) as potential evidence when the appellant was arrested and charged with violation of section 43.07 of the Los Angeles Municipal Code (Ordinance No. 77000 of the city of Los Angeles). This section reads as follows: "No person shall have in his possession any lottery device." A "Lottery device" is defined by section 43.00 of the Municipal Code as follows: "'*Lottery device*' shall mean any tool, brush, punch, stamp, die, cut, instrument or device used or understood or intended to be used to contrive, prepare, set up, propose, draw, print, stamp, mark, write or distribute any lottery or lottery ticket or by which the outcome, results or bets of any lottery or lottery drawing are prepared, drawn, printed, stamped, marked or written."

Upon his trial before the Honorable Leo Aggeler, Judge of the Municipal Court of the City of Los Angeles, the defendant, appellant here, was acquitted of the charge of violating section 43.07, but failed to secure an order, requested from the judge, for restoration of the personal property seized by the police department. Thereafter appellant brought this action in the superior court of Los Angeles county, seeking the return of said property. The adverse judgment there rendered, appellant asserts, constitutes an unlawful seizure and forfeiture of property, and he urges that it be reversed upon that ground. It is also claimed that the findings of fact and conclusions of law are not supported by the pleadings or by the evidence, and further, that the court was without jurisdiction to order the destruction of the property seized.

[1, 2] Among the various conclusions of law reached by the trial court is the following: "The possession of the articles described * * * is unlawful under the provisions of Sections 319, 320 and 330a of the Penal Code of the State of California." Section 319 defines a lottery in the following language:

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known."

Section 320 reads as follows:

"*Punishment for * * * drawing lottery.* Every person who contrives, prepares, sets up, proposes, or draws any lottery, is guilty of a misdemeanor."

We perceive nothing in either of these statutes that prohibits possession of slot machines or even of lottery devices. The net effect of the two is to prescribe punishment for the man who operates or draws a lottery, not for the man who owns or possesses a machine which may be operated as a lottery. Nor is there in section 330a any language that makes it a crime to possess a slot machine which may be operated as a lottery or as a gaming device. Reduced to its essentials, section 330a reads as follows: "Every person, who has in his possession or under his control, * * * or who permits to be placed, maintained or kept, in any room, * * * owned, leased or occupied by him, * * * any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing *is* staked or hazarded, and which *is* operated, or played, by placing or depositing therein any coins, checks, slugs, * * * or as a result of the operation of which any merchandise, money, representative or articles of value, * * * is won or lost,* * * when the result of action or operation of such machine, * * * is dependent upon hazard or chance, * * * is guilty of a misdemeanor." (Italics added.)

[3-6] The offense here denounced is the possession of a slot machine which "is operated, or played", not which *may* be operated or played. In this important particular our statute differs materially from section 982, Penal Law, McKinney's Consol. Laws of New York, c. 40, which the court, in People v. Kay, 38 Cal.App.2d, Supp., 759, at page 766, 102 P.2d 1110, at page 1113, understood to be "substantially the same as section 330a of the Penal Code." The difference is made clear by a reference to the opinion in People v. Brown, 151 Misc. 712, 273 N.Y.S. 560 (cited in the Kay case), where the court spoke of section 982 of the Penal Laws, supra, as follows: "This section applies to possession of slot machines, and makes it a misdemeanor to keep or maintain any machine into which *may be inserted* a piece of money or oth-

er object, and from which as a result *may be issued,* 'Any piece or pieces of money or any check or memorandum calling for any money.'" (Italics added.) It is noteworthy, too, that the court there relied upon proof that the slot machine was in fact actually operated as a gambling device. There is no California statute that prohibits, as does section 43.07 of the Los Angeles Municipal Code, the possession of a lottery device. Neither is the manufacture of slot machines within the state prohibited, as it is by section 982 of the Penal Code of New York, nor the sale of gambling implements or devices, as it is by section 970-a of the same code. The fact that our lawmakers have seen fit not to legislate upon these subjects, which are altogether within their province, serves to remind the court that in passing upon laws relating to gambling nothing can be taken for granted. It is still lawful in this state to play certain card games for money or valuable stakes, and pari-mutuel gambling on horse-races by those in attendance has recently been made lawful by our lawmakers. When legislators speak through statutes, their enactments must be given a strict interpretation. The law must be applied as it is written. It cannot be extended by judicial interpretation. The opinion in Bakersfield, etc., Co. v. J. K. McAlpine, etc., Co., 26 Cal.App.2d 444, at page 448, 79 P.2d 410, at page 413, points out that courts may not "indulge in mere speculations to the effect that the legislature meant something other or less than what it said. They may not depart from the literal construction of the statute unless they can be reasonably assured that the legislature meant to say something different from what it appears to have said." Observing the strictness with which the courts of California have uniformly applied the provisions of the law relative to gambling and gaming devices (see Ex Parte Williams, 7 Cal.Unrep. 301, 87 P. 565; In re Clark, 54 Cal.App. 507, 202 P. 50; People v. Carroll, 80 Cal. 153, 22 P. 129), and, noticing the omission from section 330a of important language which in other jurisdictions has been employed by legislative bodies, we cannot accept the reasoning of the court in the Kay case, supra, as controlling. In the Clark case cited above the court used this language (54 Cal.App. at page 509, 202 P. at page 50): "In order to constitute an offense under section 330, it is essential that it be alleged and proved that the game, whether described under any of the names specifically given in the section, or under the general term of 'banking or percentage game,' shall have been played 'for money, checks, credit, or other representative of value.' The purpose of the law is to prohibit games of the kind mentioned and described at which money or property, or the representative thereof, is lost or won. It cannot be assumed that it is impossible that any of the games specifically mentioned may not be played for amusement only and without the incident of money or property being wagered or bet thereat. The tenor of all the decisions that our attention has been referred to, or that we have been able to discover, indicates that this construction should be given to the statute. In re Capanna [45 Cal.App. 501], 187 P. 1077; People v. Sam Lung, 70 Cal. 515, 11 P. 673; People v. Carroll, 80 Cal. [153], 154, 22 P. 129; People v. Ah Own, 85 Cal. 580, 24 P. 780." See, also, People v. Baldaty, 139 Cal.App., Supp., 791, 795, 30 P.2d 634. Following the reasoning of the Clark case and the cited authorities, it is apparent that to sustain a conviction of violating section 330a, it is necessary to charge and to prove that the person accused was in possession or control of a machine or device which not only could be but actually was operated as a gaming device in the manner described in the statute. The full force of that decision as exemplifying the rule that statutes, and especially penal statutes, must be strictly considered and construed, strikes us when we consider that (quoting from the opinion), "The complaint in the gaming case in its charging part declared as follows: 'Said defendant did then and there willfully and unlawfully open up and conduct a gambling game, to wit, stud horse poker, in the town of Armona, county of Kings, state of California, in violation of section 330 of the Penal Code of the State of California.'" In re Clark, supra, 54 Cal.App. at page 508, 202 P. at page 50. So insistent was the court that the words of the statute be adhered to literally, in charging an offense, that it refused to accept "in violation of section 330" as a substitute for the express language of the section "for money, checks, credit, or other representative of value", although one cannot read the section without realizing that the statute would not be violated unless the specified games were conducted for money, checks, credit or other representative of value. As may be observed in the closing words of the passage above quoted, and in the citation of authorities, the court was not adopting any

new policy but on the contrary was following the law as recognized and established in this state by a long line of decisions. This, of course, runs counter to the rationale of the Kay case, supra, where the court decided, in effect, that the clause "upon the result of the action of which money or other valuable thing *is staked*" was merely descriptive and therefore properly applicable even to a machine which never had been and might never be used for gambling. (Italics added.) In our judgment the clause in question, as well as other similar clauses in the statute employing the indicative mode of various verbs, instead of the potential mode, which might have been used had the legislature so intended, must be given an altogether different interpretation and effect than that adopted in the Kay case. We believe that the statute in its application requires no strained construction; that since it uses the indicative mode it should be so applied. That this is a correct conclusion appears more clearly when we transpose the clauses of section 330a, a permissible procedure, since the meaning is not changed, and also desirable as an aid to interpretation. With deletions indicated for the same purpose, we find the statute reads as follows: "Every person, who has in his possession or under his control, * * * any slot or card machine, contrivance, appliance or mechanical device, * * * and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, * * * upon the result of action of which any money or other valuable thing is staked or hazarded, * * * is guilty of a misdemeanor * * *."

Instead of being descriptive, the clause above mentioned is in our opinion a limitation in fact and in law upon the scope of the section and literally determines what in our judgment is the sole purpose of the law, viz., prohibition of gambling by such devices and not, as the Kay case holds, "the suppression of gambling devices" and the "absolute prohibition of 'any slot or card machine'." That conclusion was based upon the reasoning of two cases cited by the court: Bobel v. People, 173 Ill. 19, 50 N. E. 322, 64 Am.St.Rep. 64, and Hurvich v. State, 230 Ala. 578, 162 So. 362. Neither case is in our opinion of any assistance in interpreting section 330a of the Penal Code of California. The Alabama decision makes special reference to the statutes of that state which made comprehensive provision for the forfeiture and destruction of gambling devices. It does not appear that the statutes of Alabama and California are similar, but, on the contrary, a substantial difference apparently exists.

[7-9] The Illinois case we find particularly inapplicable, for in that case (and not in this), there was evidence admitted to prove that the slot machine "was in fact, at the time and place mentioned, used for gambling purposes". [173 Ill. 19, 50 N.E. 324, 64 Am.St.Rep. 64.] The defendant, Adam Bobel, upon that evidence was convicted of keeping a slot machine for gambling purposes. The contention on appeal had to do with the sufficiency of the indictment, the constitutionality of the act upon which it was based, and the admissibility of evidence. That portion of the opinion relied upon by the court in the Kay case is pure dictum, reading as follows: "We are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices, or the keeping of them for gambling purposes, but also to prohibit the ownership or the keeping of them, * * * otherwise, why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping, and why provide for their seizure and destruction?" This is begging the question. It is not clear from the language of the Illinois statute under consideration that mere ownership was made an offense without qualification as to the purpose of such ownership. The Illinois court undertook to decide the issue by a rhetorical repetition of the very question involved, a process which to us is unconvincing and which is quite unnecessary when a statute under consideration can be given full effect by adhering to its language as written. In such a situation resort to speculation is worse than useless. The court, in People v. Kay, supra, expressed the opinion that unless section 330a is given the interpretation there applied it must be considered superfluous. Arguing that it is not, the statement is made at page 764 of 38 Cal.App.2d, Supp., at page 1112 of 102 P.2d, that "Section 330 of the Penal Code was ineffectual so far as the operation of a slot machine for anything other than money, checks, credits or other representative of value was concerned; likewise it did not prohibit the possession of these devices". Section 330a enumerates "merchandise, money, representative or articles of value, checks, or tokens" as the stakes prohibited in the operation of

gambling devices, including slot machines. These items represent certain additions to the list set forth in section 330 and to that extent at least section 330a is not superfluous. Nor can it be said to be superfluous when it makes unlawful the possession or control of a slot machine, naming it as such, when used as a gaming device. So applied its permits conviction of a guilty person and adds something to the law of California directed at the prohibition of gaming. But, as the courts have apprehended in the cases herein cited, even the games of chance mentioned in section 330 can be played lawfully for fun or for marbles; it is only when they are played for money or thing of value or representative thereof that they run afoul of the law. The same is true of roulette wheels and many other devices which can be purchased without secrecy or the slightest hindrance in department and toy stores throughout the state.

It must be equally true of slot machines, a fact which Judge Aggeler recognized when he found this appellant not guilty of possessing a lottery. He, apparently, did not believe that the purpose behind the adoption of the Los Angeles ordinance prohibiting possession of a lottery device, was suppression or prohibition of slot machines, but rather the suppression and prohibition of gaming by means of such machines. In our opinion any question as to the intended purpose and evident meaning of section 330a is finally and definitely resolved in favor of the view which we express by a reference to the title of the act: "An act to add a new section to the Penal Code of the State of California, to be numbered section 330a, *relating to gambling by the use of slot machines* or card dice, or other dice having more than six faces or bases each." Stats. 1911, p. 951. (Italics added.)

Appellant calls attention to the fact that in the present case no evidence was adduced to prove that any of the machines seized by the police were ever used as gambling machines; that they were seized not while being operated as gambling devices, but while in his shop for storage or repair; and further that they could be used, according to the wish of the person holding possession, either for gambling or for vending merchandise. Certain attachments or mechanical devices made it possible to use the machines in either way. So far as the record discloses, appellant was in the business not of operating any of the machines but of renting them.

At the trial it appeared that on several occasions he had rented some of his machines to moving picture studios as "props"; also that he rented machines to individuals or firms other than studios. He did not undertake to exercise supervision or control over the operation of the machines after they left his hands.

[10] The trial judge in paragraph VIII of his findings determined, "That the allegations contained in paragraph III of defendant Hohmann's second answer and first affirmative defense are true; that said machines had been leased as 'props' in the making of moving pictures to moving picture studios by the plaintiff; that forty-five (45) of said machines were equipped with vending devices and one hundred and sixty-eight (168) of said machines were not so equipped; that said machines could be set so that they could be used for vending merchandise exclusively". The allegations of said paragraph III are as follows: "That at the time of the arrest of the said Abe Chapman, as aforesaid, the Police Department of the said City seized at said place a number of gaming devices and lottery devices, which said gaming devices and lottery devices are so constructed that upon the insertion of a coin in said machines a lever is released or unlocked. Upon pulling said lever and then releasing the same a package of mints, gum or other confection is automatically released from said machine, and, in addition thereto, cylinders in said machines are set in motion, said cylinders revolving independently of each other. In addition to the package of mints, gum or other confection which the operator of such machine receives, as aforesaid, the machine delivers at intervals certain metal slugs, chips or tokens in varying numbers, depending upon the chance action of said machine."

It will be seen that this paragraph describes the working of a slot machine when it is put in operation as a gaming device, but as we have stated, until or unless it is so used it is not proscribed by the law. Or, to put it another way, the machine, unloaded with coins or tokens, is no more a lottery under state law, sections 319 and 320, Penal Code, than it was found to be under the Los Angeles ordinance; that is, not at all. Unloaded and not in use as a gaming

device, it is inoffensive also under section 330a.

[11] This leads us to comment on the fact that the trial court in this action failed to make any finding on paragraphs IV and V of the answer and affirmative defense, which we here reproduce:

"IV. That said machines are adapted for use and intended to be used for the purpose of distributing, for a consideration, property and things of value by lot or chance, in violation of the lottery laws of the State of California, and that the possession of such machines was at the time of the seizure thereof, at all times since has been and now is unlawful and constitutes a violation of the provisions of Section 43.07 of the Los Angeles Municipal Code. * * *

"V. That said machines are also slot machines, the operation of which is unlawful and in violation of Section 330a of the Penal Code of the State of California and the operation of said machines also constitutes a violation of Section 320 of the said Penal Code."

Of especial significance was the omission of any finding upon paragraph VIII of the answer and affirmative defense, reading as follows:

"VIII. That said machines and devices were constructed and adapted for use as gaming equipment for the purpose of distributing things of value by lot or chance to persons who pay for the privilege of operating said machines, and are not adapted for use for any beneficial purpose. The other articles seized at said time and place are capable of use only for the purpose of constructing or repairing machines adapted to the use aforesaid. That said machines, and the said parts thereof, are from their nature and the purpose for which adapted to use incapable of being used for any lawful or beneficial purpose and are not property the ownership of which will be protected by the courts of this state."

These omissions in themselves argue for the view which we take that error arose when the court found that appellant was not entitled to possession of the property seized, and entered judgment accordingly.

[12, 13] So far as that judgment relates to disposition of the machines, there are reasons furnished by the provisions of substantive law which cannot be ignored, and which convince us that the court, when it issued its order for destruction of the seized property, exceeded its authority. We first call attention to the fact that this appellant was convicted of no crime, and then cite the restrictive rule which obtains even when a defendant is found guilty. It is found in section 677 of the Penal Code providing that "No conviction of any person for crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law". In all of chapter X of the Penal Code, which is entitled "Gaming", and where section 330a appears, there was, prior to this year, no provision for forfeiture. This can hardly be considered accidental since the preceding chapter dealing with lotteries contains a provision for forfeiture in section 325, an instance where forfeiture is "expressly imposed by law". But even there, in order to make forfeiture effective, an action must be brought or an information filed "by the attorney-general, or by any district attorney, in the name of the state". And by this procedure no lottery or gambling machine may be taken by the state, but only the "moneys and property, offered for sale or distribution * * *". It may be urged that destruction might be authorized by section 335a, effective September 13, 1941, giving courts the power, upon posting notices and pursuant to the procedure there provided, to order the destruction of machines or devices, "the *possession or control of which is penalized* by the laws of this State prohibiting lotteries or gambling * * *". (Italics added.)

Examining the state laws relating to lotteries and gambling, we find none which penalize the possession of a lottery device as such. If it be contended that a slot machine constitutes a lottery device, it would be necessary, as we have indicated, in order to convict a person of unlawful possession or control, to prove that the machine in question was operated as a gambling machine, and in the instant case no such proof was offered or even attempted. The bare *possession or control* of slot machines is not penalized by section 330a, hence even the new section, if in effect, would be inapplicable in the circumstances here presented. In short, there is no statute in California that has been called to our attention or that we have been able to find that vests in the court authority to declare a forfeiture in a case such as we are considering. In the absence of express statutory authority, the order requiring the destruction of the property in question is without legal sanction and void.

It follows from this that the portion of the judgment, by which the court ordered the seized property to be destroyed and a record entry made of its destruction, cannot be sustained.

Judgment reversed, without costs to either party, and the cause remanded with instructions that judgment be entered for plaintiff entitling him to the return, forthwith, of the seized property.

YORK, P. J., and DORAN, J., concurred.



ELLIOTT et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 13243.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1941.

Hearing Granted Jan. 15, 1942.

1. Workmen's compensation ⇐652

Those acts as are necessary to the life, comfort and convenience of an employee while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in performance thereof is compensable as "arising out of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out Of Employment".

2. Workmen's compensation ⇐11

The law under which the Industrial Accident Commission functions in workmen's compensation proceedings is founded on sound public policy and with objective of protecting, in proper cases, an employee and his dependents against economic insecurity.

3. Workmen's compensation ⇐52

The law favors payment of compensation for industrial accidents.

4. Workmen's compensation ⇐609

The law contemplates payment of workmen's compensation only when the injury sustained is an ordinary or natural incident of the employment.

* Subsequent opinion 131 P.2d 521.

5. Workmen's compensation ⇐652

Injuries arising from such acts as are necessary to the welfare, comfort and convenience of an employee while at work are compensable when the acts may be recognized as dangers that may be necessarily contemplated in the course of employment and therefore are inevitable incidents of such employment, and such injuries are classed as acts "resulting from employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting From Employment".

6. Workmen's compensation ⇐622

Where employee while at work stated to a fellow worker that employee did not feel well and evidence warranted finding that employee's indisposition was either an aftermath of recently suffered attack of influenza or an existing acute cough, and at suggestion of the fellow worker, the employee drank from a bottle labeled "Muscatel Wine" which fellow worker had previously found in employer's carpenter shop and which he believed to contain wine, the employee's death resulting from drinking contents of the bottle which in fact contained carbon tetrachloride was not compensable as "arising out of employment".

Proceeding for writ of review by Mabel May Elliott and others, to annul an award of the Industrial Accident Commission denying compensation for the death of Robert Andrew Elliott, employee, who was employed by the Globe Grain & Milling Company.

Award affirmed.

James A. Walker, of Salinas, and Joseph Hansen and Arthur G. Baker, both of Los Angeles, for petitioners.

Everett A. Corten and J. Gould, both of San Francisco, for respondent Commission.

WHITE, Justice.

The applicants for a writ of review herein are seeking annulment of an award of the Industrial Accident Commission denying to them a death benefit by reason of the death of Robert Andrew Elliott, husband of petitioner Mabel May Elliott and father of the remaining petitioners, and which death, according to the contention of petitioners, arose out of and in the course of decedent's employment with Globe Grain & Milling Company.

In the main, the facts are undisputed, and as revealed by the record, are that decedent was employed as an electrician and millwright by respondent milling company. He reported for work on the morning of February 17, 1940, about 7 o'clock, feeling somewhat ill. As to the cause and nature of his illness there is some conflict. In a letter written by Dr. I. A. Munk, who attended Mr. Elliott during his last illness, and which letter was addressed to the attorney for petitioners and appears in the record, it is stated that in obtaining a history of the case Dr. Munk was informed by decedent that the latter had "inhaled Ves-Spray, a weevil insecticide, at 8 o'clock a. m. February 17, 1940, while at work as electrician cleaning motors. * * At 9 o'clock of the same day he took sick with nausea and vomiting." Opposed to the foregoing as being the cause of decedent's indisposition there appears in the record testimony of petitioner Mabel May Elliott that on the morning in question her husband was suffering from a cough and cold; and there is also the testimony of Peter J. Fordahl, a fellow employee, that on the morning of February 17, Mr. Elliott informed him that he was not feeling very well, and in response to a question as to what Mr. Elliott said to the witness in connection with the state of his health, Mr. Fordahl testified: "He says, 'I am not feeling well.' I said, 'What seems to be the matter?' He said, 'I think it is after the flu; I had a slight attack of the flue some time ago and I think that's the effect of it,' were the very words he used."

From the record it appears without contradiction that on arriving at work around the hour of 7 o'clock, Mr. Elliott informed his coemployee Fordahl that he was not feeling well, whereupon Mr. Fordahl asked the decedent if he thought a drink of wine would make him feel any better. Receiving an affirmative reply, Mr. Fordahl went to his clothes locker where he secured a quart bottle marked "Muscatel wine", but which actually contained carbon tetrachloride. This bottle he handed to Mr. Elliott; the latter swallowed some of the contents, and as a consequence died two days later.

Elliott's fellow employee, Mr. Fordahl, testified that he had found the bottle, covered with a sack, in the employer's carpenter shop about two weeks prior to February 17, 1940, and thinking it was wine, had placed it in his locker, where it remained until he tendered it to Mr. Elliott. The evidence also indicates that the employer kept some large drums of carbon tetrachloride on the premises for use in killing weevils and moths. It should, however, be noted that the chemical was neither kept nor used in the carpenter shop. Notwithstanding petitioners' contention that the contents of the bottle were taken from one of the employer's carbon tetrachloride drums, there is no direct evidence that such was the case, nor is there any evidence that the employer knew of the existence of this bottle. At the hearing before the commission it was testified that the employer had in force a strict rule against keeping or drinking liquor on the premises, and that the violation of this rule by any employee would result in his dismissal.

[1] At the time decedent consumed the poisonous substance under the erroneous belief that it was wine, he was in the course of his employment, having reported for work and later having gone with a fellow employee to the employer's stockyards, at which place he became so ill that he was unable to work and laid down to rest. However, it is contended, by respondent commission that the death of the employee did not arise out of the employment. There are cases which more or less directly bear upon the question here presented. In Archibald v. Ott, 77 W.Va. 448, 87 S.E. 791, 792, L.R.A.1916D, 1013, the rule is stated thus: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of the work. * * *"

Concrete examples of cases recognized as coming within the rule are narrated in Whiting-Mead Commercial Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518. In the case just cited the facts were that while at work on one of the employer's jobs the employee ran a nail into the palm of his hand, but the wound was not so severe as to cause him to cease his work, although the hand had to be bandaged. Twice during the day, once at noon and once at 3 o'clock, the bandage

was soaked with turpentine by an agent of the company in an endeavor to alleviate the pain caused by the nail wound. Soon after the second application of the turpentine the employee temporarily ceased his labor and struck a match for the purpose of lighting a cigarette. The saturated bandage was ignited by the match and the hand was seriously burned. Compensation was allowed by the commission and such award was affirmed upon review.

[2-5] In approaching a consideration of the facts presented to us in the instant proceeding, we are not unmindful that the law under which respondent commission functions in these cases is founded upon sound public policy and with the objective of protecting, in proper cases, a workman and his dependents against economic insecurity (Moquin v. Industrial Acc. Comm., 33 Cal. App.2d 511, 92 P.2d 413); neither do we overlook the fact that the law favors the payment of compensation for industrial accidents. However, the law contemplates payment of compensation only when the injury sustained is an ordinary or natural incident of the employment. The illness from which the employee suffered in the instant case was not occasioned by or through his employment. The record contains evidence warranting a finding that the employee's indisposition was either an aftermath of a recently suffered attack of influenza or an existing acute cough. Injuries arising from such acts as are necessary to the welfare, comfort and convenience of the employee while at work are compensable when such acts may be recognized as dangers that may be necessarily contemplated in the course of employment and therefore are inevitable incidents of such employment. Injuries thus arising are classed as acts resulting from the employment. That a man will drink water while at his work; warm himself when cold; smoke cigarettes in the absence of a rule prohibiting his doing so; will stop to rest when tired or exhausted, are recognized as manifestations of ordinary human behavior. True, in doing these things he ministers, strictly speaking, unto himself, but these acts, in a remote sense at least, contribute to the furtherance of his work.

[6] In the case before us, however, the conduct of the employee was not such as could be said to even remotely arise out of his employment. The illness from which he suffered was not attributable to his employment, nor did it arise by reason of such employment. If his illness was not an ordinary and natural incident of his employment, then it necessarily follows that his attempt to minister to his illness by drinking what he believed to be wine was not ordinarily and naturally incidental to his employment. Here the employer had done nothing to authorize or induce the decedent to take the poison on the supposition it was wine or something which the employee needed or which would be beneficial to the latter. On the contrary, it is revealed by the record that decedent's mistake was the result of his own voluntary action brought about through the suggestion of another employee. And the substance offered by the fellow employee, and which the decedent mistakenly believed to be wine, was not left on the premises by the employer but was obtained from the locker of a fellow employee. The situation here is not comparable to cases where the employee does something inevitably or naturally connected with his employment and an incident thereto, such as mistakenly drinking foul water or some poisonous liquid placed at a point where one might reasonably mistake such deleterious substance for drinking water. As was said by the court in the case of O'Neil v. Carley Heater Co., 218 N.Y. 414, 113 N.E. 406, 407, L.R.A. 1917A, 349, "It seems to us that the case is not different than it would have been if the decedent, voluntarily acting upon the advice of a stranger, had visited a physician who injured him by malpractice, or had sought a dispenser of prescriptions who gave him poison instead of helpful medicine, and certainly it could not be said that such an occurrence would have arisen out of his employment within the meaning of the statute."

In view of the foregoing conclusion at which we have arrived, it becomes unnecessary to consider petitioners' claim that the findings made by the commission are inadequate, insufficient and amount only to conclusions of law. Under the factual background presented by the proceeding now before us, the sufficiency of the findings must be upheld.

The award is affirmed.

YORK, P. J., and DORAN, J., concurred.

HUTCHINSON v. HUTCHINSON.

Civ. 12684.

District Court of Appeal, Second District, Division 2, California.

Nov. 24, 1941.

Rehearing Denied Dec. 17, 1941.

Hearing Denied Jan. 21, 1942.

1. Contracts ⇐101(1), 144

The legality of a contract and its interpretation must be determined by the law of the place where it was made. Civ.Code, § 1646.

2. Contracts ⇐101(1)

If a contract is legal in the state where it was made, it will be enforced in another state unless the contract is contrary to the strong public policy of the forum. Civ.Code, § 1646.

3. Husband and wife ⇐278(1), 279(1)
Trusts ⇐2, 113

Where declaration of trust and property settlement agreement for benefit of wife were made in Illinois by citizens of Illinois, and it did not appear that they were to be performed elsewhere, the law of Illinois must control as to their validity and interpretation. Civ.Code, § 1646.

4. Evidence ⇐384

The "parol evidence rule" is a rule of substantive law and not of evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

5. Trusts ⇐113

Where declaration of trust and property settlement agreement for benefit of wife were made in Illinois by citizens of Illinois, and it did not appear that they were to be performed elsewhere, whether parol evidence would be admitted to vary or contradict the written instruments would be determined by the law of Illinois. Civ.Code, § 1646.

6. Evidence ⇐450(5)

Where trust agreement and property settlement for benefit of wife provided that property might be sold by trustee for not less than $300,000 or leased for not less than $1,000 monthly, unless wife consented, and that until then husband would pay $300 monthly for support as well as costs of lighting, heating, taxes, etc., and instrument transferring stock to enable such payments to be made provided that in any event stock should be returned to husband five years from April 9, 1929, the instruments were not ambiguous, and parol evidence could not be received to show that parties contemplated that the property should be sold not later than April 8, 1934, or that wife had any obligation either to sell or to rent.

7. Husband and wife ⇐279(1)
Trusts ⇐117

Where property settlement agreement and trust for benefit of wife provided that property might be sold by trustee for not less than $300,000 or leased for not less than $1,000 monthly, unless wife consented, and that until then husband would pay $300 monthly for support as well as costs of lighting, heating, taxes, etc., and instrument transferring stock to enable such payments to be made provided that in any event stock should be returned to husband five years from April 9, 1929, the time designated for the return of the stock did not control the other written documents and impose duty upon wife to sell or rent property within such time.

8. Evidence ⇐448, 458

It is the duty of the trial judge to determine in the first instance before receiving parol evidence which would vary or contradict the writing which is the basis of the action, whether or not the contract is ambiguous, and if it is not ambiguous, so as to require evidence to assist in the interpretation of its terms, then the surrounding circumstances may not be shown.

9. Compounding offenses ⇐2

In Illinois the weight of authority is followed in holding that where no criminal proceedings are pending, the actual commission of the crime alleged to have been compounded must be shown.

10. Contracts ⇐95(3, 5)

It is the rule in Illinois that mere threats of imprisonment for which there is no ground do not constitute "duress" since the person threatened could not be put in fear thereby, nor do threats of criminal prosecution constitute duress where neither warrant has been issued nor proceeding commenced.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress".

11. Contracts ⇐95(1)

In Illinois a contract may not be avoided for "duress, menace or coercion" unless

it is of a character sufficient to overcome completely the will of the party who seeks to avoid the contract by way of defense or rescission.

12. Contracts ⇐128(1)

Trust instrument and property settlement agreement for benefit of wife executed in Illinois by Illinois citizens could not be set aside as invalid on ground that they compounded a felony where no criminal proceedings were pending and no actual offense was proved, nor could such instruments be set aside on ground of "duress" on proof of threats by wife to prosecute because of alleged offense.

13. Courts ⇐8

The fact that the law in one state may differ from the law of another, whether it be in the enforcement of rights, the creation of rights or the validity of contracts is not of itself any reason for refusing to enforce contracts valid in the state where they are made.

14. Courts ⇐8

Valid contracts made in a sister state must be enforced not only because of comity, but because of the full faith and credit and due process clauses of the Constitution.

15. States ⇐4

Local public policy cannot transcend the limitations imposed by the Federal Constitution.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Mattie Dean Hutchinson against Samuel S. Hutchinson for moneys allegedly due under property settlement agreement. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Hearing denied; CARTER, J., dissenting.

Victor Ford Collins, of Los Angeles, for appellant.

Thurlow T. Taft, Richard K. Gandy and Robert Cockins, all of Santa Monica, for respondent.

HANSON, Justice pro tem.

This appeal by the former wife of the defendant involves a question of the construction of a declaration of trust, a property settlement agreement and a further question whether these instruments are illegal because of want of a legal consideration or unenforceable because of menace, duress and coercion alleged to have been practiced upon the husband by the wife before their divorce.

The controversy was initiated by the wife, who sought judgment for $76,862 which she averred had accrued to her since June, 1934, under the terms of the property settlement agreement. The trial court, over objection of the wife, received evidence to sustain the husband's claim that even though the declaration of trust or property settlement agreement provides otherwise, the parties intended that the home should be sold by the wife within a reasonable time after it was placed in trust, and since it was not sold the husband was not to be liable for the cost of its maintenance and other items which accrued subsequent to June 1, 1934. Additionally, the trial court found that the consideration for the two instruments was the compounding of a felony, and that the instruments had been obtained by the wife through menace, duress and coercion.

We think the evidence set forth in 290 pages of the transcript was largely inadmissible under the parol evidence rule, and that there is no competent evidence to sustain any of the findings in favor of the former husband.

The record discloses that plaintiff and defendant were married in Chicago on November 6, 1893, and were there divorced thirty-five years later. At the time of the marriage the parties had no property and the husband was then earning $15 per week; but by the year 1928, when the instruments herein involved were executed, he had amassed a considerable fortune, largely in the film business. At the time he, his wife and two children (one since deceased) lived in a 25-room house which the parties had built on Sheridan Way in Chicago. Its pretentiousness is perhaps somewhat indicated by the fact that in 1928 both parties hereto agreed it should not be sold for less than $300,000 nor rented for less than $1,000 per month. In 1928 the parties separated, but before the actual separation took place the husband conveyed the Chicago home to the Northern Trust Company of Chicago in trust for the wife for life. By the terms of the declaration of trust, dated February 29, 1928, signed by the trustee, the wife, as beneficiary, and the husband, as settlor, it was provided that while the trustee might sell or lease the home during the first year of the trust only upon the written consent of the wife, it

might thereafter either sell or lease it without her consent, provided it was sold for more than $300,000 or leased for at least $1,000 per month; with a further proviso that these figures might be reduced with the written consent of the wife. No sale was ever made, and it was not until 1938 that the property was leased, and then at a rental of $200 per month.

The declaration of trust recited that the wife, in consideration of the provision therein made for her, released to the husband all her right, title and interest in and to twelve separate parcels of property owned by the husband. Coincident with the execution of the declaration of trust, and as a part of that transaction, the husband and wife executed a separate property settlement agreement. In the property settlement agreement it was recited that the husband recognized his obligation to provide adequately for his wife's support, and that until the property conveyed and transferred by him to the trustee should become income bearing she would be without means of support; and hence he agreed that until the home should be rented, and during all periods thereafter while it should be unrented, he would not only pay the wife $300 per month for her maintenance and support but would also defray monthly all costs of lighting, heating, telephone and operating expenses "of said premises, *upon the present basis*", and additionally he would pay, while the premises were unsold or unrented, all taxes, insurance premiums and reasonable charges for maintenance and repairs.

On April 8, 1929, the husband, in order further to secure his wife in the payments to be made by him under the terms of the property settlement agreement, deposited with the First Trust and Savings Bank of Chicago three hundred and fifty shares of the common capital stock of The Celotex Company, to be held and disposed of by the bank as set forth in a written agreement signed by the husband and the bank. This written agreement quoted pertinent paragraphs from the property settlement agreement and directed the bank to pay from any funds in its hands defendant's former wife $350 per month so long as the home was not sold, but in no event beyond five years from April 9, 1929, at which time if no sale of the home had been made, the stock was to be returned to him.

In December, 1931, the wife, who was then living in Chicago, as she is at this time, caused a suit to be instituted here against her former husband to recover amounts she claimed at that time were due to her under the provisions of the property settlement agreement. In his answer defendant alleged that the amounts were not due because the wife had refused offers in excess of $300,000 for a sale of the home and offers in excess of $1,000 per month for the rent thereof. No claim was made in the answer that the instruments sued upon had been obtained by reason of the compounding of a felony or because of menace, duress or coercion. The action was dismissed before it came to trial.

Upon the trial of the instant action defendant testified that when he was sued by his former wife in 1931 he told his then counsel, before they prepared his answer to that suit, the facts as to the compounding of a felony and the duress upon which he here relies. Whether his then counsel were of the opinion that the instruments were Illinois contracts and so not subject to such defenses, we do not know. However, it is plain from the way in which they answered the suit that they interpreted the contracts as we do.

In the instant case counsel for the wife objected to questions directed to the ex-husband which sought to elicit conversations and oral agreements between the parties hereto to the effect that she had an obligation to sell the home at a lesser sum than $300,000 and to rent it for a lesser sum than $1,000 per month. In overruling the objection the trial court said: "Well, there is no instrument at present; this is the transaction before anything was signed." A little later, to a question directed to the ex-husband as to whether anything had been said between the husband and wife about selling the property, objection was made: "That certainly is varying the terms of a written instrument, as I understand it. When People have reduced their contracts or agreements to writing. * * * The Court: It has not been signed yet, according to the testimony." After further argument by counsel for the wife the court said: "The written agreement takes the place of all that precedes it. The exception to that is where there is uncertainty or ambiguity in a contract or something of that sort or mutual mistake, or duress, you can always show all the surrounding circumstances under that allegation of duress because a man can put anything he wants in

a contract and force someone else to sign it, and still it would be invalid. So I will overrule the objection."

The only evidence bearing on the claim that the husband had executed the instruments as a result of the compounding of a felony, and because of duress, menace and coercion practiced upon him by the wife was the testimony of the husband, categorically denied by the wife. He testified that on a certain evening, while he and his wife were living together in the home, she told him she had made an appointment for him to go the following morning to the office of her attorney to discuss a property settlement; that he kept the appointment; that her counsel outlined to him the terms of the proposed agreement; that he told her counsel he did not believe it would be possible for him to make the large payments demanded for the support of his wife and the upkeep of their home; that her counsel told him that his wife had evidence that he had committed at least two criminal offenses and that she would have him indicted for those crimes if he did not sign the proposed agreement, but that if he did sign it he would have no trouble as far as his wife was concerned; that counsel informed him he did not need to decide right away but could study the matter over until the next morning, when the contract would be ready; that when he went home that evening his wife told him that she wanted to talk to him "about this woman"; that she stated, "You know that I have got the goods on you and that woman"; that he told her he would not admit or deny anything to her about it, and that thereupon she replied that she had the evidence; that she then asked, "What do you think of the contract that Mr. Elting (her counsel) talked to you about?"; that he replied he didn't think it was very fair—that he didn't believe he could keep up the payments on it for very long, and unless the property was sold he wouldn't have the resources to keep on paying; that she replied that he knew what her attorney proposed he should sign; that he stated he did; that she inquired, "Don't you think you ought to sign it?"; that he replied he didn't know; that she thereupon told him he had better sign it; that when he inquired, "Why?" she told him she had evidence that would convict him under the Mann Act and that she would have him arrested if he didn't sign; that he inquired if he did sign would she ever have him arrested in the future; that she replied she would not and that she would not bother him; that the next day he went down to the office of her counsel and read over the property settlement agreement and signed it.

Upon question by the court as to whether he would have signed despite his claim of duress, the husband testified: "Well, I probably would not, but I don't know. He (her attorney) had me scared, so I just felt I had to sign it right away. I don't think I especially *considered* I was forced. I *felt* that I was forced into signing these." (Italics ours.)

[1-5] Upon this record the first question for determination is whether the law of California or the law of Illinois is here applicable. It is well established that the legality of a contract is to be determined by the law of the place where it was made and its interpretation likewise. Civil Code, sec. 1646; Restat., Conflict of Laws, sec. 347. If the contract is legal in the state where it was made it will be enforced in another state unless the contract is contrary to the strong public policy of the forum. Restat., Conflict of Laws, sec. 612. As it appears that the declaration of trust and the property settlement agreement were made in Illinois by citizens of Illinois, and for aught that appears the obligations thereof were to be performed there, it is self-evident that the law of Illinois must control as to their validity and interpretation. Likewise, as the parol evidence rule is a rule of substantive law and not of evidence, Illinois law governs. Restat., Conflict of Laws, sec. 599; Air Conditioning Corp. v. Honaker, 296 Ill.App. 221, 16 N.E.2d 153; In re Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055; Engelstein v. Mintz, 345 Ill. 48, 177 N.E. 746, 747.

[6, 7] It is plain from a reading of the declaration of trust that the intention of the parties was to provide a home for the wife during her life in the home property conveyed to the trustee, so long as that home after the first year could not be sold for $300,000 or rented for $1,000 a month. The language of the written instruments here involved is crystal clear. There is not the slightest ambiguity in them, and so we are at a loss to determine upon what theory the trial court concluded that parol evidence could be received to show that the parties contemplated that the home would be sold not later than April 8, 1934, or upon what theory the wife had any obligation either to sell or rent. It may be that the trial court

was impressed by the cases, which the husband has cited to us, which hold that where a contract makes no provision for its termination it should be deemed to terminate within a reasonable time. Such cases are not in point, for the obligation of the husband was to pay as long as the home was not sold or rented for the minimum amounts set forth in the instruments. It is true that the agreement for additional security, made by the husband in 1929, provided that if the home was not sold within five years, that is to say, prior to April 8, 1934, he should be entitled to receive back from the depository, The First National Bank and Trust Company, the collateral deposited by him or any substituted collateral. The critical date, i. e., April 8, 1934, designated for the return of the collateral, was designated for that one purpose only and it may not control the other written documents between the parties which it does not purport to control. The option to sell or rent for a lesser amount than that stated in the declaration of trust rested with the wife, not the husband. The obligation to sell or rent, in any case, rested with the trustee and not the wife.

[8] We are not quite clear, from the quotations which we have made from the rulings of the trial judge in our recital of the record, whether he was of the opinion that evidence of conversations had between the parties, so long as they took place prior to the actual signing of the contract, were admissible, as the language of his ruling would seem to indicate, or whether he was simply of the opinion that the contract was ambiguous and accordingly that it was admissible. As we have pointed out that the contract was not ambiguous, the ruling in any event was erroneous. In that connection we think it important to observe here that it is the duty of the trial judge to determine in the first instance before receiving any parol evidence which would vary or contradict a writing which is the basis of the action, whether or not the contract is ambiguous. If it is not ambiguous, so as to require evidence to assist in the interpretation of its terms, then the surrounding circumstances may not in any event be shown. Surrounding circumstances, as indicated, may no more be shown than evidence directly contradicting the terms of the writing where there is no ambiguity in it, or a need of interpretation of words in the connotation of their setting. Engelstein v. Mintz, 345 Ill. 48, 177 N.E. 746; Barnhart Aircraft, Inc., v. Preston, 212 Cal. 19, 297 P. 20. Adherence to this suggestion will avoid needless evidence, taking the time of court, counsel and litigants, to say nothing of the costs involved.

[9, 10] Two further contentions made by the former husband below, and likewise sustained by the trial court, have as their base, first, that the agreements were void, as the only consideration therefor was the compounding of a felony, and, secondly, that the present action to recover, based on those agreements, is not maintainable if the two agreements, that is to say, the declaration of trust and the property settlement agreement, were obtained by reason of duress, menace or coercion. Both contentions stem from the same facts testified to by the husband and with respect to which we have already given the substance of his testimony. In that connection it is sufficient to say that Illinois follows the weight of authority in holding that where no criminal proceedings are pending the actual commission of the crime alleged to have been compounded must be shown. Keith v. Buck, 16 Ill.App. 121. See, also, 17 C.J.S., Contracts, § 228. Here not only was there no such showing, but to the contrary the husband denied the offenses charged had been committed by him. Moreover, it appears that since Rendleman v. Rendleman, 156 Ill. 568, 41 N.E. 223, 225, the law in Illinois has been that "mere threats of imprisonment, for which there is no ground, do not constitute duress, as the person threatened could not be put in fear thereby. Nor do threats of criminal prosecution constitute duress when neither warrant has been issued nor proceedings commenced". In that case the testimony was that a party in endeavoring to procure the conveyance, which it was there sought to avoid, told the grantor that "he would have him looking through the bars if he did not sign it".

[11, 12] It seems clear from the Illinois decisions that a contract may not be avoided for duress, menace or coercion unless it is of a character sufficient to overcome completely the will of the party who seeks to avoid the contract by way of defense or rescission. There is no testimony here which measures up to these rules. It may be observed, in passing, that in this state the Supreme Court in Woodham v. Allen, 130 Cal. 194, 62 P. 398, 399, said: "There could be no compounding of a felony where none existed." As it is evident that there was not under the Illinois law a compounding of a felony or duress, the contracts in question

were legal in Illinois, and accordingly we have no occasion to pass upon the further contention of the wife that the husband was barred by laches or by his failure to place her in statu quo to avoid the contract for any alleged duress.

[13] One further point made by the husband requires our consideration. He urges with much earnestness that even though the declaration of trust and the property settlement agreement were valid by the law of Illinois, where they were made, the courts of this state should refuse to enforce them on the ground of public policy because of the manner in which he claims they were procured. There are several answers to this contention. In the first place, this is not a case where the obligor received nothing or the obligee gave up nothing. Here the wife was entitled upon her separation for the fault of the defendant to be supported by him. Moreover, as additional consideration for the instruments she relinquished in favor of her husband her rights to a substantial amount of his property. The fact that the law in one state may differ from the law of another, whether it be in the enforcement of rights, the creation of rights, or the validity of contracts, is not of itself any reason for refusing to enforce contracts valid in the state where they are made. Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 705, 132 A.L.R. 1264. We see no more danger to our public policy if we enforce these contracts because of a difference in law than did our Supreme Court in Biewend v. Biewend, supra, where it enforced a Missouri contract where there was as great, if not a greater, variance in the law of the two states as there is in this case. In the Biewend case the court said: "To hold that the right created in Missouri is so immoral as to be unenforceable here would involve a complacent attribution of moral superiority to this state."

[14, 15] We have here a duty to enforce valid contracts made in a sister state not only because of comity, but unquestionably a duty, on the facts, to do so because of the full faith and credit and due process clauses of the Constitution. As has been said by the Supreme Court of the United States, local public policy cannot transcend the limitations imposed by the federal Constitution. But apart from the limitations thus imposed, the trend of decision is unmistakably toward enforcing contracts, valid in the state where they were made, except where they are contrary to a strong public policy of the forum. See Hartford, etc., Co. v. Delta, etc., Co., 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178, 92 A.L.R. 928. Today, when the states of the Union are so closely linked together by rapid communication of speech and travel, the differences of policy between them is minor and the need of uniform enforcement of rights regardless of state lines is regarded as a business and social necessity.

For the reasons stated the judgment is reversed.

WOOD, Acting P. J., and McCOMB, J., concurred.



47 Cal.App.2d 832

JONES v. RE-MINE OIL CO. et al.

Civ. 13254.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1941.

1. Fraud ⇐58(1, 3)

A cause of action for fraud in making promises without any intention to perform will be defeated if proof fails to show either the making of the promises alleged or the lack of intention to perform. Civ.Code, § 1572.

2. Appeal and error ⇐994(3)

Alleged self-contradictions and inconsistencies in defendant's testimony and contradiction thereof by other witnesses presented merely questions for trier of facts as to credibility of defendant's testimony, and decision of trier of facts could not be reversed on appeal, such inconsistencies and contradictions not stamping testimony as "inherently incredible."

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Incredible".

3. Evidence ⇐589

The fact that testimony of defendant depicts what may have been a bad deal for plaintiff from a business standpoint does not require that defendant's testimony

be called incredible so as to require its rejection.

4. Fraud ⇐1

A transaction cannot be condemned as "fraudulent" for the sole reason that the party complaining thereof has made a bad bargain. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulent Transaction".

5. Appeal and error ⇐1010(1)

In action for fraudulent promises in connection with organizing foreign corporation and issuing capital stock to plaintiff, evidence was not such as to compel a finding that any promise made by individual defendant was made without intention of performing it. Civ.Code, § 1572.

6. Licenses ⇐39

In action for fraudulent promises in connection with organization of corporation and sale of stock to plaintiff, undisputed evidence showing that corporation was organized under laws of Nevada, that at time of its organization plaintiff and defendant were in Nevada, and that money paid by plaintiff for stock was paid to corporation in Nevada and stock certificates were delivered to plaintiff in Nevada, standing alone, would show a transaction completely carried out in Nevada, and California Corporate Securities Act would have no application. St. 1917, p. 673, as amended.

7. Licenses ⇐39

Even if written agreement reciting that in consideration of loan from plaintiff, defendant agreed that if he should drill oil wells with the money he would give plaintiff 50 per cent. of oil produced, was invalid under Corporate Securities Act, the utmost effect of the invalidity would be that defendant would hold money belonging to plaintiff which defendant would be obligated to return at once, and parties could deal with this resulting situation by a new agreement which, if otherwise valid, would not be invalid because of any invalidity in first agreement. St.1917, p. 673, as amended.

8. Licenses ⇐39

Even if agreement made in California for organization of a Nevada corporation and for issuance of stock therein to plaintiff was void as a subscription to stock of a corporation to be formed without complying with Corporate Securities Act, a subsequent agreement made by parties when they were both in Nevada, carrying out the agreement in Nevada was not, therefore, invalid. St.1917, p. 673, as amended.

9. Contracts ⇐101(1)

Contracts which are illegal only because of place or time of their making may be later adopted at places or times when or where they are not unlawful.

10. Contracts ⇐138(2)

The mere act of performing in accordance with terms of original offer or executory contract may amount to a lawful contract.

11. Sales ⇐48

The validity of a sale when made is not impaired by fact that prior contract to make sale was illegal, since sale or executed contract can legally stand on its own feet independent of prior executory contract.

12. Licenses ⇐39

Where parties went from California to Nevada where they organized a corporation under Nevada laws and there paid for and had issued shares of stock in corporation and made agreement regarding the conditions on which they would hold the shares, the transaction, being valid under laws of Nevada, was valid in California, notwithstanding before going into Nevada they may have entered into a similar agreement in California which was in violation of California Corporate Securities Act. St.1917, p. 673, as amended.

13. Fraudulent conveyances ⇐174(3)

One who has transferred his property to defraud his creditors cannot thereafter recover from his grantee that which he has conveyed.

14. Contracts ⇐194

Where written agreement recited that plaintiff made a loan at interest to defendant and that if defendant used the money to drill oil wells, 50 per cent. of oil produced should belong to plaintiff, the oil wells or other property acquired by the money loaned would become defendant's property, subject to claims of his creditors.

15. Equity ⇐65(2)

Where under written agreement reciting that plaintiff made loan to defendant and that if defendant should drill oil wells with the money he would give plaintiff 50 per cent. of the oil, and defendant, in order to avoid effect of any judgment against him and to protect rights of plaintiff in oil wells

or other property acquired by money loaned against defendant's creditors, entered into a subsequent agreement for creation of corporation and issuance to plaintiff of stock therein for money advanced, the transaction was not fraudulent so as to defeat defendant's right to declaratory relief establishing his rights in the stock and the corporation under "clean hands" maxim.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

16. Equity ⇐65(2)

Where defendant, to protect plaintiff who had loaned him money under written contract giving plaintiff 50 per cent. of oil produced if defendant used the money to drill oil wells, made subsequent agreement for creation of corporation and issuance of stock to plaintiff providing that half of stock should belong to defendant, but that the stock should not become defendant's until plaintiff's investment had been returned out of dividends, salaries, or otherwise, the fact that half of stock was permitted to remain in plaintiff's name as a protection to plaintiff to prevent defendant's creditors from resorting to it did not, under "clean hands" maxim, render transaction fraudulent so as to bar defendant from declaratory relief.

17. Equity ⇐65(2)

Where plaintiff loaned money to defendant under agreement that 50 per cent. of any oil produced from oil wells drilled with the money should belong to plaintiff, fact that defendant, who subsequently entered into an agreement in order to protect plaintiff against defendant's creditors, including a judgment creditor, did not wish to pay the judgment, did not conclusively indicate fraud in the agreement, so as to bar him from declaratory relief under "clean hands" maxim.

18. Equity ⇐65(2)

Where defendant, to whom plaintiff had made loan under agreement that 50 per cent. of oil produced by any wells drilled with the money should go to plaintiff, stated to his creditors that he had no interest in corporation organized to protect plaintiff's interests, such fact did not require a conclusion that defendant's intent was fraudulent at time of corporation's formation, so as to preclude declaratory relief to defendant under "clean hands" maxim.

19. Equity ⇐65(2)

Plaintiff's claim that defendant was not entitled to declaratory relief because he did not come into court with clean hands, in that certain transaction was a fraud on defendant's judgment creditor and other creditors, was in nature of an "affirmative defense" to defendant's demand for declaratory relief, and burden was on plaintiff to show the fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Defense".

20. Appeal and error ⇐1010(1)

Trial court's findings and conclusions in defendant's favor on issue of fraud in transaction, supported by evidence, was binding on appellate court.

21. Corporations ⇐30(2)

Plaintiff suing for fraudulent promises in connection with organizing corporation and issuing stock could not recover from defendant alleged sums paid by defendant from corporation's funds for traveling expenses, contrary to agreement and without authority from corporation, where complaint alleged nothing about such claim, which belonged to corporation, and action did not purport to be brought in corporation's behalf.

22. Corporations ⇐207

Where plaintiff assumed control over corporation prior to trial by electing a board of directors of her own choosing, she could not maintain a stockholder's representative action in corporation's behalf.

23. Money lent ⇐6

The common count for "money lent" was the appropriate form in which to state a cause of action at common law for money loaned.

See Words and Phrases, Permanent Edition, for all other definitions of "Money Lent".

24. Money received ⇐17(3)

Proof of a loan of money will not support a count for money had and received.

25. Appeal and error ⇐1039(13)

Though, under the liberal construction given pleadings on appeal, especially where an issue has been tried without objection, a variance in proving loan of money under a count for money had and received might not afford ground for reversal of judgment for plaintiff, a judgment for defendant based on a finding recognizing the variance is not erroneous, and should not be reversed.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Adelaide R. Jones against the Re-Mine Oil Company and others for fraud in organizing the corporation and selling stock, to enforce a trust and for an accounting, in which action defendant sought declaratory relief establishing his rights in the stock and in the corporation. From an adverse judgment, plaintiff appeals.

Affirmed.

Cannon & Callister, of Los Angeles, for appellant.

Henry G. Bodkin, of Los Angeles, for respondent Ralph L. Goetz.

Benjamin W. Henderson, of Los Angeles, for respondent E. R. Erickson.

SHAW, Justice pro tem.

Plaintiff appeals from a judgment entered against her on findings made by the trial court after a trial of the issues without a jury. The complaint, as amended, contains three counts. In the first count plaintiff alleges that she paid to defendant Goetz the sum of $49,500 on his promises that he would use it with an equal amount of his money, or property of that value, to form a Nevada corporation, to carry on its objects and purposes and to acquire property for it; that the ownership of the stock of such corporation would be equally divided between plaintiff and defendant Goetz, and they would have equal voice in its management and control and receive equal income from it; that a strict account would be kept of its business and affairs, and that plaintiff would be furnished at regular intervals and on request, a full and complete statement of its assets, liabilities and income. It is further alleged that Goetz caused defendant Re-Mine Oil Company to be organized as a Nevada corporation, with capital stock of 2,500 shares, and caused it to issue in plaintiff's name two certificates of stock, for 1,250 shares each, of which she received and still holds one, and the other, after plaintiff had endorsed it in blank, on Goetz' statement that the promises alleged would be performed, was kept and is held by Goetz. Plaintiff also alleges that the promises alleged were made by Goetz without any intention of performing them and were not performed in various respects. While this count is long, we deem it unnecessary to set forth here further details of its allegations. On it plaintiff seeks a judgment that she is the owner of all the stock in and property of the defendant corporation. Defendant Goetz denies all these allegations of fraud, and in particular denies that the agreement between him and plaintiff required him to use an amount of his own money or property equal to the contribution of plaintiff, and affirmatively sets forth the terms of that agreement, as he claims them to be, and by his prayer asks for a determination of the rights of the parties in accordance with the agreement as he alleges it. The other defendants deny practically all of this count.

In her second count plaintiff alleges that she paid to defendant Goetz the sum of $49,500, to be held or used by him as her trustee or agent; that he has used it to acquire properties for plaintiff, the nature of which is unknown to her, and that he has never accounted and refuses to account to her therefor. By amendment at the trial plaintiff added a third count in the form of a common count for money had and received in the sum of $49,500. These counts are denied by all the defendants, and were found by the court to be untrue.

[1] The cause of action stated in the first count is obviously based on fraud, of the type which consists of making a promise without any intention of performing it. Sec. 1572, Civ.Code. While the word "representations" appears frequently in this count, no statements of existing fact are alleged to have been made by Goetz. We have above set forth the substance of the statements charged to him, and they are all of a purely promissory nature. This cause of action would be defeated if the proof failed to show either the making of the promises alleged or the lack of intention to perform them. The promise principally relied on here by plaintiff is that Goetz would put into the corporation an amount of his money equal to that contributed by plaintiff, or property of that value. The court found that this promise was not made, and the promise that was made was substantially that set forth in Goetz' answer; that in performance of this agreement plaintiff and Goetz organized defendant corporation as a Nevada corporation with a capital stock of 2,500 shares, all of which was sold, issued and delivered to plaintiff in Nevada for $49,500; that this sum was paid to the corporation by Goetz and this payment was

treated by plaintiff and Goetz as repayment to plaintiff of a loan of $49,500 previously made by plaintiff to Goetz; and that the stock was issued in two certificates for 1,250 shares each, both in plaintiff's name and delivered to plaintiff, one of which plaintiff endorsed and delivered to Goetz to be held in accordance with the agreement, which provided that "when the sum of $49,500.00 would have been paid to plaintiff by way of dividends and salary or otherwise from said corporation, one half of said stock would be owned by defendant Ralph L. Goetz and the other half by plaintiff".

[2-4] The organization of the corporation and the issuing of these two stock certificates and delivery of one of them to Goetz are not in dispute. In other respects these findings are supported by the testimony of Goetz, who directly testified, among other things, that he did not make the agreement which plaintiff alleged, and that the allegations of his answer, which were read to him as part of a question, correctly stated the agreement. Goetz is corroborated in many respects by the witness Johnson, a Nevada attorney who attended to the organization of the corporation in Nevada, and testified to conversations which he heard there between plaintiff and Goetz regarding their agreement, in which were stated the principal terms of that agreement as testified to by Goetz. The attack on the evidentiary support of the findings resolves itself, in large part, into an assault on the credibility of the testimony given by Goetz, it being claimed that by reason of self-contradictions and inconsistencies, as well as contradictions by other witnesses, it should not have been believed. But these matters present merely questions for the trier of facts, whose decision cannot be reversed on appeal; they do not stamp the testimony as inherently incredible. People v. McMillan, 1941, 45 Cal.App.2d, Supp., 821, 114 P.2d 440, 444, and cases there cited. The parts of Goetz' story which were accepted by the court were, as already stated, corroborated to some extent, and there is nothing about the story which is contrary to human experience or impossible of belief. It suggests that plaintiff may have made a bad deal, from a business standpoint; but the world is so full of such deals that testimony depicting one cannot for that reason be called incredible. Neither can a transaction be condemned as fraudulent for the sole reason that the party complaining has made a bad bargain.

[5] Defendant Goetz admitted and the court found that he promised that strict account would be kept of the corporation's business and affairs and that plaintiff would be furnished with statements thereof at regular intervals and on request. The evidence shows that defendant Erickson, who was secretary of the corporation, kept books of account for it, and there is nothing to show that they were not correct and complete. At least one statement of the corporation's condition was furnished to plaintiff, though not until after this action was begun, and it does not appear that she requested any others. These promises appear to have been substantially complied with, and any non-compliance appearing was consented to by plaintiff. The same is true of all the other promises which the court found were made by Goetz. There is nothing in the evidence compelling a finding that any promise made by Goetz was made without the intention to perform it, and the trial court found plaintiff's allegation in this respect to be untrue.

[6] Plaintiff contends further that her dealings with Goetz were in violation of the California Corporate Securities Act and for this reason they were void and the stock issued to her was also void, and that therefore such stock constituted no consideration for the payment of her money to the corporation and she may recover it from all parties concerned. It is in evidence without dispute that no permit was obtained from the California Corporation Commissioner for the issue of any of the stock which plaintiff received, or for the making of any of the other agreements with her.

In this connection the trial court found that "all of said stock was sold, issued and delivered in the State of Nevada to plaintiff", and that "no stock of said corporation was sold or otherwise disposed of in the State of California". The evidence shows without dispute that the defendant corporation was organized under the laws of Nevada; that at the time of its organization plaintiff and Goetz were in Nevada; that the money paid for the stock issued to plaintiff was paid to the corporation in Nevada, and that the certificates for said stock were delivered to her in Nevada. These facts, if they stood alone, would show a transaction complete-

ly carried out in Nevada, and the laws of California could have no application to such a transaction. Robbins v. Pacific Eastern Corp., 1937, 8 Cal.2d 241, 277, 65 P.2d 42; In re Motor Products Mfg. Corp., 9 Cir., 1937, 90 F.2d 8.

Plaintiff argues further, however, that preceding the events just mentioned there were agreements made in California which were in violation of the Corporate Securities Act, and that their invalidity infects the subsequent dealings and renders them also void. First we are pointed to Exhibit 6, an agreement of August 26, 1936, made after plaintiff had loaned defendant $49,500. That agreement read as follows:

"Los Angeles, California,
"August 26th, 1936.

"Mrs. Wm. A. Jones,
Hermoyne Apts.,
Los Angeles, Calif.

"Dear Mrs. Jones:

"In consideration of the loan to me by you of $49,500.00, for which I agree to pay you interest at four per cent per annum, I also agree that if I should drill some oil wells with any of this money which you loaned me, that I will give you fifty per cent of all the oil which I obtain after deducting the landowners royalty on such property as the well may be drilled upon, and that that royalty paid to the landowner shall not exceed 25 per cent. There are no other agreements of any kind between us except those stated herein.

"Yours very truly,
"R. L. Goetz.

"Accepted Adelade ReMine Jones,
"Aug. 26, 1936."

[7] It is contended that this agreement was a security within the scope of the Corporate Securities Act, St.1917, p. 673, as amended. Its character in that respect need not now be determined. Assuming that it was wholly invalid, the utmost possible effect of such invalidity would be that Goetz held money belonging to plaintiff and was obligated to return it at once to plaintiff. The parties could deal with this resulting situation by such new and independent agreement as they might deem proper, and if such new agreement were otherwise valid, it would not be avoided because of any invalidity of their previous dealings. That they did make such a new agreement, amounting to a novation, is shown by sufficient evidence. The transaction as carried out does not conform to Exhibit 6, and Goetz testified that the arrangement set forth in that exhibit was "changed when we decided to organize a corporation in Nevada", and then proceeded to state the new arrangement substantially as it was carried out.

[8] The agreement superseding Exhibit 6 was first made in California, as Goetz admits, and plaintiff next contends that this agreement was, in effect, a subscription to stock of a corporation to be thereafter formed, and not having been made in accordance with the Corporate Securities Act, it was void, even though the corporation was to be formed outside of this state. This point also may pass undecided here. Goetz further testified, after stating the agreement made in California, "then we again went into the agreement when the corporation was organized, and further agreed that that was our agreement. Q. In other words, you repeated in Nevada what your agreement had been in California; is that right? A. That is true." In this he was corroborated to a considerable extent by the witness Johnson, whose testimony we have already mentioned. Assuming once more the invalidity of the agreement made in California, this testimony shows no invalidity of the agreement made in Nevada.

[9-11] The case of Robbins v. Pacific Eastern Corp., supra, 1937, 8 Cal.2d 241, 65 P.2d 42, 60, involved a situation similar to that we have here. Agreements involving and providing for the issuance of stock in a New York corporation (referred to as Trading Corporation) to be exchanged for stock in a California corporation (designated American Company), had been made in California, without the obtaining of any permit therefor under the Corporate Securities Act, and the parties owning the stock of the California corporation appointed an agent who took their stock certificates to New York and there exchanged them for certificates of stock of the New York corporation, and it was held that the transaction in New York was valid against an attack like that made here, the court saying: "As already indicated, even if it be assumed that the Corporate Securities Act did apply to the negotiations had in this state, and even if it be assumed that the executory contract, so far as the seller—the Trading Corporation—is concerned, was illegal, nevertheless, the performance and execution of the contract in New York,

being legal there, and being complete in themselves, stand independently of the prior illegality. * * * Contracts which are illegal only because of the place or time of their making may be later adopted at places or times when or where they are not unlawful. * * * If the offer of July 31st or August 1, 1929, was illegal, and if the other activities of the Trading Corporation in California were illegal, in fact, even if the executory contract to sell was illegal, that would not prevent the parties from later making another legal contract in New York dealing with the same subject matter. The authorities are quite uniform in holding that the mere act of performing in accordance with the terms of the original offer or executory contract may amount, in itself, to a lawful contract. Stated another way, it does not impair the validity of a sale when made that the prior contract to make it was illegal. This is so because the sale or executed contract may legally stand on its own feet, independent of the prior executory contract." The court further said: "The application of these principles to the present appeals would be quite obvious had the stockholders of American Company, after having received the offer from the Trading Corporation (which offer is assumed to have been illegal) gone to New York themselves and accepted delivery of the Trading Corporation certificates, instead of doing so by agent. Then, obviously, the New York transaction would stand independently of the prior negotiations in California." Robbins v. Pacific Eastern Corp., supra., 8 Cal. 2d at page 283, 65 P.2d at page 63.

[12] We regard this decision as determinative of all the points raised here under the Corporate Securities Act. All the parties here did go in person to Nevada; they there organized a corporation; they there paid for and had issued shares of stock in that corporation, and they there made an agreement regarding the conditions on which they would hold the shares. No suggestion is made that any of these acts was invalid under Nevada law. California law can have no application to them and they must be regarded as valid here. Some suggestion is made in the case just cited that a purpose to evade California law might affect the conclusion to be reached in this matter. We doubt whether that suggestion was meant to apply to a case where all parties go to another state and there engage in and complete a transaction which is valid under the laws of that state, but we need not resolve this question, for there is no evidence of such purpose here.

Plaintiff relies on Gillis v. Pan American Western Pet. Co., 1935, 3 Cal.2d 249, 44 P.2d 311, but we find no help for her in that decision. There the stock in question was issued and sold in California, though by a foreign corporation, and the point decided was merely that it is within the power of California to regulate the issuance and sale within its borders of stock of a corporation organized elsewhere. We have no such question before us here.

[13-15] The judgment awards defendant Goetz declaratory relief asked for by him, establishing his rights in the stock and the corporation. No complaint is made of the nature or extent of this relief, nor is it claimed that this is not a proper case for such relief, generally speaking, and hence we have not considered these matters. But it is urged, in effect, that Goetz is not entitled to such relief in this case because he does not come into court with clean hands. It appears from the evidence that at the time of the dealings under consideration a money judgment existed against Goetz, and it is claimed that he had the certificate for the stock which would ultimately be his issued and left in the name of plaintiff in order to defeat the collection of this judgment. Basing the argument on this claim as to the facts, plaintiff invokes the rule stated in 12 Cal. Jur. 1026 that, "One who has transferred his property in order to defraud his creditors cannot thereafter recover from his grantee that which he has conveyed", citing also Allstead v. Laumeister, 1911, 16 Cal.App. 59, 116 P. 296, where the same rule was applied to one who did not himself convey property, but on buying it had it conveyed to another in order to avoid its seizure on a judgment against himself, and other cases of the same tenor. There can be no doubt of the rule of law thus invoked, but the evidence does not require its application to this case.

The evidence on this subject came altogether from defendant Goetz. After stating the existence of the judgment and its origin, he further testified: "I did not think that it was proper that I should pay it, and I didn't want to pay it, so I remembered that they might—if I did business with just this agreement, it wouldn't be any protection for Mrs. Jones; somebody

could come in there, maybe, and try to collect that judgment. So, I suggested to Mrs. Jones—explained all that to her. * * * So, that is when we decided to form a corporation. * * * I explained to Mrs. Jones that it would be for her protection to operate under a corporation rather than this agreement. * * *" This testimony shows a desire to protect plaintiff from Goetz' creditors rather than an intent to defeat the collection of the debts. The "agreement" mentioned here is Exhibit 6, which recited a loan to Goetz and stated that if he should drill oil wells with the money, he would give plaintiff 50 per cent of the oil. Under this agreement the wells or other property in which he might put the money lent would be his property and of course subject to the claims of his creditors, which might result in loss to plaintiff of what she was to receive. An intent to protect her against such loss, even from Goetz' creditors, does not stamp the transaction as fraudulent on his part. The same rule applies to the transaction as actually carried out. The stock held by Goetz was not to become his until the amount of plaintiff's investment had been returned to her, and if in the meantime that stock were allowed to stand of record in his name his creditors might resort to it; so that the procedure followed, of leaving it in her name, was for her protection.

[16-20] The fact alone that Goetz did not wish to pay the judgment does not conclusively indicate fraud; nor does the fact, shown by the evidence, that later Goetz stated to other creditors that he had no interest in the corporation here involved necessarily require a conclusion that his intent was fraudulent at the time of its formation. If such fraud existed it was in the nature of an affirmative defense to Goetz' demand for declaratory relief, and the burden was on plaintiff to show it. Even if we concede that the evidence might have supported a finding of fraud, the trial court's finding against it, not expressly stated, but implied from the findings and conclusions in Goetz' favor, is also supported, and is binding upon us.

[21, 22] It is suggested that Goetz caused himself to be paid sums of money for traveling expenses from the corporation's funds, and that this was done contrary to the agreement between him and the plaintiff and without authority from the corporation, and that defendant Erickson is also liable for this amount. Nothing is alleged in the complaint about this claim. It belongs to the corporation, and this action does not purport to be brought in the corporation's behalf. Moreover, plaintiff assumed control over the corporation prior to the trial, electing a board of directors of her own choosing, so that she is not now in a position to maintain as stockholder a representative action in its behalf on this matter.

[23-25] Finally, plaintiff contends that even if all of her other points fail, she should have had judgment against defendant Goetz for $1,000. The evidence shows without dispute that the defendant corporation made several loans to plaintiff and to Goetz; that one of these loans to plaintiff for $1,000 was made to her at Goetz' suggestion, and that she at once reloaned this amount to Goetz. It has not been repaid and the contention is that plaintiff should have judgment for it, with especial reference to her third count, which is for money had and received. Obviously this claim is not within the scope of the causes of action set up in her first and second counts. The court found the allegations of the third count to be untrue. The common law, from which we derive our forms of pleading known as the "common counts", knew a count for "money lent" which was the appropriate form in which to state a cause of action for money loaned. See 17 Cal.Jur. 577 et seq. It has been held that proof of a loan of money will not support a count for money had and received (Scarbrough v. Blackman, 1895, 108 Ala. 656, 18 So. 735); and while, under the liberal construction given pleadings on appeal, especially where an issue has been tried without objection, such a variance might not afford ground for a reversal of a judgment for plaintiff, (see Horka v. Wieczorek, 1917, 64 Ind.App. 387, 115 N.E. 949; 41 Cor.Jur. 2), a judgment for defendant based on findings which recognize the variance, is not erroneous and should not be reversed.

Other points made in the briefs have been considered, but are not deemed to require discussion here or to show ground for a reversal.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

47 Cal.App.2d 844

LOUIS ECKERT BREWING CO. et al. v. UNEMPLOYMENT RESERVES COMMISSION et al.

Civ. 12626.

District Court of Appeal, Second District, Division 2, California.

Nov. 21, 1941.

Hearing Denied Jan. 19, 1942.

1. Action ⇐6
Taxation ⇐608(1)

In action against the Unemployment Reserves Commission for a declaratory judgment respecting plaintiff's liability for taxes under the Unemployment Insurance Act, a judgment that plaintiff was not an employer within the act was unauthorized in view of statute, which became effective before entry of judgment, providing that no legal or equitable process shall issue in any proceeding against the state or any officer thereof to enjoin collection of contributions sought to be collected under the act. St.1935, p. 1226 et seq., St.1939, pp. 2051 et seq., 2058, § 45.10.

2. Action ⇐6

A "declaratory judgment" is an adjudication, not an abstraction, and public officials must respect the court's declaration and follow its interpretation of the law.

See Words and Phrases, Permanent Edition, for all other definitions of "Declaratory Judgment".

3. Evidence ⇐83(1)

For purposes of judicial finality, there is no more reason for assuming that a commission, such as the Unemployment Reserves Commission, will disregard the direction of a reviewing court than that a lower court will do so.

4. Constitutional law ⇐70(1)

The matter of classification of employers under the Unemployment Insurance Act is primarily for legislative determination. St.1935, p. 1226 et seq., St.1939, p. 2051 et seq.

5. Taxation ⇐446½

Under rule adopted by Unemployment Reserves Commission providing that employees and employees' associations having problems arising out of administration of the Unemployment Insurance Act may have such problems adjusted by director of the department, it was within commission's province to determine whether plaintiff corporation was an employer for purposes of imposing taxes under the act. St.1935, p. 1226 et seq., St.1939, p. 2051 et seq.

6. Officers ⇐103

The exhaustion of an available administrative remedy is a jurisdictional prerequisite to resort to courts.

7. Action ⇐6

Where plaintiff corporation applied to director for a ruling regarding whether certain persons were plaintiff's employees within Unemployment Insurance Act, and plaintiff did not appeal from director's adverse ruling to Unemployment Reserves Commission as provided by rule adopted by commission pursuant to its rule-making power, plaintiff could not maintain an action in courts for a declaratory judgment respecting whether such persons were plaintiff's employees within the act. St.1935, p. 1226 et seq., St.1939, p. 2051 et seq.

8. Officers ⇐103

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before courts will act.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by the Louis Eckert Brewing Company and others against the Unemployment Reserves Commission and others for a declaratory judgment respecting the liability of plaintiff brewing company for taxes under the Unemployment Insurance Act, St.1935, p. 1226 et seq., St.1939, p. 2051 et seq., and for other relief. From a judgment for plaintiffs, defendants appeal.

Reversed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen. (Maurice P. McCaffrey and Ralph R. Planteen, both of Sacramento, of counsel), for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Jas. A. Gibson, Jr., Van Niven, and Keith Bullitt, all of Los Angeles, of counsel), for respondents.

SCOTT, Justice pro tem.

Defendants appeal from a declaratory judgment holding that plaintiff corporation is not an employer within the meaning of the Unemployment Insurance Act.

Plaintiff corporation brought suit alleging that it is engaged in the manufacture of beer; that it sells it through twenty-six persons, including the six individual plaintiffs, who in turn sell it to ultimate customers; that these persons are independent contractors and not employees; that defendant commission is about to tax it under the act (Stats.1935, p. 1226; Stats.1939, p. 2058) on the theory that such persons are employees, and asking that the court determine the legal rights and duties of the respective parties and enjoin defendant commission from collecting any such tax. Judgment was rendered declaring that the persons were not and are not employees and that plaintiff corporation is not liable for such taxes.

On appeal defendants assert (1) that section 45.10 of the act prohibited the trial court's granting a declaratory relief judgment, and (2) that plaintiffs had not exhausted their administrative remedies under the act and were not entitled to judicial relief until they had done so. The determination of the appeal depends largely upon the construction to be placed on section 45.10 of the act, enacted in 1939, and on the commission's rule 90.6.

Section 45.10 of the act, which became effective on September 19, 1939, approximately three months and twenty days before entry of judgment in this case, provides as follows: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contribution sought to be collected; but after payment of any such contribution under protest, duly verified and setting forth the grounds of objection to the legality of such contribution, the employer paying such contribution may bring an action against the Unemployment Reserves Commission in any court of competent jurisdiction in the county seat of the county wherein the employer maintains his principal place of business for the recovery of contributions so paid under protest."

The commission had adopted rules pursuant to its rule-making power under the act, including rule 90.6, which is as follows: "Workers, workers' organizations, employees, employees' associations and trade associations having problems arising out of the administration of the Act may have the same adjusted by the Director of the Department and its regional officers, or may request a hearing before the Commission with respect to matters other than disputed benefit claims. A request for Commission hearing may be considered only if such individuals or groups file a detailed statement of facts and supporting data thereon concerning the problem involved with the Department of Employment at the time the request for a hearing is made." The trial court found, and it is not disputed, that plaintiff corporation, in accordance with this rule, applied to the director for a ruling and that the latter had ruled that the persons in question were employees under the act, and that no hearing was requested or had before the commission.

[1-3] The effect of section 45.10 is to preclude a judgment such as the trial court undertook to enter in this case. The commission herein could not properly undertake to enforce a tax against plaintiff corporation as an employer in defiance of an adjudication that the latter did not maintain that relationship with the other parties. A declaratory judgment is an adjudication, not an abstraction. Collier Advertising Service, Inc., v. City of New York, D.C., 32 F.Supp. 870. Public officials must respect the court's declaration and follow its interpretation of the law. Socony-Vacuum Oil Co. v. City of New York, 247 App.Div. 163, 287 N.Y.S. 288. For purposes of judicial finality there is no more reason for assuming that a commission will disregard the direction of a reviewing court than that a lower court will do so. Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180. An obvious frailty of such a declaratory judgment lies in the fact that such relationship need not remain unchanged. It is conceivable that immediately after judgment that relationship might be modified so that a subsequent consideration by a trial court would result in a totally different conclusion. This would require one or more additional court actions to determine whether the status of the parties had so changed as to warrant the collection of the tax under the provisions of the act without violating the terms of the declaratory judgment. "The only express provision for court review is made by section 45.10, St.1939, p. 2058, which permits an employer to contest the legality of the contribution sought to be enforced against him by paying it under protest and then suing to recover the amount so paid." Bo-

dinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935, 938.

[4] Under the provisions of the act an employer is defined as every individual, trust or estate, partnership, association, joint stock company or corporation subject to a payroll tax levied by the United States government (namely, employers having eight or more employees), if the tax levied by the state act, or any portion thereof, may be credited against such payroll tax. It is not questioned that the matter of classification such as this is primarily one for legislative determination. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595.

Plaintiff corporation in response to defendant's second point on this appeal concedes that administrative remedies must first be exhausted before recourse is had to the courts, but challenges the applicability of the rule to the instant case, asserting that there is a difference between (1) administering the act as against or for the benefit of persons subject to it and (2) determining a dispute as to whether any certain person falls within the scope of the act and is therefore subject to such administration.

[5-8] Under rule 90.6 it is well within the province of the commission to determine for purposes of imposing the tax whether plaintiff corporation is an employer. An administrative proceeding, therefore, was and is available to plaintiff under the Unemployment Insurance Act to determine this very matter, and exhaustion of administrative remedy is a jurisdictional prerequisite to resort to the courts. Application was made to the director, but his adverse ruling was not followed by an appeal to the commission as provided by rule 90.6, and obviously the remedies are not exhausted until the appeal is fully prosecuted. It would be illogical and impractical for a party to apply to the court for relief asserting, without conclusive proof and without any possibility of successful challenge, the outcome of an appeal which the administrative body had not even been permitted to decide. Where an administrative remedy is provided by statute relief must be sought from the administrative body and this remedy exhausted before the courts will act. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942.

Judgment reversed.

MOORE, P. J., and WOOD, J., concurred.

19 Cal.2d 104

STANDARD OIL CO. OF CALIFORNIA v. JOHNSON.

Sac. 5493.

Supreme Court of California.

Nov. 29, 1941.

1. Courts ⇐97(1)

Where decision of Supreme Court of California held that a military post exchange was not an instrumentality or department of the federal government and that sales of gasoline to it were subject to motor vehicle fuel license tax act and such questions were not discussed by United States Supreme Court reversing the decision on ground that the sales were made within territory subject only to control of the United States, the decision of the Supreme Court of California stood as the latest expression of the court upon the questions not discussed by the United States Supreme Court. St.1935, p. 1696, § 10.

2. Licenses ⇐19(3)

An army post exchange is not an "instrumentality or department of the federal government" within motor vehicle fuel license tax act granting exemption to such an instrumentality or department but is an organization largely engaged in business of a private nature. St.1935, p. 1696, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrumentality or Department of the Federal Government".

3. Licenses ⇐5

Sales of gasoline to army post exchange located on recently acquired government reservation, not under exclusive jurisdiction of federal government, were subject to sales tax imposed by the motor vehicle fuel license tax act. St.1935, p. 1696, § 10.

4. Licenses ⇐5

The federal statute removing immunity from taxes on sales to army post exchange within territory over which federal government has exclusive legislative jurisdiction does not affect question of whether state sales tax could be imposed on sales to army post exchange located on government reservation not under exclusive legislative jurisdiction of federal government. 4 U.S.C.A. § 13(a).

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the Standard Oil Company of California against Charles G. Johnson to recover taxes paid under protest. From an adverse judgment, plaintiff appeals.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco (Felix T. Smith, Sigvald Nielson, and Frank J. Kockritz, Jr., all of San Francisco, of counsel), for appellant.

Earl Warren, Atty. Gen., and H. H. Linney and Adrian A. Kragen, Deputies Atty. Gen., for respondent.

CURTIS, Justice.

During the month of March of the present year the Standard Oil Company of California, plaintiff herein, sold several thousand gallons of gasoline to the United States Army post exchanges located on recently acquired government reservations, not under the exclusive jurisdiction of the federal government, at Camp McQuaide, Watsonville, California; Campo, California, and Seeley, California. None of said post exchanges was, at any of the dates on which said sales were made, located on any United States reservation over which the federal government had exclusive jurisdiction to legislate on these sales of gasoline or other merchandise. Said post exchanges were organized and owned at all times herein mentioned, and were operated and did business under Army Regulations No. 210-65, of date June 29, 1929, and Army Regulations 210-65, C 3, of date March 9, 1940.

Plaintiff paid a tax on said sales amounting to the sum of $526.08 to the State of California. Said payment was made under protest and was accompanied by a verified written demand for the repayment to plaintiff of said sum on the ground that said tax was illegal for the reasons stated in said protest and demand. The reasons so stated were that said gasoline was sold to the United States Government or a department thereof for official use and was therefore exempt from the tax under section 10 of the Motor Vehicle Fuel License Tax Act, St.1923, p. 574, as amended by St.1935, p. 1696; and furthermore, that the State of California is without right or authority to impose a tax on gasoline sold to post exchanges since they are instruments and agencies of the federal government. The officials of the state refuse to acquiesce in the demand of plaintiff, and no part of said sum of $526.08 has been re-

paid to plaintiff. Thereupon plaintiff instituted this action against the defendant, the Treasurer of the State of California, to recover said amount. A trial was had and judgment was rendered in favor of the defendant, and plaintiff has appealed therefrom.

There is no dispute as to the facts. The controversy between the parties hereto involves simply questions of law, and they may be briefly stated as follows: Has the State of California the right and power to impose such tax on gasoline sold to United States Army post exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?

This action in many of its essential features is like the case of People v. Standard Oil Company of California, 218 Cal. 123, 22 P.2d 2. That case arose out of sales of gasoline by the Standard Oil Company to United States post exchanges located within the Presidio military reservation at San Francisco. The Standard Oil Company in that case refused to pay the tax, and the action was brought to compel its payment. The tax in that case and the tax in the present case were levied and imposed under practically the same statute of this state. Our attention has not been called to any material change in the legal status of military post exchanges since the rendition of the decision in that case. So what was said by this court in that case upon the questions involved in the present action would be most persuasive of the decision of those questions.

In that case it was contended by the Standard Oil Company that sales made to military post exchanges were exempt from the state tax by virtue of the provisions of section 10 of the state statute hereinbefore referred to. In reply to the contention that "a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government", our former opinion held at page 126 of 218 Cal., at page 3 of 22 P.2d: "Manifestly these sales are neither to a 'department' of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause."

The decision then passes to a consideration of the nature of army post exchanges and of the power of the state to tax sales made to such exchanges, and upon that question concludes at page 128 of 218 Cal., at page 4 of 22 P.2d: "From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the federal government directly exercises its constitutional or sovereign power."

[1] We further held in that opinion that the tax on such sales was collectible even though the sales were made within the territorial limits of the Presidio, over which the State of California had exclusive legislative jurisdiction. An appeal was taken to the Supreme Court of the United States, and the judgment of this court was reversed on the ground that the sales were made without the jurisdiction of the state and "within territory subject only to control by the United States". Standard Oil Company v. California, 291 U.S. 242, 54 S.Ct. 381, 383, 78 L.Ed. 775. No reference was made in the opinion of the United States Supreme Court to any question decided in our opinion except the one involving territorial jurisdiction over the place where the sales were made. That portion of our decision holding that a military post exchange was not an instrumentality or department of the federal government, and that sales of gasoline to it were subject to the statutes of this state, was unaffected by the decision of the Supreme Court of the United States and must stand as the latest expression of this court upon those two questions, which are the only questions involved in this appeal.

The conclusion at which we arrived in the Standard Oil Company case, as hereinbefore set forth and which was not considered or passed upon by the Supreme Court of the United States, finds support in the decisions of the federal courts and in those of the United States Court of Claims, although the cases considering that question are not without conflict.

For a reversal of the judgment herein in favor of the respondent, the appellant cites

and relies upon the following cases: Dugan v. United States, 34 Ct.Cl. 458; Woog, Administrator, v. United States, 48 Ct.Cl. 80; Post Exchange, 31st Infantry v. Keeney, Reg. No. 30920, decided August 20, 1929, Supreme Court of the Philippine Islands; United States v. Query, D.C., 21 F.Supp. 784; United States v. Query, D.C., 37 F.Supp. 972; and United States v. Cordy, D.C., 58 F.2d 1013.

It may be conceded that the Dugan and Woog cases support the contention of appellant, and the same may be said respecting the Keeney case from the Supreme Court of the Philippine Islands, although the last-mentioned case may have been overruled by the case of Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. Rep. 866, hereinafter referred to. The cases of United States v. Query, D.C., 21 F.Supp. 784, and United States v. Cordy, supra, are readily distinguishable from our present case. While the earlier Query case was decided by a court composed of three judges and the questions involved therein were thoroughly and carefully considered, it involved the right of the state of South Carolina to tax a Civilian Conservation Corps camp exchange. Such a camp had its existence by virtue of congressional legislation and federal funds were used to pay the expense in connection with its conduct, operation and maintenance. As shown by our decision in the Standard Oil Company case, supra, an army post exchange "is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. * * * Neither the government nor the officers of the post wherein the exchange is located are liable for its debts." 218 Cal. 128, 22 P.2d 4. The case of United States v. Cordy, supra, involved the right of the state of Maryland to levy a tax upon the sale of gasoline to a "Y" military post exchange on a military reservation over which the state of Maryland had ceded exclusive jurisdiction to the United States Government. That case involved the precise point decided by the United States Supreme Court in Standard Oil Company v. California, supra. The later Query case, 37 F.Supp. 972, was also a decision by a court of three judges and unquestionably supports the position of appellant. It was decided in March of this year. It contains an exhaustive review of the authorities bearing upon the legal status of army post exchanges and holds that they are federal instrumentalities and immune from state taxation.

As against these authorities in favor of the appellant, the respondent relies upon two decisions of the circuit courts of appeal and one from the Supreme Court of the Philippine Islands. In the first of these cases, Keane v. United States, 4 Cir., 272 F. 577, Keane was charged with conspiracy to defraud the United States by padding invoices for meat sold by him to an army post exchange. He appealed from a judgment of conviction and the circuit court of appeal reversed the judgment, holding at pages 587, 588 of 272 F.: "Clearly the post exchange described in the indictment in this case is not such a lawful department of Government. Therefore this post exchange is not such an institution as that a fraud upon the United States can arise from or be involved in any transaction concerning it, * * *." While this decision was by a divided court, it is not shown that any appeal was taken therefrom. Apparently the government was satisfied with the conclusion reached therein.

Pan American Petroleum Corporation v. State of Alabama, 5 Cir., 67 F.2d 590, a decision of the circuit court of appeal and the second case relied upon by respondent, involved the right of the state of Alabama to impose a tax upon gasoline sold to a military post exchange. After pointing out that the tax was not on the sale, but upon the withdrawal of the gasoline from storage, the court stated at page 591 of 67 F.2d: "Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges * * * are not exempt from the state excise taxes. People v. Standard Oil Co. [218 Cal. 123], 22 P.(2d) 2." A petition for a writ of certiorari to review this decision was denied. 291 U.S. 670, 54 S.Ct. 454, 78 L.Ed. 1060.

The third case relied upon by respondent in support of the judgment is the case of Thirty-First Infantry Post Exchange v. Posadas, supra. It involved the right to collect a tax levied by the local government upon sales made to army post exchanges and "ship's stores". (The latter are organized within the navy in the same manner and for the same purpose as post

exchanges are established in the army.) The court sustained the tax in the following language: "We rule that an Army Post Exchange, although an agency within the United States Army cannot secure exemption from taxation for merchants who make sales to the Post Exchange." The United States Supreme Court denied a petition to review this decision by certiorari. 283 U.S. 839, 51 S.Ct. 487, 75 L.Ed. 1449. This decision would apparently overrule the case of Post Exchange, 31st Infantry v. Keeney, supra, decided by the Supreme Court of the Philippine Islands and relied upon by the appellant.

We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions: First, in the Thirty-First Infantry Post Exchange v. Posadas, supra, when it declined to review the judgment of the Supreme Court of the Philippine Islands, involving a tax on merchandise sold to a post exchange; second, in our own case of Standard Oil Company v. California, supra, where it held the tax void because the same was made within territory over which this state had ceded full legislative authority to the United States, but declined to pass upon the legal status of an army post exchange, that is, whether it is or is not a department or instrumentality of the federal government; and, third, in the case of Pan American Petroleum Corporation v. State of Alabama, supra, wherein the circuit court of appeal sustained a tax levied by the state upon sales of gasoline made to a post exchange.

In a very recent decision of the Board of Tax Appeals for the District of Columbia, in a proceeding entitled "Post Exchange, The Army War College v. District of Columbia," decided July 24, 1941, a tax assessed by the assessor of the District of Columbia upon two automobiles belonging to said post exchange was sustained. After an extensive review of all the authorities cited above and many others, the Board of Tax Appeals arrived at the following conclusion: "After giving consideration to the decisions, upon which the petitioner and respondent rely, and a study of the Army Regulations pertaining to post exchanges, the Board is of the opinion that the petitioner is not an agency, instrumentality or department of the United States, but is a voluntary co-operative association of army organizations in which all share as partners in the profits and losses, and in which the United States has neither a share in the profits, nor liability for the losses. The Board realizes that there are authorities opposed to this ruling, but believes that the reasoning of the decisions which support the Board's conclusion is more persuasive. That being so, it follows that the tax here involved was not erroneously collected by the District from the petitioner. * * *"

[2, 3] It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, "is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located". People v. Standard Oil Company of California, supra, 218 Cal. at page 128, 22 P.2d at page 4.

[4] Since the rendition of the opinion in the case of Standard Oil Company v. California, supra, holding a sale to a post exchange within a territory over which the state has ceded to the federal government full legislative authority, is immune from a state tax, congress has enacted a statute which removes the immunity from taxes on sales made within a federal area. 54 U.S.Stats., p. 1059, 4 U.S.C.A. § 13(a). This change in the federal law, however, would not in any manner affect the decision in this case, as it is expressly alleged that none of the army post exchanges to which the plaintiff sold gasoline, and on which it paid a tax, is located on United States military reservations, over which the federal government has exclusive jurisdiction to legislate.

For the reasons herein stated the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concurred.

I concur in the judgment: HOUSER, J.

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HAMMELL v. BRITTON et al.

L. A. 17012.

Supreme Court of California.

Nov. 25, 1941.

1. Evidence ⇐43(3)

In considering sufficiency of a complaint referring to prior judgments from which appeals were taken, the Supreme Court could take judicial notice of matters contained in its records on those appeals. Code Civ.Proc. § 1875, subd. 3.

2. Judgment ⇐403

Under proper circumstances, an action will lie for equitable relief from a judgment when other remedies are not available, and such an action is a direct attack on the judgment.

3. Judgment ⇐432

Equitable relief from judgment cannot be obtained on grounds which would have been a defense to original action, in absence of showing of some equitable excuse for not having made the defense or for having made it unsuccessfully.

4. Judgment ⇐460(3)

In action to set aside California judgment, where plaintiff contended that judgment was based on Colorado judgment vacating Colorado divorce decree and that California judgment was subject to attack because of second Colorado judgment vacating the first Colorado judgment, allegation of complaint that plaintiff had no knowledge of first Colorado judgment until time of trial of action in which California judgment was rendered was insufficient to show excuse for failure of defense in that action, since plaintiff could have contested the first Colorado judgment in that action.

5. Judgment ⇐818(1), 820

In action to quiet title to property conveyed to plaintiff by husband without wife's consent, wherein plaintiff had been made a defendant, he was entitled to contest Colorado judgment obtained by wife vacating divorce decree on ground that Colorado court lacked jurisdiction and that judgment was obtained by fraud. U.S.C.A.Const. art. 4, § 1.

6. Judgment ⇐822(1)

A judgment of a sister state is binding upon California courts, if valid, by virtue of full faith and credit clause of the Federal Constitution. U.S.C.A.Const. art. 4, § 1.

7. Judgment ⇐818(1, 5), 820

The jurisdiction of court of sister state in which a judgment was rendered may be questioned collaterally in another state, notwithstanding full faith and credit clause of Constitution and notwithstanding jurisdictional recitals in judgment, and if extrinsic fraud exists with respect to jurisdiction, the judgment may be ignored. U.S.C.A.Const. art. 4, § 1.

8. Judgment ⇐460(4)

In action to set aside California judgment, wherein plaintiff contended that judgment was based on a Colorado judgment vacating Colorado divorce decree and that California judgment was subject to attack because of second Colorado judgment setting aside the first Colorado judgment, allegations that plaintiff charged in Colorado proceeding resulting in second Colorado judgment that first Colorado judgment was obtained by fraud and that second Colorado judgment so determined did not sufficiently allege fraud as basis for equitable relief.

9. Judgment ⇐460(4)

In action for equitable relief based upon extrinsic fraud in obtaining a judgment, facts constituting the fraud must be pleaded with particularity and specifically.

10. Judgment ⇐443(1)

Where plaintiff attacked California judgment on ground that judgment was based upon Colorado judgment vacating Colorado divorce decree, and that Colorado judgment was obtained by fraud of wife, the fraud alleged was "intrinsic" rather than "extrinsic" and therefore insufficient as basis for equitable relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Intrinsic Fraud."

11. Judgment ⇐443(1)

Fraud sufficient to justify equitable relief from a judgment must be extrinsic or collateral to questions examined or determined.

12. Judgment ⇐444

Equitable relief from a judgment arising out of a contested action will not be granted because judgment was obtained by perjured testimony or forged documents, since that does not constitute "extrinsic fraud" but constitutes "intrinsic fraud" against which defense may be made at trial.

13. Judgment ⇐717

If plaintiff, who had been made a defendant in action in California to quiet ti-

tle, made defense that Colorado judgment, on which judgment in California proceeding was allegedly based, was obtained by fraud, the issue was "res judicata" and plaintiff was "estopped" from asserting it in action to set aside the California judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Res Judicata."

14. Judgment ⇐822(1)

The full faith and credit clause does not compel court to set aside a judgment rendered in a prior action involving the same issue which has subsequently been adjudicated by a court of a sister state. U.S.C.A. Const. art. 4, § 1.

15. Judgment ⇐822(1)

Where California judgment on first trial of proceedings attacked by plaintiff was an adjudication of validity of Colorado judgment vacating a divorce decree, and thereafter a second Colorado judgment vacated the first Colorado judgment, the full faith and credit clause of Federal Constitution did not require California court to recognize the second Colorado judgment by setting aside California judgment. U.S.C.A.Const. art. 4, § 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by D. C. Hammell against John H. Britton and others to set aside a judgment rendered against plaintiff by the superior court for Los Angeles county. From a judgment dismissing the complaint, the plaintiff appeals.

Judgment affirmed.

Prior opinion, 110 P.2d 106.

Thos. H. Hearn and L. H. Pemberton, both of Los Angeles, for appellant.

Leland J. Allen, of Los Angeles, for respondents.

CARTER, Justice.

This action is one for equitable relief in which the plaintiff attacks and seeks to have set aside a judgment rendered against him by the superior court for Los Angeles County. Defendants' demurrer to plaintiff's amended complaint, based on insufficiency, uncertainty, ambiguity, and unintelligibility, having been sustained without leave to amend, judgment of dismissal of the action was entered from which plaintiff appeals.

[1] Plaintiff alleges in his amended complaint: That defendant John H. Britton is the administrator of the estate of Sophie Britton, who died in December, 1932, and is an heir of Sophie Britton; that defendant Frank Bryson is the administrator of the estate of John Henry Britton, who died in June, 1927, having been the husband of Sophie Britton prior to March 30, 1891, at which time they were divorced by a decree of divorce rendered by the county court of Bent county, Colorado (this decree is hereinafter referred to as the Colorado divorce decree); that on April 19th, and May 12, 1926, John Henry Britton conveyed to plaintiff certain real property situated in Los Angeles county, California; that on July 16, 1928, a judgment (hereinafter referred to as first Colorado judgment) was rendered by the county court of Bent county, Colorado, vacating the Colorado divorce decree in a proceeding in which Sophie Britton was plaintiff, and Bryson administrator of the John Henry Britton estate, and the heirs of Sophie and John Henry Britton were defendants, but plaintiff was not a party; that plaintiff had no knowledge of said first Colorado judgment until November 30, 1928; that on November 18, 1933, plaintiff commenced an action in the county court of Bent county, Colorado, against the defendants herein to set aside the first Colorado judgment upon the ground that the same "was obtained by means of fraud and collusion of the said Sophie Britton" et al., and that on July 6, 1934, the Colorado court rendered its judgment (hereinafter referred to as second Colorado judgment) vacating the first Colorado judgment and declaring the Colorado divorce decree in full force and effect, and that said second Colorado judgment was given on the ground that the first Colorado judgment was "obtained through and by the means of the fraud and collusion of said Sophie Britton" et al.; that the second Colorado judgment was affirmed on appeal July 2, 1935. Plaintiff then refers to certain California judgments the last of which he seeks by this action to have set aside, although he does not set forth those judgments. An appeal from those judgments was heard and determined by this court. Under the circumstances we may take judicial notice of the matters contained in the records of this court on those appeals in considering the sufficiency of plaintiff's complaint, even though those matters do

not appear on the face of the amended complaint. See Code Civ.Proc., sec. 1875 (3); French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756; Fey v. Rossi Imp. Co., 23 Cal.App. 766, 139 P. 908; Livermore v. Beal, 18 Cal. App.2d 535, 64 P.2d 987; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; Chavez v. Times-Mirror Co., 185 Cal. 20, 195 P. 666; City of Los Angeles v. Abbott, 217 Cal. 184, 17 P.2d 993; Mason v. Drug, Inc., 31 Cal.App.2d 697, 88 P.2d 929.

Turning to those judgments, they disclose that the action which ultimately resulted in the judgment (hereinafter referred to as second California judgment) here attacked, was commenced on August 6, 1926, by Sophie Britton against plaintiff herein and John Henry Britton, her husband, to have it declared that the above-mentioned real property in Los Angeles county, California, was the community property of Sophie Britton and John Henry Britton because they were husband and wife when Mr. Britton acquired the property, and that they had never been divorced. Plaintiff herein was made a defendant in that action because the property had been deeded to him by Mr. Britton without Mrs. Britton's consent. That action came on for trial in November of 1928, Bryson having been substituted as administrator in place of Mr. Britton, the latter having died after the commencement of the action. The trial court gave judgment (hereinafter referred to as first California judgment) for the defendants which was reversed by this court on September 22, 1932. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502. In its opinion, rendered on said appeal, this court said:

"It appears that Sophie Britton and John Henry Britton were married in the year 1873. Five children were born as the result of that union. In March, 1891, while the parties were both domiciled in Colorado, John Henry Britton secured a decree of divorce from his wife in the county of Bent, state of Colorado. This decree dissolved the marriage relation, and in addition awarded to the wife the care, custody, and control of the five children, alimony of $40 per month, and required the plaintiff in said action, John Henry Britton, to deed to defendant therein, Sophie Britton, certain real property situated in Arapahoe county, Colorado. It is the claim of Sophie Britton that this decree was *fraudulently obtained by John Henry Britton,* as they were both residents of Arapahoe county, not Bent county, Colorado, at that time; that *she was never served with summons;* and that although an attorney, one W. B. Lourance, purported to act for her in the matter, *she knew nothing of the matter and, in fact, knew nothing of the procurement of the decree until after the death of her husband,* John Henry Britton, during the pendency of this action. She further claims that the terms of the decree were never carried out by John Henry Britton, either as to the deeding of the Colorado property to her or the payment of the alimony, and that there were no circumstances to indicate to her or to arouse her suspicions that any divorce had been procured by her husband. The next month following the procurement of the divorce, in April, 1891, John Henry Britton married Rose E. Dixter in the state of Texas. Thereafter by deed dated May 13, 1916, he acquired in his own name the property which is the subject of this action [the property in California]. On March 2, 1923, John Henry Britton executed a deed conveying his interest in this and other described property to Rose E. Britton. This deed was recorded on May 31, 1923. Subsequently on June 2, 1924, John Henry Britton executed another deed conveying this particular property to Rose Britton as her sole and separate property. This deed was recorded on July 29, 1924. On June 26, 1924, Rose Britton reconveyed said property to John Henry Britton as his separate property. This deed was recorded January 2, 1926. On April 19, 1926, John Henry Britton executed a deed of gift of said property to D. C. Hammell, reserving to himself the 'exclusive possession, use and enjoyment in his own right, of the rents, issues and profits thereof,' and further reserving the right to revoke said deed and sell and convey said property. Subsequently on May 12, 1926, he executed another deed of said property to D. C. Hammell [the plaintiff herein]. This was the usual form of gift deed and contained no reservations. This deed was recorded May 14, 1926. When this suit was instituted on August 6, 1926, John Henry Britton appeared first by demurrer and then by answer. An inspection of his pleadings shows that *there was no mention therein of the divorce procured by him in 1891, and it was not until the answer of the administrator of his estate had been filed that this decree of divorce was set*

up as a defense. During the pendency of this action, plaintiff instituted in Colorado a suit in equity in which Frank Bryson, as administrator of the estate of John Henry Britton, and the five children of said couple, as the heirs at law of said John Henry Britton, were named as defendants. By this action, which was commenced in Bent County, Colo., she sought to have set aside the former decree of divorce granted by said court upon the ground that it had been fraudulently procured by her husband without service upon her. Substituted service was procured upon Frank Bryson, administrator of his estate, in California, and the five children accepted service. In that action she proved to the satisfaction of the court and the court specifically found that fraud had been perpetrated by John Henry Britton upon the 'County Court of Bent County, State of Colorado' by the filing of a purported service of summons and a representation that the said W. B. Lourance, an attorney, represented the said Sophie Britton, when in fact no service had been made upon Sophie Britton and W. B. Lourance did not in fact represent Sophie Britton, and had no authority to represent her. Judgment [first Colorado judgment] was entered on July 16, 1928, in favor of the plaintiff that 'the purported decree of divorce entered in Judgment Book 2, page 272 of the County Court of Bent County, State of Colorado, is set aside and decreed void and of no force and effect whatsoever; that the relationship of husband and wife between John H. Britton and Sophie Britton be decreed as if the said purported decree had not been entered.'

"At the trial of the instant action there were introduced by stipulation of both parties a copy of the decree of divorce procured by John Henry Britton from plaintiff in 1891, and likewise a copy of the decree of the county court of Bent county, Colo., of July 16, 1928, setting aside the former decree of divorce secured by John Henry Britton from Sophie Britton in 1891. *There were also introduced in evidence the depositions of Sophie Britton and her daughter, Pearl Britton. The deposition of the former contained a statement that she had never been served with a summons in a divorce action at any time; that she had never secured a divorce; and that continuously from December 4, 1873, until the death of John Henry Britton on June 29, 1927, she was his wife.* It was also, stipulated that a claim for $17,000, arrearage of alimony had been filed by plaintiff against the estate of John Henry Britton, which claim was to be dismissed if the judgment in this action were favorable to the plaintiff.

"Upon the submission of the case herein, which was tried without a jury, the court, apparently upon the theory that the judgment in the divorce suit was binding upon it by virtue of the full faith and credit clause of the United States Constitution (article 4), and that the judgment in the later suit setting aside said former decree was an idle act—an absolute nullity—gave judgment for the defendants. From this judgment plaintiff prosecutes this appeal.

"It is at once apparent that the answer to the question of whether or not the property in controversy ever was the community property of the plaintiff and the defendant John Henry Britton depends upon the binding effect upon the courts of this state of the two decrees of the Colorado court introduced in evidence by stipulation. At the outset it should be stated that as we understand the record the stipulation with reference to the introduction of each of these decrees in evidence went only to the authenticity of the decrees as judgments of the county court of Bent county, Colo., and no further. The stipulation did not concede the jurisdiction of the court in either action, nor the validity and binding effect of either judgment. It is obvious that plaintiff did not intend by the stipulation to concede the jurisdiction of the Colorado court to render the judgment therein procured, since by the same stipulation she was introducing in evidence a subsequent decree the very purpose of which was to conclusively prove that the court in the former case was without jurisdiction. Neither did the defendants intend to concede jurisdiction to the court to enter the later decree declaring void the former divorce decree, since their sole contention upon this appeal is that said decree is powerless to affect said former decree by reason of the fact that the court in the later action never obtained proper jurisdiction, inasmuch as no personal jurisdiction was obtained by Frank Bryson, administrator of the estate of John Henry Britton, he having been served by substituted service in California." (Emphasis added.)

This court then proceeded to reverse the judgment of the trial court chiefly on the

ground that the first Colorado judgment was valid and it conclusively established that the Colorado divorce decree was of no effect because fraudulently obtained. The case was retried and resulted in the second California judgment for Sophie Britton. On appeal therefrom that judgment was affirmed by this court on December 6, 1935. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221. The statement there made by this court further clarifies the situation. It is said at page 691 of 4 Cal.2d, at page 222 of 52 P.2d:

"* * * John H. Britton then made deeds of gift to defendant D. C. Hammell.

"In 1926 Sophie Britton brought this action against John H. Britton and defendant Hammell to declare the deeds to Hammell void and to compel the return of the property to the community. Answers were filed, but the divorce decree of 1891 was not pleaded. In 1927 John H. Britton died, and his administrator, Frank Bryson, substituted as a party defendant, pleaded the 1891 decree as a bar. Thereafter, in 1928, Sophie Britton brought an action in Bent county, Colo., and procured a judgment annulling the divorce decree of 1891, for fraud.

"The lower court in the first trial of this cause held that the Colorado decree of 1891 was valid. In Britton v. Bryson, supra, this court reversed the judgment. *Substantially the same evidence was presented at the new trial, and the lower court concluded that the plaintiff was still the wife of John H. Britton at the time the deeds were made;* that they were, in consequence, void for lack of her consent. Sophie Britton has since died, and her administrator has been substituted as plaintiff." (Emphasis added.)

The decision then discusses certain legal issues not here pertinent and affirms the judgment.

Plaintiff urges that the California judgment determining that the property was community property, was based solely on the first Colorado judgment which vacated the Colorado divorce decree and thereby finding that Sophie Britton and John Henry Britton were not divorced but were married when the latter acquired the property, and that said first Colorado judgment having fallen by reason of the second Colorado judgment, the California judgment must likewise fall; and that Sophie Britton was guilty of fraud in obtaining the first Colorado judgment, and therefore the California judgment is similarly tainted with fraud and is vulnerable to his attack. Neither of his contentions is tenable.

[2-7] Under proper circumstances an action will lie for equitable relief from a judgment when other remedies are not available; such an action is a direct attack on the judgment. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184; Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598. However, a party is not entitled to that relief on grounds which would have been a defense to the original action in the absence of a showing of some appropriate equitable excuse for not having made the defense or having been unsuccessful if made. McPhee v. Reclamation Dist. No. 765, 161 Cal. 566, 119 P. 1077; Brum v. Ivins, 154 Cal. 17, 96 P. 876, 129 Am.St.Rep. 137; Johnson v. Reed, 125 Cal. 74, 57 P. 680; Beaudry v. Felch, 47 Cal. 183; Agard v. Valencia, 39 Cal. 292. The only purported excuses offered by plaintiff which we are able to discover are three. The first is that he had no notice or knowledge of the first Colorado judgment, which vacated the divorce decree entered in 1891, until November, 1928, the time of the first trial of the California action; he was not a party to the proceeding resulting in the first Colorado judgment. Sophie Britton likewise knew nothing of the Colorado divorce decree until long after she had commenced her action, and it was first interposed as a defense by her husband's administrator after his death. Britton v. Bryson, supra. Upon learning of it, however, she obtained in Colorado the first Colorado judgment, and introduced that judgment at the first trial of the California action as a defense to the divorce decree. Assuming that plaintiff knew of the first Colorado judgment for the first time at that time, he had ample opportunity to defend against it and establish that it was fraudulently obtained, if such were the case. That he did vigorously contest it is evident from the decision of this court on the first appeal in the California action in which this court held that the first Colorado judgment was valid. Britton v. Bryson, supra. It cannot be doubted that he was legally entitled to contest that judgment on the ground that the Colorado court lacked jurisdiction

and that the judgment was obtained by fraud. A judgment of a sister state is binding upon the courts of this state *if valid* by virtue of the full faith and credit clause of the Constitution of the United States (see Article IV, § 1); but the jurisdiction of the court of the sister state in which the judgment is rendered, may be questioned collaterally in another state notwithstanding the full faith and credit clause and notwithstanding the jurisdictional recitals in the judgment; if extrinsic fraud exists with respect to the jurisdiction, the judgment may be ignored. Britton v. Bryson, supra. As stated, plaintiff had ample opportunity to be heard and contest the first Colorado judgment. He first knew of it at the first trial of the California action in 1928. That action was tried, heard on appeal, retried and again heard on appeal resulting in a final affirmance in December, 1935, but it was not until November, 1933, that plaintiff commenced his action in Colorado in which he ultimately obtained the second Colorado judgment setting aside the first Colorado judgment.

[8-12] The second ground offered by plaintiff for equitable relief is fraud. His allegations in that respect are insufficient. He alleges that he charged in the Colorado proceeding resulting in the second Colorado judgment that the first Colorado judgment was obtained by means "of fraud and collusion of Sophie Britton" and others, and that the second Colorado judgment determined that the first Colorado judgment was obtained by means "of the fraud and collusion of said Sophie Britton" and others. There are no allegations of the facts constituting the fraud. It is elementary that in an action for equitable relief based upon extrinsic fraud in obtaining a judgment, the facts constituting the fraud must be pleaded with particularity and specifically. Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798; Heller v. Dyerville Mfg. Co., 116 Cal. 127, 47 P. 1016; Berger v. Horlock, 10 Cal.App. 352, 101 P. 918; Wheat v. McNeill, 111 Cal. App. 72, 295 P. 102; O. A. Graybeal Co. v. Cook, 16 Cal.App.2d 231, 60 P.2d 525. But even more significant is the fact that there is not a single allegation in the amended complaint which establishes that plaintiff was prevented by fraud from making any defense available to him in the California action. If we assume that he sufficiently alleges that the first Colorado judgment was obtained by means of fraud, and that such judgment was an important factor in the California action inasmuch as it declared the divorce decree invalid and left Sophie and John Henry Britton still married, thereby giving community character to the real property acquired by the husband, still plaintiff has failed to state a case, because such fraud would be intrinsic rather than extrinsic. The first Colorado judgment constituted conclusive evidence that the divorce decree was invalid, and if obtained by fraud, was not unlike a forged instrument or perjured testimony forming the evidentiary basis for a judgment. The fraud sufficient to justify equitable relief from a judgment must be extrinsic or collateral to the questions examined or determined. Eisenmayer v. Thompson, supra; Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220; La Salle v. Peterson, 220 Cal. 739, 32 P.2d 612; Swallow v. Tungsten Products Co., 205 Cal. 207, 270 P. 366; Stenderup v. Broadway State Bank, 219 Cal. 593, 28 P.2d 14; 15 Cal. Jur. 14. It has been frequently stated that equitable relief from a judgment arising out of a contested action will not be granted merely because it was obtained by perjured testimony or forged documents; that constitutes intrinsic fraud against which defense may be made at the trial. False or perjured testimony is not extrinsic fraud. Godfrey v. Godfrey, 30 Cal.App.2d 370, 86 P.2d 357; O. A. Graybeal Co. v. Cook, supra; Harvey v. Griffiths, 133 Cal.App. 17, 23 P.2d 532; Jeffords v. Young, 98 Cal.App. 400, 277 P. 163; Julien v. West, 96 Cal.App. 558, 274 P. 421; La Salle v. Peterson, supra; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159. It must be concluded therefore that plaintiff has failed to allege extrinsic fraud entitling him to relief.

[13] Plaintiff was not prevented by any fraudulent conduct of defendants from presenting his full case in court. He has not set forth any equitable excuse for not having made the defense of fraud or lack of jurisdiction or for having failed to prevail thereon in the California action with reference to the first Colorado judgment, and if it may be said that he did make such a defense, then the issue is res judicata by the second California judgment and he is estopped to assert it in this action.

[14, 15] The third justification claimed by plaintiff as a basis for equitable relief is

that the full faith and credit clause of the United States Constitution compels the recognition by this court of the second Colorado judgment vacating the first Colorado judgment, and that by this proceeding in equity the second California judgment must be set aside because it rests on a false premise, that is, that, the Colorado divorce decree was invalid and therefore the Brittons were husband and wife, whereas the Colorado court has now declared that its divorce decree is valid and its judgment declaring it invalid is a nullity. Plaintiff cites no authority supporting that proposition. As we have seen, plaintiff is now estopped to assert the invalidity of the first Colorado judgment, having had his day in court on that issue in the California action. It may be further observed in that connection that it appears from the records of the second trial of the California action, plaintiff raised the contention that the first Colorado judgment was invalid because fraudulently obtained, and introduced evidence on that issue. While it is not entirely clear what ruling was made upon an objection to that evidence, we are satisfied the court considered it. In that action Sophie Britton introduced evidence independent of the first Colorado judgment, to the effect that no service of process had been made upon her in the Colorado divorce action, and that she was married to John Henry Britton when he acquired the property in question. On his motion for a new trial after the second trial, which was denied, plaintiff again urged that the first Colorado judgment was fraudulent. When the case was pending before this court on the last appeal, plaintiff moved this court for authorization to introduce evidence consisting of the second Colorado judgment, and called said judgment to this court's attention on petition for rehearing after decision on the appeal. Both the motion and petition were denied. Under these circumstances it cannot be seriously doubted that the California judgment was an adjudication on the validity of the Colorado divorce decree and first judgment vacating said decree. The full faith and credit clause does not compel this court to set aside a judgment rendered in an action involving the same issue which has subsequently been adjudicated by a court of a sister state. To so apply that clause would result in giving greater faith and credit to the judgments of the courts of other states than to those of the courts of this state. That provision of the Constitution cannot reasonably be interpreted to authorize a person to litigate a question ad infinitum. If full faith and credit is to be given, it should have been given to the California judgment by the Colorado court when entertaining the plaintiff's action which resulted in the second Colorado judgment. In Martin Bros. Box Co. v. Fritz, 228 Iowa 482, 292 N.W. 143, an Iowa court gave a default judgment in personam for plaintiff against an Indiana corporation. The corporation moved the Iowa court to vacate that judgment on the ground of lack of jurisdiction of the person. That motion was denied. Thereafter plaintiff sued on that judgment in Indiana, and the Indiana court gave judgment for the corporation on the ground that the Iowa court lacked jurisdiction. The corporation then brought an action in Iowa based upon the Indiana judgment for equitable relief from the Iowa judgment. Relief was denied and the court remarked at page 148 of 292 N.W.:

"The full faith and credit clause requires the courts of one state to give to the judgment of a court of another the same effect that is accorded such judgment in the latter state. Bowen v. Bowen, 219 Iowa 550, 552, 258 N.W. 882; In re Guardianship of Baxter, 191 Iowa 407, 182 N. W. 217; Secor v. Siver, 165 Iowa 673, 146 N.W. 845. Under such clause, since the Iowa judgment has been adjudicated to be valid in Iowa, the Indiana court should have enforced such judgment. It refused to do so. We know of no decision which would support the proposition that, if a judgment has been adjudicated to be valid and enforcible by a court in Iowa, but enforcement of such judgment is thereafter refused by a court in Indiana, the Iowa court must then follow the example of the Indiana court and also refuse to enforce such judgment. We are unwilling to so construe the full faith and credit clause."

What we have said in the foregoing opinion disposes of all of appellant's contentions and results in the conclusion that appellant cannot prevail in this action.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

19 Cal.2d 111

WILSON v. WALTERS.
L. A. 17792.

Supreme Court of California.
Dec. 2, 1941.

1. Judges ⇐3

A judge of a municipal court is an "elective officer" being chosen by the vote of the electorate in the municipality in which the court is established. Const.Cal. art. 6, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Elective Officer".

2. Garnishment ⇐63

A municipal court judge does not fall within the exception to statute authorizing garnishment of salary of a public officer excepting an elective officer of the state whose salary is fixed by specified section of the Constitution. Code Civ.Proc. § 710; Const. Cal. art. 5, § 19.

3. Constitutional law ⇐70(3)

The declaration of public policy is essentially a legislative function, and although courts occasionally invade that field, a declaration of policy by the Legislature is paramount.

4. Garnishment ⇐63

The Legislature, by statute expressly excepting from garnishment salaries of certain elective state officers whose salaries are fixed by specified section of Constitution, established a "public policy" contrary to the public policy previously declared by the courts that the salary of no officer or employee of the state or a political subdivision thereof should be subject to garnishment. Code Civ.Proc. § 710; Const.Cal. art. 5, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

5. Constitutional law ⇐52
Garnishment ⇐2

Even assuming that the office of judge of a municipal court is a constitutional office, such fact alone constitutes no constitutional prohibition against legislative action authorizing the garnishment of the salary of such officer. Code Civ.Proc. § 710.

6. Garnishment ⇐63

Even assuming that a judge of the municipal court of Los Angeles was a "constitutional officer," his salary was not exempt from garnishment under statute providing for the garnishment of salaries of public officers and expressly exempting therefrom only elective state officers whose salaries are fixed by specified section of Constitution. Code Civ.Proc. § 710; Const.Cal. art. 5, § 19.

7. Garnishment ⇐63

Statute providing for garnishment of salaries of public officers and employees, excepting those of elective state officers whose salaries are fixed by specified section of Constitution, is comprehensive and should receive a liberal construction. Code Civ.Proc. § 710; Const.Cal. art. 5, § 19.

8. Officers ⇐100(1)

A constitutional provision, prohibiting the increase or decrease of an officer's salary during his term of office, would not prohibit the garnishment of an officer's salary. Code Civ.Proc. § 710.

9. Judges ⇐22(2)

Constitutional provision that compensation of judges of all courts of record shall be fixed by Legislature abrogated prior constitutional provision that salary of judicial officer should not be increased or decreased during his term of office. Const.Cal. art. 6, § 11.

10. Judges ⇐22(2)

A municipal court is a "court of record" within constitutional provision that the compensation of judges of all courts of record shall be fixed by Legislature. Const.Cal. art. 6, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Court of Record".

11. Municipal corporations ⇐67(5)

Legislation with reference to garnishment of the salary of public officer as applied to a judge of municipal court of Los Angeles was not an unconstitutional interference with a "municipal affair", since the constitution of municipal court from every viewpoint except only that of the bare question of whether there shall be such court in any given locality is a state rather than a municipal affair. Code Civ.Proc. § 710; Const.Cal. art. 6, § 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

12. Municipal corporations ⇐64

If a state law affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, the state law applies to charter cities.

13. Municipal corporations ⇐67(5)

Statute, authorizing garnishment of salaries of public officers, was applicable to salary of judge of municipal court of charter city, even though it incidentally affected a municipal affair, since such statute relates to a matter of state-wide concern as distinguished from a municipal affair. Code Civ. Proc. § 710.

14. Bankruptcy ⇐363, 423(1)

Where the remedy for obtaining money or property by fraudulent representations may be predicated on either contract or tort, the liability therefor is not canceled by a discharge in bankruptcy, even though creditor makes his claim on contract rather than on the fraud in the bankruptcy proceeding and claim is allowed, such claim and allowance not constituting a "waiver" of the tort liability nor of creditor's right to recover difference between amount received on allowance and damages actually suffered. Bankr. Act, § 17, 11 U.S.C.A. § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

15. Bankruptcy ⇐363, 421(1)

A liability which is excepted from the discharge by bankruptcy act is not canceled by the discharge, regardless of whether creditor proved her claim in the bankruptcy proceeding. Bankr.Act, § 17, 11 U.S.C.A. § 35.

16. Bankruptcy ⇐421(1)

The mere fact that a liability, which was excepted from the discharge by bankruptcy act, had been reduced to judgment and that a judgment had been subsequently obtained on such judgment, did not take liability out of the exception from the discharge, since it is the nature of the liability itself which is the determining factor. Bankr.Act, § 17, 11 U.S.C.A. § 35.

17. Bankruptcy ⇐421(1)

A claim, which is not provable in bankruptcy proceeding, is not discharged by bankruptcy, but sole test of whether a liability is discharged is not whether the claim is susceptible of proof in bankruptcy proceeding, since a claim or liability, falling within the class expressly excepted by bankruptcy act from the discharge, even though a provable claim, is not discharged. Bankr.Act, § 17, 11 U.S.C.A. § 35.

18. Bankruptcy ⇐423(1)

Where complaint contained counts both in contract and fraud and stipulation for judgment and judgment recited that judgment was in accordance with allegations of the complaint, plaintiff did not "waive" tort, so as to preclude her from asserting that claim was based on fraud, and hence not discharged in subsequent bankruptcy of judgment debtor. Bankr.Act, § 17, 11 U.S.C.A. § 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

19. Exemptions ⇐150

In garnishment proceeding where affidavits with respect to what portion, if any, of defendant's salary was exempt from execution under exemption laws were conflicting, trial court should have determined such issue. Code Civ.Proc. § 690.11.

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Suit by Edith Maud Wilson against Byron J. Walters. From an order releasing from garnishment the salary of defendant as municipal judge of the city of Los Angeles, plaintiff appeals.

Order reversed, with directions.

Prior opinion, 112 P.2d 964.

W. Cloyd Snyder, of Los Angeles, for appellant.

Pierson & Block, of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, as a judgment creditor of defendant, complied with the provisions of section 710 of the Code of Civil Procedure, authorizing a garnishment or levy of execution against the salary of a public officer or employee. Defendant is a judge of the municipal court in the city of Los Angeles and there was payable to him the salary of that office. Pursuant to said section 710 the documents necessary to garnish that salary were filed with the county auditor of Los Angeles county, who thereafter paid the same into the superior court for Los Angeles county to be by it disbursed according to law. On May 31, 1940, defendant filed a notice of motion for an order releasing the money so held by the superior court, which motion was based upon three grounds, namely, that defendant's salary as a municipal court judge was not subject to garnishment; that defendant had been discharged in bankruptcy; and

that the salary was exempt from execution under section 690.11 of the Code of Civil Procedure because it was earned within the period of thirty days next preceding the filing of the abstract of judgment with the county auditor. The court made its order granting the motion, stating therein: "* * * defendant's discharge in bankruptcy does not release the claim of plaintiff's judgment herein. The motion of defendant to release the balance of money under garnishment is granted upon the sole ground that defendant is * * * a judge of the Municipal Court. * * *" Plaintiff appeals from that order.

[1,2] Section 710 of the Code of Civil Procedure provides that whenever a judgment for the payment of money is rendered against a defendant to whom money is owing and unpaid by the state, county, city, etc., the judgment creditor may file an abstract of the judgment and affidavit with the appropriate fiscal officer who thereupon pays the money so owing into court. The court then pays to the judgment creditor the sum necessary to satisfy the judgment, excepting, however, any portion thereof that is exempt from execution. That section apparently includes officers and employees of the state and various political subdivisions thereof, excepting therefrom, however, as expressed in the last sentence thereof, the following: "Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any *elective officer of this State whose salary is fixed by section 19 of Article V of the State Constitution.*" (Emphasis added.) Manifestly, in order to qualify for that exception the officer must be: (1) A state officer, (2) An elective officer, and (3) One of the officers whose salary is fixed by the constitutional provision to which reference is made. A judge of a municipal court is an elective officer, being chosen by the vote of the electorate in the municipality in which the municipal court is established. California Constitution, art. VI, sec. 11. Whether or not he is a state officer need not be determined inasmuch as he is not one of the officers whose salary is fixed by section 19 of Article V of the California Constitution. That section fixes the salaries of the governor, lieutenant-governor, secretary of state, controller, and surveyor-general (the attorney-general is also mentioned but is affected by article V, section 21), and provides that the legislature may diminish but not increase the salaries so fixed, except that the salaries of those officers may not be increased or decreased during the term for which they shall have been elected. It follows therefore that defendant, a judge of the municipal court, does not fall within the exception specified by section 710 of the Code of Civil Procedure.

Defendant urges, however, that there is another group of officers excepted from that Code section which is created by implication, and that included therein are all so-called "constitutional officers", that is, officers who are provided for by the Constitution, and that a judge of a municipal court is a constitutional officer. Assuming but not deciding that a judge of the municipal court is a constitutional officer, we cannot agree with defendant's contention. It was long the accepted theory that public policy, invoked and declared by the courts, prevented the garnishment of the salaries or wages of any officers or employees of the state or other political subdivisions either by attachment before judgment or levy of execution thereafter. 28 Corpus Juris 174, et seq.; Lawson v. Lawson, 158 Cal. 446, 111 P. 354; Ruperich v. Baehr, 142 Cal. 190, 75 P. 782; Trow v. Moody, 27 Cal.App. 403, 150 P. 77; Vaughn v. Condon, 52 Cal.App. 713, 199 P. 545; Walker v. Rich, 79 Cal.App. 139, 249 P. 56; Irilarry v. City of San Diego, 186 Cal. 535, 199 P. 1041. Various reasons were advanced as the foundation for that rule, including the sovereign and public character of the garnishee and the lack of privity between the garnishee and judgment debtor. The most common basis for that public policy is expressed in Ruperich v. Baehr, supra, at page 193 of 142 Cal., at page 783 of 75 P.: "The state and its subordinate bodies perform their governmental functions through their officers and employés elected or appointed for that purpose. Therefore any process of law which would tend to embarrass such officers or employés while in office, and hinder or distract them in the discharge of official duty, would injuriously affect the capacity of the state to perform its functions, as much as, if not more than, the annoyance of having its funds subjected to garnishee process."

[3,4] The same policy has been urged as a ground for construing statutes, such as section 710, to the end that they do not include public officers and employees.

Ruperich v. Baehr, supra. The declaration of public policy is essentially a legislative function and although the courts occasionally invade that field, a declaration by the legislature is paramount. In enacting section 710 the legislature has made such a declaration with respect to that public policy concerning garnishments by a judgment creditor which is contrary to that established by the courts. Ruperich v. Baehr, supra. The last-cited case was the first in California to construe a statute authorizing garnishment by a judgment creditor which prima facie was applicable to public officers and employees and it was there held that the salary of an employee of the city and county of San Francisco was subject to garnishment by a judgment creditor under section 710 of the Code of Civil Procedure. The court did remark in that case that it was not there passing upon the issue with respect to "constitutional offices and officers" but only on those clearly "within legislative control", such as the particular employee involved; however, that cannot be said to be a determination that the section does not apply to constitutional officers. Likewise, the statement in Lay v. Hammond, 212 Cal. 665, 300 P. 10, concerning the salaries of constitutional officers was not necessary for the decision. See, also, Payne v. Baehr, 153 Cal. 441, 95 P. 895; Lawson v. Lawson, supra. In Lawson v. Lawson, supra, it was held that the salary of a justice of the peace could be garnished under section 710. The court again referred to a possible distinction between constitutional officers and those created by the legislature, but did not decide the point. Its decision was predicated on the proposition that there was no constitutional provision inhibiting the garnishment of the salary of a justice of the peace. In Trow v. Moody, supra, it was determined that the salary of a deputy treasurer of a municipal corporation was subject to garnishment under section 710. Finally, in Gamble v. Utley, 86 Cal.App. 414, 260 P. 930, it was held that the salary of a district attorney of a county was not subject to garnishment because it was a constitutional office, that is, the Constitution provided that there should be a district attorney for every county who shall receive a salary to be fixed by the legislature. That case therefore was the first one squarely deciding that section 710 was not applicable to a constitutional officer; a constitutional officer being defined as one whose office was created by the Constitution and which was not subject to the will of the legislature. In so far as that case is in conflict with the views herein expressed and for the reasons herein stated, it is disapproved. The basic reasoning for exempting, by implication, so-called constitutional officers from section 710 is not substantially different than the foundation for the public policy protecting the salaries of all public officers and employees from execution, which was declared by the courts. As we have seen, section 710 was a declaration by the legislature of a public policy contrary to that expressed by the courts. The reason for the rule having been eliminated in one instance, it is likewise inapplicable as to the other.

[5] It is true, of course, that if there is in fact a constitutional restriction against the garnishment of the salaries of certain public officials, then the legislature could not lawfully enact a statute to the contrary. But we find no such inhibition in the Constitution. Even assuming as we have, but not deciding, that the office of judge of a municipal court is a constitutional office, that is, an office created and provided for by the Constitution, we do not believe that such fact alone constitutes a constitutional prohibition against the legislature authorizing the garnishment of the salary of such officer. The only possible way in which such a constitutional inhibition could be said to exist would be by *implication.* And the only basis for that implication is that public policy is said to require that the legislature must not be permitted to interfere with, or in any way affect the efficiency or functions of an officer whose office is created by the Constitution; and that authorizing the garnishment of such officer's salary has that result. That is no longer the policy of this state, and in any case, it is of extremely doubtful merit. Making it possible for a judgment creditor to realize upon the obligations justly owed by his debtor is certainly a sound and just policy. It cannot be said to be detrimental to the public interest to expect the same integrity and duty with respect to satisfying his judgment obligations of a constitutional officer as of any other officer or any other person. To draw the implication that the Constitution, by creating an office, thereby exempts the salary of the incumbent from payment of his debts, it is necessary to assume a condition will exist that is more imaginary than real. It would have to be accepted that by merely permitting his salary to be garnished his

effectiveness in office will be destroyed, and that the office so created will be to an extent at least, impaired and destroyed. That assumption is manifestly highly speculative and conjectural. In this connection it is worthy of note that by a process of reasoning quite analogous with that urged by defendant, it was long the rule that the salary of a state office or employee was not subject to federal taxation and vice versa. See Collector v. Day, 11 Wall. 113, 20 L.Ed. 122; McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579. The basis of that rule was *implied* from the United States Constitution on the theory that the power to tax involved the power to destroy, and that one sovereignty could not impair the exercise by the other of its powers, and that a taxation of the salaries of employees or officers, of one by the other, would have that result. That premise has been abandoned by the Supreme Court of the United States and is no longer the law. Graves v. New York, 306 U.S. 466, 59 S. Ct. 595, 83 L.Ed. 927, 120 A.L.R. 1466. Furthermore, it is worthy of note that the Supreme Court of the United States has overruled prior cases and held that the salary of a federal judge may be subjected to federal taxation although the Constitution of the United States (art. 3, sec. 1) provides that the salary of a judge shall not be diminished during his term of office. O'Malley v. Woodrough, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289, 122 A. L.R. 1379. There are well-reasoned cases in accordance with the views herein expressed. Department of Banking v. Foe, 136 Neb. 422, 286 N.W. 264, 123 A.L.R. 894; State v. Surety Finance Co., 42 Ariz. 42, 21 P.2d 929.

[6, 7] We conclude therefore that the mere fact that an officer is a constitutional officer, that is, the incumbent of an office created by the Constitution, does not exempt him from the provisions of section 710 of the Code of Civil Procedure, unless he is one of the officers expressly exempted by that section, that is, one who is elective and whose compensation is fixed by article V, section 19 of the Constitution. This is consonant with the intent of that section which by its terms is comprehensive. It should receive a liberal construction. Ruperich v. Bachr, supra, 142 Cal. 195, 75 P. 782.

[8-10] There is no constitutional provision which forbids the application of section 710 to constitutional officers. It has been suggested that a provision prohibiting the increase or decrease of an officer's salary during his term of office would constitute such a prohibition. What we have heretofore said is pertinent to the point that in our opinion there is no merit in such a proposition. See Department of Banking v. Foe, supra; O'Malley v. Woodrough, supra. In any event there is no such constitutional provision applicable to judicial officers. Prior to 1924, section 17 of article VI of the Constitution contained such a provision but it was abrogated by section 11 of article VI, which provided that: "The compensation of the justices or judges of all courts of record shall be fixed, and the payment thereof prescribed by the Legislature." See Sevier v. Riley, 198 Cal. 170, 244 P. 323. A municipal court is a court of record. California Constitution, art. VI, sec. 12; 6 Cal.Jur.Ten Yr.Supp. 733.

[11] The argument is advanced that permitting the garnishment of defendant's salary would constitute an unconstitutional interference with a municipal affair, he being the judge of a municipal court in Los Angeles, a charter city. It has been declared that the constitution of municipal courts from every viewpoint, except only that of the bare question of whether there shall or shall not be one in any given locality, is a state rather than a municipal affair. Chambers v. Terry, 40 Cal.App.2d 153, 158, 104 P.2d 663. The salaries of judges of municipal courts are fixed by the legislature. California Constitution, art. VI, sec. 11. Therefore, legislation with reference to the garnishment of the salary is not a municipal affair.

[12, 13] The result is the same if it be conceded that the matters with respect to a municipal court judge and the payment of his salary is a municipal affair. The most that could be said is that such municipal affair is *incidentally* affected by section 710 authorizing garnishment. If a state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of state-wide concern, then the state law applies to charter cities. Dept. of Water & Power v. Inyo-Chem. Co., 16 Cal.2d 744, 108 P.2d 410. Section 710 clearly relates to a matter of state-wide concern as distinguished from a municipal affair. Dept. of Water & Power v. Inyo-Chem. Co., supra. Furthermore, what we have heretofore said with relation to the purported public policy against

the garnishment of salaries of public officers is also pertinent here as showing that such garnishment is not in reality an interference with municipal affairs.

Turning to the discharge in bankruptcy as a ground for the release of the money levied upon, the record shows that the complaint in the action which ultimately resulted in plaintiff's judgment, the execution of which is here involved, was entitled "Complaint for Damages and Breach of Contract". It contained four counts, one being for money had and received; one for damages for false and fraudulent representations made by defendant with the intent to deceive plaintiff and have her act thereon and upon which plaintiff relied and by which she was induced to advance money to defendant and to take defendant's promissory note; one upon said note; and one upon an oral contract for a loan of money. It is apparent that all of the counts involved the same transaction and same money. The pleading of the actual fraud was complete and sufficient. Defendant's answer denied the allegations of fraud, but after it was filed he stipulated that judgment might be taken against him in the following language, in part: "* * * and the defendants waive trial, findings of fact and conclusions of law and stipulate that judgment be taken and entered against them, the said defendants by confession, *in accordance with the allegations of the complaint herein.*" (Emphasis added.) The form of judgment was agreed upon in the stipulation and read in part: "The plaintiff having filed her complaint herein praying for judgment against defendants upon certain *allegations as stated in the complaint,* and the defendant Byron J. Walters having answered said complaint personally without counsel, and the defendant William B. Johnston having filed no answer nor made any appearance herein, and the said cause having been set for trial before a jury and the defendants having signed and filed a stipulation for judgment herein waiving trial, findings of fact and conclusions of law, and the said defendants having stipulated that *judgment may be taken and entered herein in accordance with the allegations of the complaint in certain amounts* as hereinafter set forth, * * *." (Emphasis added.) That judgment was accordingly entered on August 17, 1932. Plaintiff brought an action on that judgment in 1937, and defendant having failed to appear default judgment was entered by the clerk on August 20, 1937. In response to voluntary proceedings therefore defendant was discharged in bankruptcy on August 10, 1939. It does not appear whether or not plaintiff was listed as a creditor, filed a claim or objected to the discharge, in the bankruptcy proceedings.

[14-16] With respect to those liabilities not included in a discharge in bankruptcy, the Bankruptcy Act as amended in 1938, provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, * * * except such as * * * are liabilities for obtaining money or property by false pretenses or false representations, * * *." 11 U.S.C.A. § 35. When property or money has been obtained by fraudulent representations and the remedy for the liability thereby created may be predicated on either contract or tort (fraudulent representations), such liability is not cancelled by a discharge in bankruptcy even though the creditor makes his claim on contract rather than on the fraud in the bankruptcy proceedings and the claim is allowed. He is still entitled to recover the difference between the amount received on the allowance and the damages actually suffered. There is no waiver of the tort liability. Friend v. Talcott, 228 U.S. 27, 33 S.Ct. 505, 57 L.Ed. 718. It is immaterial whether or not plaintiff proved her claim in the bankruptcy proceeding because if the liability is one excepted from the discharge by the Bankruptcy Act, it is not cancelled by the discharge. Friend v. Talcott, supra; 11 U.S.C.A. 35. The mere fact that the liability excepted from the discharge has been reduced to judgment does not take it out of the exception; it is the nature of the liability itself which is the determining factor. 8 C.J.S., Bankruptcy, §§ 563, 573. And the fact that a judgment is obtained on a judgment, the latter being based on the excepted liability, does not alter the rule. In re Bernard, D.C., 278 F. 734.

[17] The sole test of whether or not a liability is discharged in bankruptcy is not whether the claim is susceptible of proof in the bankruptcy proceedings under the bankruptcy laws. If a claim is not provable then for that reason alone it is not discharged by bankruptcy. But in addition thereto a claim or liability which falls within the class expressly excepted by the Bankruptcy Act, 11 U.S.C.A. § 35, from the discharge, is not discharged even though it is a provable claim. The case

of Marr v. Superior Court, 30 Cal.App. 2d 275, 86 P.2d 141, relied upon by defendant, in so far as its holding is to the contrary, is disapproved. The District Court of Appeal in that case erroneously relied upon Crawford v. Burke, 195 U.S. 176, 25 S.Ct. 9, 49 L.Ed. 147, and Tindle v. Birkett, 205 U.S. 183, 27 S.Ct. 493, 51 L. Ed. 762, in holding that a liability arising from fraudulent representations was dischargeable in bankruptcy where a note was also given in the transaction which made the claim provable in bankruptcy proceedings. The Crawford and the Tindle cases were decided under the Bankruptcy Act as it existed prior to its amendment in 1903. Under the law then existing the express exception from the discharge of certain liabilities founded upon fraudulent representations was limited to those instances where the liability had been reduced to judgment. The liabilities in those cases (Crawford and Tindle), not having been reduced to judgment, could not therefore fall within the express exceptions; thus, the court was concerned only with whether or not they were susceptible of proof. It determined that they were provable because the liability could be founded on contract as well as tort, and therefore dischargeable. But since the 1903 amendment the liability does not need to be reduced to judgment to fall within the express exceptions. Furthermore, the liability here involved had been reduced to judgment prior to bankruptcy.

[18] It cannot be said that plaintiff waived the tort, the claim based upon fraudulent representations, and relied upon contract in her action and is thereby foreclosed from asserting that her claim is based on fraud and not discharged in bankruptcy. The designation of her complaint at the beginning thereof as being for damages and breach of contract is of no significance. She stated counts both in contract and fraud, the stipulation for judgment and the judgment recited that the latter was "in accordance with the allegations of the complaint". Therefore, it cannot be said that the judgment is not predicated on fraud, or that the liability on that basis was abandoned. See Mathewson v. Naylor, 18 Cal.App.2d 741, 64 P.2d 979; Zimmern v. Blount, 5 Cir., 238 F. 740; Blumberg v. Louis Henne Co., Tex.Civ.App., 5 S.W.2d 1015; Gehlen v. Patterson, 83 N.H. 328, 141 A. 914; Friend v. Talcott, supra.

[19] The affidavits with respect to what portion, if any, of defendant's salary is exempt from execution under the exemption laws (Code Civ.Proc., sec. 690.11) are conflicting and a determination on that issue should be made by the trial court.

The order is reversed, with directions to the trial court to determine what, if any, portion of defendant's salary so levied upon is exempt under section 690.11 of the Code of Civil Procedure, and thereupon enter an order directing the disbursement of such portion to defendant, and any balance remaining to plaintiff in partial satisfaction of her judgment against defendant.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.



48 Cal.App.2d 82

LO BUE v. PORRAZZO et al.

Civ. 13303.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1941.

1. Trusts ⇐44(1)

Evidence *held* to support finding that intention of husband and his parents in maintaining joint bank account was that all moneys deposited should be held in trust for husband, and hence husband's widow was entitled to such moneys on husband's death.

2. Husband and wife ⇐262(1)

It is presumed that all of husband's property constituted a community estate.

3. Estoppel ⇐85

Limitation of actions ⇐13

Where husband and parents maintained joint bank account with intention that all moneys deposited should be held in trust for husband, and after husband's death the parents obtained the money, parents' statements to husband's children indicating that they would eventually get the money, and state-

ments showing understanding that money was held for benefit of husband, but not comprising any promises to pay the money to wife, did not create an equitable "estoppel" against parents' pleading laches and limitations in wife's action to recover the money. Code Civ.Proc. § 337, subd. 1, § 338, subds. 3, 4, § 339, subd. 1, § 343.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

4. Estoppel ⇐52

To constitute "estoppel" there must have been a false representation or concealment of material facts, and ignorance on part of person claiming estoppel of the truth of such misrepresentation or concealment.

5. Appeal and error ⇐1071(6)

The trial court's failure to make a finding with reference to facts constituting basis for an estoppel is not prejudicial, where the only finding that could have been made upon the evidence would have been adverse to appellant.

6. Trial ⇐397(2)

Where case is tried upon theory that it is not necessary to plead facts relied upon as estoppel, and that estoppel was in issue, court must necessarily have determined the question of estoppel by impliedly finding against party claiming estoppel, and express finding would add nothing to the court's decision.

7. Appeal and error ⇐1071(6)

Where evidence raises the issue of estoppel, the action is tried upon that theory, and it appears from findings that the court impliedly found against the party claiming estoppel upon that issue, absence of express finding does not warrant reversal.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Irene Porrazzo Lo Bue against Julia Porrazzo and others, to recover moneys allegedly held in trust for plaintiff by defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Homer C. Compton and Musick & Burrell, all of Los Angeles, for appellant.

David L. Shaw and Robert E. O'Neill, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

From a judgment barring plaintiff's recovery of moneys alleged to have been held in trust for her by defendants, plaintiff appeals.

The factual background behind the issues adjudicated is as follows: on the 16th day of May, 1929, one Joseph Porrazzo, husband of appellant, departed this life, and appellant, as surviving widow, was appointed administratrix of his estate and as a result of the probate proceedings all of the property of decedent was distributed to her.

During some 18 months prior to Joseph's decease, he and his parents, respondents herein, maintained an account in joint tenancy with the federal branch office of defendant bank, payable to either of said respondents or to decedent. From time to time, the decedent deposited various sums of money and on the 2nd day of January, 1929, decedent withdrew a large sum on deposit, leaving a balance of $10,000. Thereafter, on the 27th day of May, 1929, respondents withdrew the $10,000 from the federal office and deposited it with the head office of the bank to their own credit. Appellant filed this action July 21, 1939.

[1, 2] The court found and the evidence abundantly supports the finding that the intention of the parties was that all moneys so deposited in the federal office should be held in trust for the use and benefit of decedent and pursuant thereto, the court concluded that plaintiff was the sole distributee and heir at law of decedent. No mention is made that decedent left a will but the presumption is that all his property constituted a community estate of himself and appellant.

Under such findings appellant should have been entitled to a decree awarding to her the money on deposit with defendant bank after the passing of decedent. However, respondents pleaded various sections of the statute of limitations and laches. Basing the judgment upon such pleas the court determined that the right of plaintiff as such distributee was barred by the provisions of section 337, subdivision 1; section 338, subdivisions 3 and 4; section 339, subdivision 1, and section 343 Code of Civil Procedure; also that her right was barred by laches. On this appeal appellant contends that, by reason of misrepresentations made by respondents to her, she was induced to refrain from taking action for a longer period than that

permitted under the statute of limitations or by the rule of laches, and that respondents are therefore estopped to plead such defenses.

The only question for determination, then, is whether the evidence was sufficient to warrant a finding that respondents are estopped by their representations to plead laches and the statute of limitations and whether it was prejudicial error not to make such finding.

Following the decease of Joe Porrazzo, appellant inquired of respondents as to the status of his money, at which times she was advised by them that if she "ever took them to court they would say the money did not belong to Joe"; that the money belonged to decedent; that they "would keep it for the benefit of his children"; that they were going to "take good care of it * * * save it and give it to the children"; that appellant could trust them; that they did "not want the money for themselves"; that the money was safe, that it was being kept in their names; that "they would not give me the money". To the children of appellant, respondents made the statements that they "would give us our father's money when we got older"; and that "we would get our father's money and that we didn't have to worry"; that "the money was ours and that we would get it eventually".

[3, 4] On October 15, 1929, less than five months after appellant qualified as such administratrix, she filed a petition in the probate proceeding of the estate for the discovery of concealed property, in which petition she alleged that the respondents had in their possession the sum of $40,000, the property of decedent; that it was kept on deposit with defendant bank; that they refused to deliver it to appellant as administratrix of the estate; and that defendant Antonio had fraudulently embezzled and converted the money to his own use. In the answer of respondents to such petition all of her allegations were denied and it was specifically alleged that all of the property possessed by decedent was at that time in the possession of petitioner. The answer was filed in the probate proceedings on the 18th day of October, 1929. While a number of witnesses testified to certain language used by respondents as indicating their understanding that they held the $10,000 for the benefit of Joe, there is a dearth of evidence indicating that respondents ever made any promises to appellant that they would pay the money to her in consideration of her desisting from the filing of an action for the recovery of the money or for any other reason. From their replies to her or to her emissaries, no promise can be inferred that they would give the money to appellant if she desisted from filing an action to gain possession thereof. Such statements of respondents are not such as will create an equitable estoppel. To constitute such estoppel there must have been a false representation or a concealment of material facts with reference to the possession and final disposition of the money and in addition thereto, it would have been necessary that appellant have been ignorant of the truth of such misrepresentation or concealment. General Motors Acceptance Corp. v. Gandy, 200 Cal. 284, 297, 253 P. 137.

[5-7] The testimony of appellant establishes that at all times she possessed knowledge of the facts with reference to the continued possession of the money by respondents as well as of her right to recover it from them. The failure of the trial court to make a finding with reference to the facts constituting the alleged basis for an estoppel is not prejudicial. This is so because the only finding that could have been made upon the evidence would have been adverse to appellant. Where a case is tried upon the theory that it is not necessary to plead facts relied upon as an estoppel, and that such estoppel was in issue, the court must necessarily have determined the question of estoppel by impliedly finding against appellant upon that issue. An express finding under the circumstances would add nothing to the court's decision. Fair Oaks Bank v. Johnson, 198 Cal. 196, 203, 244 P. 335. Where the evidence in a case raises the issue of estoppel and the action is tried upon that theory and it appears from the findings that the court impliedly found against the appellant upon that issue, the absence of an express finding does not warrant a reversal. Tharp v. San Joaquin V. Securities Co., 20 Cal.App.2d 20, 25, 66 P.2d 230.

The authorities relied upon by appellant (Miles v. Bank of America, 17 Cal.App.2d 389, 62 P.2d 177; Rapp v. Rapp, 218 Cal. 505, 24 P.2d 161; Calistoga National Bank v. Calistoga Vineyard Co., Ltd., 7 Cal.App. 2d 65, 46 P.2d 246) are readily distinguishable. In those cases the plaintiffs were induced to desist from promptly suing to enforce the covenants of their agreements by

repeated fraudulent promises to perform them. Each plaintiff was induced to believe an amicable adjustment would be made with them without suit. Delay in commencing action was induced by conduct of the offending party, and could not, therefore be availed of by him as a defense. 37 C.J. 725.

The judgment is affirmed.

WOOD and McCOMB, JJ., concurred.



48 Cal.App.2d 131

MONTEREY CLUB et al. v. SUPERIOR COURT OF LOS ANGELES et al.

Civ. 13189.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1941.

1. Prohibition ⇐10(2)

Prohibition would lie to prevent enforcement of temporary injunction pendente lite against operation of gambling games or premises under city license on ground that court had no authority or power to issue the injunction. Code Civ.Proc. § 1103.

2. Prohibition ⇐15

A club was "beneficially interested" in proceeding against one operating gambling table for club pursuant to contract with the club, and hence could apply for writ of prohibition to prevent enforcement of temporary injunction. Code Civ.Proc. § 1103.

See Words and Phrases, Permanent Edition, for all other definitions of "Beneficially Interested".

3. Courts ⇐207(5)
Prohibition ⇐17

Ordinarily, claim of excess or lack of jurisdiction should be called to attention of inferior tribunal as a "condition precedent" to application for writ of prohibition, unless complaint fails on its face to state a cause of action, but this is not essential to jurisdiction of Court of Appeal to grant writ, and the rule is not invoked where the plea would have been rejected by lower court or entire proceedings involved lower court's jurisdiction to enjoin an allegedly lawful enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

4. Prohibition ⇐17

Where club was not made a party to proceedings for injunction against one operating gambling tables on club's premises pursuant to contract with club, and thus had no opportunity to object on jurisdictional grounds, failure to make such objection did not preclude relief by prohibition.

5. Injunction ⇐146

Where an answer has been filed specifically denying all material allegations of complaint, generally a temporary injunction will not be granted, but circumstances may justify temporary injunction notwithstanding absolute denials in answer.

6. Injunction ⇐135
Prohibition ⇐5(3)

If trial court had jurisdiction to grant temporary injunction, the granting or refusal of it was addressed to court's sound discretion, and court's action will not be disturbed unless abuse of discretion is shown.

7. Nuisance ⇐84

Where a nuisance affecting the public well-being exists, granting a temporary injunction upon sufficient allegations contained in a verified complaint, despite denials in answer, cannot be said in all cases to constitute an abuse of discretion.

8. Nuisance ⇐80

An action to enjoin operation of an alleged gambling house must be predicated upon statutes rather than upon the common-law definition of "public nuisance". Civ. Code, §§ 4, 3479; Pol.Code, § 4468.

9. Common law ⇐12

In California the common law is inapplicable where it has been modified by state statutes. Civ.Code, § 4; Pol.Code, § 4468.

10. Nuisance ⇐84

A temporary injunction against continuance of an alleged public nuisance, consisting in operation of draw poker and other card games by one operating under contract with club and city license from city specially authorizing such games, was beyond court's authority and jurisdiction. Civ.Code, §§ 4, 3479–3482; Pen.Code, §§ 330,

331; Pol.Code, § 4468; St.1935, p. 2071, § 862.12.

11. Gaming ⇐68(1)

The playing of draw poker is not a crime under California statutes. Pen.Code, §§ 330, 331.

12. Injunction ⇐102

A court of equity will not undertake to enforce the criminal law.

13. Nuisance ⇐80

The courts have refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the statutory definition of public nuisance. Civ.Code, §§ 4, 3479; Pol. Code, § 4468.

14. Municipal corporations ⇐120

Any ordinance passed by a municipal corporation within scope of its authority has the same force within its corporate limits as a statute passed by the legislature has throughout the state. St.1935, p. 2071, § 862.12.

15. Licenses ⇐6(2)

Under statute expressly authorizing license of businesses and games, city of Gardena could pass ordinance licensing the playing of draw poker. St.1935, p. 2071, § 862.-12; Pen.Code, §§ 330, 331.

16. Nuisance ⇐61

The fact that gambling is associated with draw poker, low ball, contract bridge, and rummy does not necessarily make such pastimes "public nuisances" as a matter of fact or of law. Civ.Code, § 3482.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance".

17. Gaming ⇐62
Nuisance ⇐61

Gambling is neither unlawful per se nor a "public nuisance per se" in California. Civ.Code, § 3482.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Nuisance Per Se".

18. Constitutional law ⇐50

It is for Legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity.

19. Gaming ⇐62

Playing at any game, even for money, is not of itself an offense at common law, and the offense must be created by statute and can only be punished as statutes direct. Pen.Code, §§ 330, 331.

20. Nuisance ⇐61

The rule at common law with reference to gambling as a nuisance has been superseded by statutes and is inapplicable. Pen. Code, §§ 330, 331.

Proceeding in the matter of petition by the Monterey Club and others against the Superior Court of Los Angeles for writ of prohibition against enforcement of a temporary injunction pendente lite.

Peremptory writ issued as prayed.

See, also, Cal.App., 112 P.2d 321.

Samuel L. Rummel, of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, Ned Marr, Deputy Co. Counsel, John F. Dockweiler, Dist. Atty., and Thomas O'Brien, Deputy Dist. Atty., all of Los Angeles, for respondents.

WHITE, Justice.

This is a petition for a writ of prohibition seeking to prevent the Superior Court of the County of Los Angeles from enforcing the provisions of a temporary injunction pendente lite issued after hearing on an order to show cause by said court in a certain action numbered 460977, instituted by the district attorney of Los Angeles county on behalf of the People of the State of California against E. J. Prim, Frank Martin, Myron Porter and others as defendants, and which action sought a permanent injunction restraining the defendants, their agents, or anyone acting on their behalf from conducting, maintaining or operating certain alleged gambling games on premises occupied by petitioners in the city of Gardena, in Los Angeles county. The matter is submitted to this court upon the petition and the answer thereto filed by the respondents in response to the alternative writ heretofore issued.

The essential facts of the case are as follows:

Monterey Club, one of the petitioners herein (hereinafter referred to as the club), is a corporation organized and existing under and pursuant to the laws of this state. Civ.Code, Div. 1, Pt. 4, Title 12, Art. 1, § 593 et seq. Such petitioner

is a nonprofit corporation and its primary purposes, as outlined in its articles of incorporation, are as follows: "To promote, advance and maintain good will and harmonious action among the individual members; to establish higher standards of social relationship between the individual members and the public at large, to the end that the members may receive the benefits and advantages of social relationships and social intercourse, and that the public in general be benefitted thereby. To establish a place or places of meeting so that the members may derive the maximum amount of pleasures and recreation." The membership of said club totals some 400, each and all of whom were admitted and elected to such membership pursuant to the articles of incorporation and the by-laws of the club. As a prerequisite to membership in the club an applicant therefor is required to make a written application, whereupon an investigation of such applicant's reputation, character and habits is made to determine his fitness and eligibility for membership. If such inquiry results favorably to the applicant he may be elected as a member in accordance with the by-laws, rules and regulations of the club as promulgated by its board of directors. A courtesy or guest card may be issued to a non-member, entitling the latter to the privileges of the club for a period not to exceed two weeks. Use of the club and its facilities is limited to the members and guests, and the public is not invited nor permitted to enter such club or participate in its activities.

At all times herein mentioned there was and is in effect in the city of Gardena an ordinance, numbered 95, regularly and duly adopted by the council of said city and approved by the mayor, which ordinance is amendatory of ordinance No. 86 and which provides in general for the licensing and regulating of certain kinds of business, trades, vocations, enterprises or occupations conducted or carried on within the limits of said city. So far as here pertinent, the provisions of said ordinance might be epitomized as prohibiting any person from conducting or carrying on the business of maintaining a place where tables are used by the public for playing cards and for the use of which tables a fee or compensation is charged the players until such person shall have first obtained a permit and license for each table he uses or proposes to use in said business. The ordinance then provides that an applicant for such a permit shall first make out an application to secure a permit from the chief of police and provides for a license fee depending upon the number of tables installed. It is further provided in said ordinance that before a permit is issued thereunder by said chief of police he shall make a full and complete investigation of the location and building where the applicant proposes to conduct such place of business. The ordinance also prescribes the construction of any building in which such business is to be carried on. By way of regulation in connection with a licensee who permits the playing of the game of "draw poker", the ordinance declares that "the playing of games not prohibited by statute is conducive to public morals, and that in any proceeding to annul license or to abate the business conducted thereunder, or to prosecute the licensee or his employees for any acts authorized thereby, it shall be presumed that such acts are not unlawful and that such business is not a public or private nuisance". The ordinance further provides that when an applicant for a permit or license desires to carry on the business of maintaining a place where tables are used by the public for playing the game of "draw poker" pursuant to the provisions of the ordinance, the application must specifically so state. The ordinance then declares it unlawful for any permittee or licensee to permit any person under the age of 21 years to play the game of draw poker, at any time on the premises referred to in such permit or license and limits the hours within which such business may be conducted. Finally, the ordinance declares the violation of the same to be a misdemeanor and provides a penalty therefor.

The ordinance provides that the terms thereof shall not apply to regularly incorporated social clubs or fraternal organizations not open to the general public and whose membership is restricted to those persons regularly and formally elected to membership therein, nor to any charitable or benevolent organization which may from time to time hold card parties, the proceeds from which are used for charitable or benevolent purposes.

Concededly, the petitioner Frank Martin is the holder of an unrevoked license issued to him pursuant to the terms of the foregoing ordinance, authorizing him to

operate card tables in conformity with such ordinance upon the premises occupied by the petitioner Monterey Club within the city of Gardena, and of which premises the said Martin is lessee.

It further appears that when by resolution of the board of directors of the club it was voted to domicile said club and hold the meetings thereof in the premises of which petitioner Martin was the lessee, and in connection with which premises he held a license from the city of Gardena to operate tables for the playing of draw poker, said club entered into a contract in writing with petitioner Martin, under the terms of which the latter undertook and agreed to provide and maintain suitable furniture, fixtures and equipment for the use of said club and its members and also to maintain said premises as a suitable meeting place for the members of the club and to provide facilities for such members to engage in lawful games of cards, checkers, dominoes and other recreational activities; to equip and maintain suitable facilities for the serving of nonalcoholic beverages, sandwiches and other foods to the members of the club. Said contract further provided that Mr. Martin would refuse permission to any person other than a bona fide member or guest of said club to enter upon the premises for the purpose of using the facilities therein located. Under the terms of the contract petitioner Martin was also invested with the right to make a reasonable charge for furnishing such facilities, service and food to the members of said club or their guests; and he agreed to provide and furnish necessary employees, and would have the right to refuse use of the premises to any individual member of the club or any guest violating any of the rules of conduct promulgated by the board of directors or who should engage in any loud, obnoxious or boisterous actions.

It is further made to appear that petitioner Martin, pursuant to the terms of his contract, equipped and furnished the premises in question at a substantial cost; that he is the owner of such equipment and has carried out all the provisions of the said contract upon his part agreed to. As a part of such facilities, it appears that petitioner Martin, has, in accordance with the permission granted him by the license from the city of Gardena, furnished and operated tables upon which members and guests of the club were permitted to play draw poker, "low ball", and also games commonly known and referred to as contract bridge and rummy.

In connection with the operation of said tables, the pleadings indicate that in the playing of low ball, "before each hand each player antes five cents, and that the cards were dealt out one at a time until each player had five. The player to the left of the dealer had the privilege of opening first, and fifty cents was the minimum and maximum bet, with as many raises and re-raises as the players desired to make. Those who met the opening bet then drew the number of cards they wanted; then it was up to the players whether to check or bet, and the lowest valued hand won the pot". That in playing the game of draw poker the cards were dealt out as aforesaid; "that the player on the left of the dealer had the privilege of opening the pot; that the deal passed to the player immediately to the left of the dealer after each hand", there being no "banker" who conducted the game or obtained a percentage therefrom. "That each player anted five cents before the deal; that the pot could be opened with jacks or better, with a minimum and maximum bet of twenty-five cents and fifty cents respectively, with no limit on the number of raises and re-raises. That the best high poker hand won the game."

It further appears that in connection with the playing of the game of low ball poker, each half hour one of the attendants upon the premises came to the table and collected a twenty-five-cent chip from each player; that this was for rent of the chair and table. From the players engaged in the game of draw poker the attendant collected two five-cent chips as rental for the chair and table from each player.

While no money was used in the conduct of the games, the record shows that the players purchased poker chips for cash at a cashier's cage on the premises in question, which chips were in denominations of five, ten and twenty-five cents. These chips were redeemable in lawful money of the United States at the cashier's window. Any player was privileged at any time he so desired to leave the game and redeem his chips for cash.

The complaint filed by the district attorney of Los Angeles county in behalf of the people of this state alleged that the defendants therein named, including petitioner herein Frank Martin, for a period of at least ten days prior thereto and with the knowledge and consent of the owner of

the premises, were using such premises and the furniture and fixtures therein contained for the purpose of "carrying on and conducting as the owners and operators thereof said gambling games on said premises under the fictitious name and style of Monterey Club. That in conducting, operating and maintaining said gambling games, said defendants, and each of them, have caused said premises, buildings, furniture, fixtures and other equipment hereinabove described to be used in the way and manner and for the purpose of inducing, inviting and encouraging the public generally to enter into said premises, and to then and there engage in and play at said gambling games. * * *" Then follows a description of the manner in which said games were played as hereinabove set forth. The complaint further charged: "That the maintenance, existence, operation and conduct of said gambling games by the owners and operators thereof has in the past constituted, and does now and will in the future constitute the keeping of a gaming and gambling house and public nuisance injurious to the health of the people of the State of California, for the reason that it tends to and does in fact debase and corrupt the public morals, encourages idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, and is thereby injurious to health, indecent and offensive to the senses, and impairs the free enjoyment of life."

The prayer contained in said complaint was for a permanent injunction restraining the defendants from conducting, maintaining or operating the gambling games in question upon the premises mentioned, and further, that the judgment in said action determine and declare that the maintenance and operation of said gambling games and each of them on the premises referred to constitutes and is a public nuisance and that the owners of the premises upon which said games were being conducted be enjoined and restrained from renting, leasing, or permitting the premises to be used for the aforesaid purposes.

Upon the filing of said complaint an order to show cause and temporary restraining order were issued. On the return day fixed in the order to show cause defendants named in said action appeared and presented affidavits in opposition to the requested preliminary injunction. These affidavits included one by Myron H. Porter, president of the Monterey Club, in which he set forth the status of such club as a nonprofit corporation, detailed the terms of the aforesaid agreement between the club and petitioner herein Frank Martin, and also averred that no persons were permitted to enter upon or in said premises except duly elected and qualified members of the club or bona fide guests. He denied that the games played in and upon the premises were unlawful or that any of the activities conducted upon said premises, including the playing of draw poker or low ball poker, were harmful to the public or against public health, safety, peace or interest in any manner or way, or indecent or offensive to the senses of the community or neighborhood. This affiant further denied that the activities of the club in the playing of games therein attracted a great number or any number of dissolute persons, but on the contrary stated that no disorderly persons were permitted to come or ever did come upon the premises; that no persons of idle or dissolute habits or of debased or corrupt character were permitted upon the premises. Corroborative of the statements contained in the affidavit of the president of the Monterey Club was the affidavit of petitioner Frank Martin. It further appears from the last-named affidavit, and is denied by respondents *only* upon the ground of lack of information or belief, that the maintenance, operation and conduct of places of business where draw poker and other similar games are played is permitted throughout the state of California, and the names of various cities in this state, totaling seventy-six, together with the number of similar enterprises operated in each of the respective cities, is set forth in the affidavit. Further corroboration of the foregoing affidavits was furnished by the affidavits of Russell Miller and Franklin Cogswell, members of the Monterey Club. There was also presented to the superior court at such hearing the affidavit of Don Parrott, chief of the fire department of the city of Gardena, who deposed and said that he was familiar with the premises occupied by the Monterey Club and the nature and character of the activities conducted therein, and had visited such club on several occasions. He further averred that the building in which said club was conducted was attractive and sanitary in all respects and particulars, was adequately illuminated and heated, and that he had never observed therein any disorderly conduct or breach or

disturbance of the public peace, and that at all times the club had been conducted in an orderly manner and the members thereof appeared to him to be law-abiding citizens. On the occasions of his visits affiant stated that he had never observed any lewd, dissolute or immoral persons or any conduct inimical to the peace and contentment of the community. This affiant gave it as his opinion that said club is and at all times since its establishment has been "a credit to the community". Also introduced at the hearing on the order to show cause was the affidavit of Elmo Field, chief of police of the city of Gardena. This affiant stated that he is familiar with the Monterey Club, has visited the same on many occasions since it opened, and that at all times it has been conducted solely as a private social club where members may play various card games, including draw poker, high or low hand, and may obtain light lunches, soft drinks and tobacco. The chief of police further stated that he knows the rules and methods pertaining to the game commonly known as draw poker; that he has observed the nature of the game played by the members and that it is draw poker; and that he has never seen any game other than draw poker, high or low hand, played therein. He then detailed the procedure of collecting from the users of the tables a rental therefor. We quote from his affidavit the following: "That there is and has been no traffic congestion in front of or in the vicinity of said Monterey Club since it was established. Adequate parking facilities have always been provided and made available; affiant has never known or heard of a traffic accident in front of said premises, nor has any complaint been made to affiant concerning the actions of the proprietor of the premises, the conduct of the club or the conduct of the members thereof. That at all times herein mentioned, to the knowledge of affiant, the premises have been operated in respect to the playing of cards in the card room of said club in strict compliance with the license therefor issued by the City of Gardena."

The mayor of the city of Gardena by his affidavit stated that he had visited the Monterey Club and that the same was conducted in an orderly and peaceful manner; that the members were law-abiding citizens; that he had never observed any immoral or dissolute practices, and that, as stated by him, "there is and was nothing about the said club or the manner in which it was conducted, or the conduct of the employees or members thereof, which was in any way whatsoever offensive to public morals or decency, nor of such a character as to interfere with the peace and contentment of the community nor was the same a nuisance of any kind or character. On the contrary, in the opinion of this affiant, said Monterey Club is and at all times since its establishment has been a credit to the community".

The affidavit of the mayor was corroborated by those of Earl Jacobs and Earl P. Powers, members of the council of the city of Gardena. That the Monterey Club was maintained as a private club catering only to its members; that the city of Gardena has a population of approximately 6,000 persons; that he never observed any one engaged in any disorderly conduct nor had he ever seen or heard of any breach of the public peace by any one; that he had never witnessed any offensive conduct within or about said club, was the statement contained in the affidavit of P. MacDonneil, secretary of the Gardena Valley Chamber of Commerce, secretary of the Harbor District Chamber of Commerce, and president of the Lions Club of Gardena. Lewis T. Guild, Jr., editor and publisher of the Gardena Valley News, made affidavit to the same effect, and he too averred that the club "at all times since its establishment has been a credit to the community".

In opposition to the foregoing affidavits and in support of the order to show cause, there were presented the affidavits of two deputy sheriffs of the county of Los Angeles, who deposed that they obtained admission to the club by filling out an application card and paying twenty-five cents as dues. They then described the interior of the building occupied by the club as hereinbefore set out. They further averred in their affidavits that they purchased chips and engaged in playing draw and low ball poker in the manner and form hereinabove narrated.

There is also on file the answer of the defendants in the action instituted by the district attorney, in which pleading the alleged illegality of the games played in the Monterey Club is denied; and which pleading denies that the public generally is invited or permitted to engage in such games upon the premises of said club and alleges that on the contrary the use of said club and its facilities is limited to duly elected members and bona fide guests. The answer further denies that the operation

of said club is a public nuisance, injurious to the health of the people, or that any idle, dissolute persons are or ever have been permitted within said club. As a further, separate and affirmative defense, the answer alleges facts in connection with the operation of the club which are heretofore in this opinion set forth, and which facts, generally speaking, were presented upon the hearing of the order to show cause by affidavits, from which quotations hereinbefore have been made.

[1] Respondents first urge that petitioners here are not entitled to the writ sought on the ground that the court was vested with authority to hear and determine the cause; that such authority constitutes jurisdiction, and jurisdiction carries with it the power to decide wrongly as well as the power to decide rightly. Respondents' claim in this regard cannot be upheld. In the recent case of Fortenbury v. Superior Court, 16 Cal.2d 405, at page 407, 106 P.2d 411, at page 412, it was pointed out that the original conception of the meaning of the term "jurisdiction" as including only the right to hear and determine concerning the subject matter of the case has been broadened where the right to review a decision or order by prohibition or other prerogative writ is the question for decision. In the cited case it was said: "A court may have jurisdiction of the cause of action and of the parties, but it may lack the authority or power to act in the case except in a particular way. Under such circumstances, it is now generally held that the court had no jurisdiction. * * *" If, therefore, in the instant case the court was without authority or power, as claimed by petitioners, to enjoin them as it did, then relief may be sought by resort to the writ of prohibition.

[2] It is next urged by respondents that petitioner Monterey Club is not entitled to a writ of prohibition because the club was not named in nor a party to the injunction proceeding pending before respondent court. This contention is equally without merit, because section 1103 of the Code of Civil Procedure authorizes the issuance of the writ upon the verified petition of "the person beneficially interested". We hold that the claimed legal rights of Monterey Club being injuriously affected by the judicial action of respondent court, the club is "beneficially interested" and therefore authorized to apply for a writ of prohibition.

[3, 4] While it is true, as claimed by respondent, that ordinarily as a condition precedent to an application for a writ of prohibition on the ground of want of jurisdiction in the inferior tribunal to make the order, the claim of such excess or lack of jurisdiction should be called to the attention of the respondent tribunal unless the complaint on its face reveals its failure to state a cause of action, nevertheless this is not essential to the jurisdiction of this court to grant a writ of prohibition. Havemeyer v. Superior Court, 84 Cal. 327, 405, 24 P. 121, 10 L.R.A. 627, 18 Am.St. Rep. 192. This is merely a rule adopted by reviewing tribunals as a matter of respect for and consideration of the lower court and to aid in minimizing, if not preventing, unnecessary litigation. The rule, however, is not invoked where it appears that the plea would have been rejected if presented in the lower court or where, as here, it is apparent that the proceedings on the order to show cause in their entirety went to the question of the jurisdiction of the lower court to enjoin what petitioners here contended in the court below was a legal and lawful enterprise and business. Furthermore, petitioner Monterey Club was not a party to the proceedings in respondent court and therefore had no opportunity to there object on jurisdictional grounds before the action of such court which is here sought to be restrained by prohibition was taken.

[5-7] While it may be conceded, as urged by petitioners, that where, as here, an answer has been filed specifically denying all the material allegations of the complaint, the general rule is that a temporary injunction will not be granted, nevertheless, circumstances may exist in a case which justify the issuance of a temporary injunction notwithstanding the absolute denials in the answer. Assuming that the court in the instant proceeding had jurisdiction to grant the temporary injunction prayed for, then the granting or refusal of it was a matter addressed to the sound discretion of the trial court and the action taken by such court will not be disturbed except where an abuse of discretion is shown. The rights of the people to be protected and immunized from a nuisance affecting the public wellbeing where such nuisance exists, are such that in granting a temporary injunction upon sufficient allegations contained in a verified complaint, it could not be said in all cases to constitute an abuse of discretion. Metropolitan

L. Co., Ltd., v. Greenfield, 20 Cal.App.2d 246, 247, 66 P.2d 722.

[8] But it is futile to quibble over technical objections when the sole question presented to the trial court and now directed to us was and is whether the playing of draw poker under the circumstances prevailing at the Monterey Club was a nuisance and subject to be abated and enjoined. It is not necessary for us to resort to the common law for a definition of what constitutes a nuisance, because, as was held in an especially well-considered opinion prepared by Mr. Chief Justice Gibson of the Supreme Court in the case of People v. Lim, Cal.App., 118 P.2d 472, an action such as this to enjoin the operation of an alleged gambling house must be predicated upon the statutes of this state rather than upon the common-law definition of "public nuisance". In the cited case it is pointed out that while a line of cases therein referred to seemingly indicates that at common law gambling houses were recognized as public nuisances in criminal prosecutions, nevertheless such cases do not serve as authority for holding that an equity action could be instituted on behalf of the state at common law to enjoin the operation of a gambling house. The attitude of the earlier courts of equity where the sovereign sought injunctions against public nuisances is epitomized by our Supreme Court in the cited case by the following quotation from the opinion of Chancellor Kent in a leading case: "I know that the court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less, preliminarily, by injunction, to put down a *public* nuisance which did not violate the rights of property, but only contravened the general policy." Attorney-General v. Utica Insurance Co., 2 Johns.Ch., N.Y., 371, 380.

[9] Section 3479 of the Civil Code defines a nuisance, so far as here applicable, as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * *." In California the common law is inapplicable where, among other things, it has been modified by our statutes. In re Estate of Elizalde, 182 Cal. 427, 432, 433, 188 P. 560. The Constitution of the United States, guaranteeing as it does individual rights to life, liberty and the pursuit of happiness, was ordained, it is true, by descendants of Englishmen who inherited the traditions of English law and history; but our Constitution was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations, of many tongues, and while we take pride in the principles and institutions of the common law, we are not to forget that in lands, including our own, where other systems of jurisprudence prevail, the idea and processes of civil justice are also not unknown. In recognition of the foregoing, we find it ordained by section 4468 of our Political Code that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution *or laws of this state*, is the rule of decision in all the courts of this state"; and again, section 4 of the Civil Code provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

Sections 3480 and 3481 of the Civil Code define a public and a private nuisance. Section 3482 of the same code declares: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

[10] The lack of authority of the courts to resort to equity for the purpose of justifying action of the character taken by the court in the instant case is clearly established in People v. Lim, supra [118 P.2d 476], where it is emphatically stated that "* * * the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. * * * The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to

the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted. Thus, for the reasons set forth, the basis for an action such as this must be found in our statutes rather than by reference to the common law definitions of public nuisance."

[11, 12] It might be added here by way of emphasis that even if the playing of draw poker were a crime, which under the statutes of California it is not, still a court of equity would be without jurisdiction to enjoin the commission of such an act merely because when committed it would constitute a crime. A court of equity will not undertake to enforce the criminal law. Weis v. Superior Court, 30 Cal.App. 730, 159 P. 464; People v. Seccombe, 103 Cal.App. 306, 312, 313, 284 P. 725. And the reason for such a rule under our form of government is clear, because as pointed out by the Supreme Court in the Lim case, supra, an individual accused of crime by way of prohibition or injunction would not only be required to prove his own innocence, but as well would be deprived of the right of trial by jury, the protection of the presumption of innocence and the doctrine of reasonable doubt; and in the final analysis, upon an order to show cause would be forced to become a witness against himself.

[13] As set forth in the case of People v. Lim, supra, the courts have therefore refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. In the cited case the court says: "Where the legislature has felt that the summary power of equity was required to control activity contrary to public policy, it has enacted statutes specifying that such activity constitutes a public nuisance which may be enjoined in an action brought on behalf of the state.—'* * * but it is not the province of the courts to ordain such jurisdiction for themselves'."

[14-18] Any ordinance passed by a municipal corporation within the scope of the authority conferred on it has the same force within its corporate limits as a statute passed by the legislature has throughout the state. Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 46 P.2d 308. Section 862.12 of the Municipal Corporations Act (stats.1935, p. 2071) expressly authorizes municipalities "to license, for the purpose of revenue and regulation, all and every kind of business authorized by law * * * and lawful games carried on therein. * * *" That by reason of the aforesaid delegation of power the city of Gardena was authorized to pass the ordinance hereinbefore referred to licensing the playing of draw poker, if such game was not unlawful, admits of no argument or denial. Manifestly, under the terms of section 3482 of the Civil Code, supra, nothing done under the express authority of a statute or within a city by authority of an ordinance can be deemed a nuisance. Nowhere in the codes of this state is the playing of draw poker or the maintaining of a place where it is played denounced as a crime or declared to be unlawful. Whatever games may have been outlawed by the common law, the statutes of this state have undertaken to enumerate and define those games the playing of which is unlawful, and draw poker is not one of them. Pen. Code, sec. 330. Also noteworthy in this connection is the fact that section 331 of the Penal Code makes it unlawful to permit the playing in any house only the games mentioned in the preceding section. The difference between places where games inhibited by the code are played and those where poker is played is thus described by Chief Justice Beatty in Ex parte Meyer, 5 Cal.Unrep. 64, 40 P. 953, 954: "The difference between the two places is just exactly as broad as the difference between legality and illegality, or, in other words, since we have none but statutory crimes, it is as broad as the difference between guilt and innocence." In the same opinion follows this expressive language: "Poker, played for money, however objectionable in fact, is, in the eyes of the law, as innocent as chess, or any game played for simple recreation; and its votaries, and the places where it is played, are not criminal."

Neither playing draw poker nor maintaining a place where it is played being an offense under our law, and therefore being lawful, it follows that the city of Gardena was authorized to license and regulate the operations of such pastime within its corporate limits, and no action can be maintained in law or equity against one operating a business authorized by statute or ordinance upon the claim that such enterprise or business is a public nuisance. Civ.Code, sec. 3482. Nor, from the fact that gambling is associated with the games herein

described, does it necessarily follow as a matter of fact or as a matter of law that a public nuisance is thereby borne of such pastime. Gambling is neither unlawful per se nor a public nuisance per se in California. In the face of the declaration of the legislative branch of the government, to which branch alone is confided the duty of determining the policy of this state in the matter of public morals, it does not lie within the power of the courts to impose their views as to what is moral or immoral, or what is beneficial or deleterious to public welfare, upon the residents of a community who have legalized the playing of a game not outlawed by statute. In a field where the meaning of such terms as "public nuisance" is so vague and uncertain, it "is a proper function of the legislature to define those breaches of public policy which are to be considered public nuisances within the control of equity. Activity which in one period constitutes a public nuisance, such as the sale of liquor or the holding of prize fights, might not be objectionable in another. Such declarations of policy should be left for the legislature. * * *" People v. Lim, supra.

[19, 20] Playing at any game, even for money, is not of itself an offense at common law. The offense, if any, must be created by statute, and can only be punished as the statute directs. United States v. Willis, 28 Fed.Cas.No.16,728, p. 698. The statutes of this state enumerate and define what games are inimical to public morals and welfare and should therefore be declared unlawful. The statutes further declare that what is not unlawful cannot be made the subject of a nuisance. Whatever may have been the rule at common law with reference to gambling, such rule has been superseded by the statutes of this state, and is therefore inapplicable.

It may be conceded that in the case of People v. Lim, supra, the Supreme Court held that a complaint containing averments similar to those pleaded in the case at bar was adequate and sufficient as against a demurrer. We refer to the allegations that the alleged gambling house "draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses, and impairs the free enjoyment of life and property". And, as also pointed out in the Lim case, the free enjoyment of life and property and the dangers designated in the nuisance statute may be impaired through the assemblage of disorderly people who disturb the peace and obstruct the traffic. However, it is important to note that in the case before us the sufficiency of the allegations contained in the complaint is not the issue we are called upon to decide. In the instant case not only was an answer filed, but a hearing was had upon the order to show cause predicated upon the averments of the complaint, at which hearing as heretofore pointed out, many affidavits were filed. At that hearing not one iota of evidence was presented which would bring the conduct of petitioner Martin, the club, or its activities, within the pale of our California nuisance statute (Civ.Code, secs. 3479, 3480); but on the contrary, it was established without contradiction that none of the hazards designated in the statute were present in the operation or conduct of the Monterey Club.

As above noted, the complaint filed by the district attorney was an injunction action seeking to abate a public nuisance. The respondents' answer in the within proceedings contains the following allegation: "Respondents allege that the purpose and object of the complaint in injunction is to abate a common nuisance consisting of a common gaming and gambling house by enjoining gambling in connection with the games of draw poker and low ball poker as described in said complaint." The utter failure of proof on this issue, as the record clearly reveals, serves to emphasize the significance of that portion of the opinion in the Lim case, supra, which merely holds the complaint to have been sufficient as against a demurrer.

From the foregoing it follows that the temporary injunction granted by respondent court against petitioners was beyond and in excess of the jurisdiction of such court. Let a peremptory writ issue as prayed.

YORK, P. J., and DORAN, J., concurred.

48 Cal.App.2d 160

CITY OF CORONADO v. CITY OF SAN DIEGO et al.

Civ. 2825.

District Court of Appeal, Fourth District, California.

Nov. 28, 1941.

1. Waters and water courses ⇐200(1)

Even if delivery by San Diego to Coronado of some water taken from wells near the mouth of the Otay river and later of other waters from the Otay system under oral and written agreement resulted in the "dedication" in a legal sense of a portion of the water of that river to the use of consumers in that area, that could not constitute a dedication of the entire water of that river and its tributaries, including water from outside sources which was brought into the Otay system, especially where equal or superior rights in favor of other communities had intervened and had been exercised and confirmed by long-continued use.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

2. Waters and water courses ⇐200(1)

Where contract under which San Diego delivered water for use in Coronado provided that in event of a water shortage water furnished by San Diego to all its consumers should be equitably apportioned among all its consumers, a judgment in effect giving to Coronado, in the event of a shortage of water, prior rights to all waters of the particular system involved to the extent of denying San Diego any water therefrom, if necessary, was not justified.

3. Waters and water courses ⇐200(1, 2)

Where San Diego under a 1912 contract took over a water supply system subject to burden of supplying requirements of a water company which supplied Coronado, but between 1920 and 1936, and even thereafter, San Diego knowingly acquiesced in the taking of only a part of those requirements from the system, and that policy was carried into a settlement agreement in 1936, containing specific provision that the development of additional water should not be construed as changing basic contract of 1912, that contract continued in force, but water company and Coronado had the right to develop other waters.

4. Waters and water courses ⇐200(2)

Where San Diego under a 1912 contract took over a water supply system subject to burden of supplying requirements of a water company which supplied Coronado, but between 1920 and 1936, and even thereafter, San Diego knowingly acquiesced in the taking of only a part of those requirements from the system, and that policy was carried into a settlement agreement in 1936, containing specific provision that the development of additional water should not be construed as changing basic contract of 1912, parties so modified or confirmed basic contract as to agree that water company need not take all of its requirements from system, and San Diego was "estopped" from insisting on a different interpretation of the contract as so modified or confirmed.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Appeal and error ⇐175

Where a contract obligating San Diego to sell and deliver to water company all water required to supply the demands of its consumers was the only contract mentioned in the complaint in an action for declaratory relief and to quiet title to certain waters, and no modification of contract was specifically pleaded, but there were other allegations concerning modification, and the question of modification with its effects was thoroughly gone into at the trial, it could not be contended on appeal that the matter of modification was not in issue or that it was not material to the controversy.

6. Waters and water courses ⇐200(1)

The public has an interest in the use of water, and "public policy" favors the conservation of water and requires that all waters be put to a reasonable use, and in carrying out that policy a court should not compel a public utility or city to take water it does not need under the penalty of losing its right thereto when the interested parties have agreed to the contrary.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

7. Waters and water courses ⇐200(1)

As between a city operating a water system and another city, or public utility supplying water for such other city, an agreement to supply water to the extent it may be needed only is not void for lack of mu-

tuality merely because the amount needed may be a variable quantity.

8. Waters and water courses ⇐200(2)

A contract obligating San Diego to supply water for the purpose of continuing service to the inhabitants of Coronado and subsequently modified so as to permit water company serving Coronado to take only that part of its requirements which it did not develop from other sources was not void for uncertainty and lack of mutuality.

9. Waters and water courses ⇐200(1)

Where 1912 contract, obligating San Diego to sell and deliver water required by water company which supplied Coronado, provided that all waters covered should be delivered at so-called Coronado "Y" and made no reference to delivery of water at foot of Market street, evidence showed that San Diego began delivering some water at foot of street in 1907 as an accommodation under a city ordinance and that some waters were delivered at that point each year since 1907, with the exception of two years, and 1936 settlement agreement provided that San Diego would continue sale of water at both points, judgment declaring that San Diego was legally obligated to deliver water at either or both points went too far and could not be allowed to stand.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the City of Coronado against the City of San Diego and the California Water & Telephone Company for declaratory relief, to establish that certain waters have been dedicated to the use of plaintiff, and to quiet its title thereto. From the judgment, the City of San Diego appeals.

Reversed and remanded.

D. L. Ault, City Atty., and Phil D. Swing, Sp. Counsel, both of San Diego, for appellant.

Shelley J. Higgins and Lindley & Higgins, all of San Diego, for respondent City of Coronado.

Bacigalupi, Elkus & Salinger, of San Francisco, and Philip Storer Thacher, of El Cajon, for respondent Water & Telephone Co.

BARNARD, Presiding Justice.

This is an action for declaratory relief, to establish that certain waters have been dedicated to the use of the plaintiff, and to quiet its title thereto.

The material facts may be briefly summarized as follows: In 1886, the Coronado Water Company was organized for the purpose of supplying water to consumers in an area including what is now the city of Coronado. From 1886 to 1888 that company furnished water to the inhabitants of that area, which water it purchased and brought through a submarine pipe line built across San Diego bay and running from the foot of Market street in San Diego to the Coronado peninsula. In 1888, this company purchased lands riparian to the Otay river, near the point where that river flows into San Diego bay, and developed wells on said lands. From the latter part of 1888 to 1908 this water company secured practically all of its entire supply of water from these Otay wells, taking the water around the head of San Diego bay and up the Strand to the present location of the city of Coronado.

In 1886, the Otay Water Company was organized for the purpose of acquiring water rights on the Otay river and Cottonwood creek, and furnishing water to inhabitants "within the county of San Diego". That company filed notices of appropriation of waters on the Otay river, including among the named places of intended use the cities of San Diego and Coronado. The Southern California Mountain Water Company, which was incorporated in 1895, acquired the rights of the Otay Water Company and filed additional notices of appropriation of the waters of the Otay and Dulzura rivers and of Pine Creek and Cottonwood Creek, also naming among the places of intended use the cities of San Diego and Coronado. In 1897, that company constructed a dam on the Otay river about twelve miles above the location of plaintiff's Otay wells. This dam and its reservoir will be referred to as the Otay dam. In March, 1908, the Southern California Mountain Water Company, which for some time had been serving water to the city of San Diego, began to supply the Coronado Water Company with practically its entire water requirements from the Otay dam. In the beginning there was no written contract covering the sale of this water.

On February 6, 1912, the Southern California Mountain Water Company, as first party, and the Coronado Water Company, as the second party, entered into a written agreement, which is one of the controlling

factors in this action. This contract provided that the first party agreed to sell and deliver to the second party and the second party agreed to buy from the first party "all the water which said party of the second part may require to furnish and supply all the demands of its present consumers" between two points not material here, and "also all water for domestic and irrigation purposes for use" on certain portions of the Coronado peninsula, including the present city of Coronado. The contract provided that such water was to be delivered "at the junction and connection of the Coronado Water pipe line with the main water pipe line running from the Lower Otay Dam to the city of San Diego". This point of delivery is between the Otay dam and plaintiff's Otay wells, and is known and referred to as the Coronado "Y". It was provided that the contract was to be a continuing one for the purpose of supplying water to those then being supplied with water by the second party "and particularly the city of Coronado and its inhabitants", and "without any limitation as to the time when such obligation to so furnish water shall cease", and that "the only changes to be made herein are as to the compensation to be paid and received for such water, as herein provided". It was further provided that for ten years water was to be furnished at a certain price and thereafter as such rates, as might be agreed upon by the parties or in the event they were unable to agree then at such rates as should be fixed by arbitration, the manner of arbitration being provided for.

Later, in 1912, the city of San Diego purchased the Southern California Mountain Water Company's rights and water system on and in connection with the Otay river and the other streams above mentioned, paying some $4,000,000 therefor and taking the same subject to the above-mentioned contract of February 6, 1912. The transfer of this water system to the city of San Diego was consented to by the Railroad Commission on the city's express stipulation "that any legal claim for water which may be enforced against the company may likewise be enforced against the city". Thereafter, the city of San Diego expended several million dollars in building the Barrett dam, in improving the Otay dam and the Morena dam, and in other improvements to this water system. After the execution of the contract of February 6, 1912, the Coronado Water Company took all the water required by it for distribution to its consumers from the Otay dam, purchasing the same under the terms of that contract at first from the Southern California Mountain Water Company and later from the city of San Diego, until some time in the year 1916, when the Otay dam was washed out in a flood. After that occurrence the Coronado Water Company supplied most of its requirements from its Otay wells until a new Otay dam was completed in 1919. It then resumed taking water from the Otay dam but continued pumping from its Otay wells for a part of its requirements. This continued until 1935. From 1920 to 1935 about 30 per cent of the water distributed by Coronado Water Company was pumped by it from its Otay wells and the remainder was purchased from the city of San Diego under the contract of February 6, 1912.

In 1922, the Coronado Water Company began to plan to develop a new supply of water from wells near the Tia Juana river, a few miles easterly from its Otay wells. In 1935, the defendant, the California Water & Telephone Company, purchased the business of the Coronado Water Company and began the development of water from wells in the Tia Juana river basin. In July, 1936, that company began using water from that source in its distribution system supplying the peninsula and the city of Coronado and, thereafter, rapidly substituted such water for the water previously purchased from the city of San Diego under the contract of February 6, 1912, with the result that by 1939 approximately 90 per cent of its water was obtained from that source and about 10 per cent was purchased under the contract of February 6, 1912.

On July 26, 1934, the Coronado Water Company had filed an action against the city of San Diego seeking an order directing said city to proceed with an arbitration for the purpose of fixing the rate to be paid for water purchased from that city under the contract of February 6, 1912. On May 8, 1935, a judgment was entered in that action directing the city of San Diego to proceed to arbitration and to appoint its arbitrator within twenty days. No appeal was taken and the city of San Diego appointed its arbitrator. A settlement was negotiated between the parties and on March 17, 1936, the council of the city of San Diego passed a resolution approving a settlement of the action referred to and directing the city manager and city attor-

ney to execute the proper documents to carry out the settlement agreement on the following basis and conditions: 1. "The City of San Diego will continue the sale of water at the Coronado 'Y' and at Atlantic and Market Streets in the City of San Diego to California Water & Telephone Company as successor in interest to the Coronado Water Company, at the rate of fifteen cents per hundred cubic feet, irrespective of the total quantity of water delivered, and will cancel its purported charge at twenty-five cents per hundred cubic feet heretofore imposed upon the Market Street delivery." 2. That the water company agrees that it will not institute arbitration proceedings for a period of at least five years and further represents, without binding itself beyond that period, that its present intention is not to institute such proceedings for a period of years thereafter. 3. "California Water & Telephone Company will endeavor to develop an additional and independent supply of water to lessen the burden now resting upon the City, but such development shall not be construed as in any way changing the basic contract dated February 6, 1912, relating to the supply of water to the Coronado and other areas." Based upon the agreement thus approved by the city council a stipulation was filed dismissing the action commenced on July 26, 1934, and in which it was further stipulated that neither that stipulation nor the dismissal of that action "shall operate to change or alter whatever legal effect the decision and order of the court, made and entered herein, might otherwise have in any future proceedings of a similar character" instituted by the plaintiff or its successor against the city of San Diego.

Shortly after that settlement agreement the defendant water company completed its wells in the Tia Juana river basin and began its use of water therefrom, with a corresponding decrease in the amount of water it purchased from the city of San Diego under the contract of February 6, 1912. On January 19, 1937, the city council of San Diego passed a resolution directing the city attorney to draft a resolution terminating the contract of February 6, 1912. Shortly thereafter, the present action was begun by the city of Coronado.

The complaint alleged many of the facts above set forth and prayed for a judgment decreeing that all of the waters impounded by the Otay dam had been dedicated to its use and quieting its title thereto, and asking the court to construe the contract of February 6, 1912, and to decree that under that contract the city of San Diego is obligated to supply to the defendant water company, as the successor of the Coronado Water Company, such amounts of the water stored by the Otay dam as may be required by it to supply the needs of the plaintiff and its inhabitants. The defendant water company filed an answer denying that the plaintiff had the rights it claimed in the waters stored by the Otay dam except only the right to be served from said waters by said defendant, and asserted in itself a prior and paramount right to the water stored by the Otay dam sufficient to supply all of its requirements. It further asserted that the contract of February 6, 1912, was in full force and effect and that it obligated the city of San Diego to furnish it with all of the water required by it to meet the needs of its customers, including the city of Coronado, but that it was not bound to take more water than it desired to take and that it could supply its needs as far as possible from other sources, especially from its project in the Tia Juana river basin. The answer of the city of San Diego denied that the water company or the city of Coronado had any prior or superior rights to the waters of the Otay river and the other streams mentioned, alleged that the city of San Diego had a prior right to said waters, and further admitted the validity of the contract of February 6, 1912, but alleged that under the terms of that contract the water company was obligated to take its entire requirements from the city's Otay system, and then alleged that since the water company had refused to do this and was taking most of its water from a new source it had broken that contract.

After a trial, a large part of the evidence being documentary, the court found in all respects in favor of the plaintiff and entered its judgment accordingly. The findings are voluminous and it is sufficient for our present purposes to say that the facts found are substantially the same as those set forth in the above statement of facts. In addition to what has been mentioned the court also found that from 1912 up to and including January, 1937, the city of San Diego has a number of times admitted before the courts and the Railroad Commission of this state that the contract of February 6, 1912, was a legal and binding obligation upon said city; that during the year 1913 and all

of the years from 1916 to 1937 the city of San Diego has been and still is delivering water under said contract at two points of delivery, namely at the Coronado "Y" and at the foot of Market street; that the city of San Diego at all times, except when prevented by the act of God, has been and now is ready and willing to deliver to the defendant water company (and its predecessor) all waters required by it for serving its consumers, including the city of Coronado; that the city of San Diego has expended about $4,000,000 in improving this water system, which has resulted in increasing the safe net yield of said system from 5.25 to 13.6 million gallons daily; that the Coronado Water Company and its successor, the California Water & Telephone Company, did not violate any of the terms of the contract of February 6, 1912, by taking water from sources other than the Otay dam; and that while water from the Otay dam has been supplied to the city of San Diego continuously since 1906, neither the contract under which such deliveries started nor such continued delivery has dedicated any of the waters of the Otay system to the public use of supplying the city of San Diego or any of its inhabitants.

As conclusions of law the court found that all or so much as may be necessary of the waters of the Otay and Dulzura rivers, whether impounded by the Otay dam or not, and of the waters of Pine creek as impounded by Barrett dam, and of Cottonwood creek as impounded by Morena dam, have been dedicated forever to the use of the city of Coronado and its inhabitants; that there is vested in said city and in its inhabitants the right to have delivered forever said dedicated waters; that said city is entitled to a judgment quieting its title to the right to said waters and restraining the defendants from ever asserting or claiming anything contrary to such right; that the contract of February 6, 1912, as supplemented by the settlement agreement in 1936, is a binding contract and in full force and effect; that the defendant water company and its predecessor, the Coronado Water Company, have not breached that contract by supplying water from other sources to the city of Coronado; that the defendant city of San Diego has no right to terminate the contract because a part of the water used by the defendant water company in supplying the city of Coronado was not taken from the Otay system; that the city of San Diego accepted a transfer of the Otay system subject to, and assumed all burdens created by, the contract of February 6, 1912, and is bound to perform all the terms of that contract as written and as supplemented by the agreement of 1936; that among the terms thereof which the city of San Diego is legally bound to perform is the duty of selling and delivering from this system to the defendant water company all the water which it may require to supply its consumers, including the city of Coronado; that the city of San Diego is bound to deliver said water at either or both of two places, namely at the Coronado "Y" and at the foot of Market street; that there is nothing in the contract which forbids the water company from developing and using water from other sources; and that by so doing the city of Coronado and the defendant water company have not lost or surrendered any of the rights now vested in them.

A judgment was entered substantially in the language of the conclusions of law and the defendant city of San Diego has appealed from that judgment.

The first provision of the judgment quiets title in the city of Coronado to all the waters of the appellant's Otay system which for many years was the principal, if not the sole, source of supply for the city of San Diego, and including waters which long after the execution of the contract of February 6, 1912, were developed from streams other than the Otay and Dulzura rivers and a part of which were brought in from other water sheds, if and when these waters may in the future be needed by the city of Coronado, and the appellant city is enjoined from ever asserting any claim to the contrary. The complaint asks such relief only with respect to the waters of the Otay and Dulzura rivers as impounded by the Otay dam. The first conclusion of law, which is carried into the judgment, not only gives that relief but extends it to all of the waters of those rivers whether impounded by the Otay dam or not, and also to the waters of Pine creek as impounded by Barrett dam and of Cottonwood creek as impounded by the Morena dam. At the same time the court found that from 1906 to the date of the trial waters from these streams and from this water system had been continuously supplied to the city of San Diego and its inhabitants, but that such delivery and use of this water did not "dedicate any of the waters of said Otay system to the public

use of supplying" the city of San Diego or any of its inhabitants. This was found although it clearly appears that the appellant and its predecessors had filed the original appropriation notices on these streams and had spent some $8,000,000 in constructing this water system, and that the greater part of the water thereof had been continuously served to and used by the city of San Diego and its inhabitants for some thirty-four years. The preference and prior right to all of this water thus given to the city of Coronado not only goes beyond the prayer of the complaint, but is entirely without evidentiary support and is directly opposed to all established principles of law governing the dedication of water and the acquisition of water rights. Every argument of the respondents in support of this part of the conclusions of law and judgment applies also in favor of the right of the city of San Diego and its inhabitants to the continued service of the greater part of this water.

[1] Assuming that the delivery to the city of Coronado of some water taken from wells near the mouth of the Otay river, and later of other waters from the Otay system, under oral and written agreement, has resulted in the dedication in a legal sense of a portion of the water of that river to the use of consumers in that area, this cannot constitute such a dedication of the entire water of that river and its tributaries, including water from outside sources which has been brought into the Otay system, especially where equal or superior rights in favor of other communities have intervened and have been exercised and confirmed by long-continued use. There is nothing in the many authorities cited on this subject which would support a contrary view.

[2] Moreover, the contract of February 6, 1912, under which most of this water has been delivered for use in the city of Coronado, specifically recognized and protected the rights of the appellant city in a provision thereof which is to govern in the event of any shortage of water. While the effect of the judgment herein, in the event of a shortage of water, is to give to the city of Coronado prior rights to all the waters of the Otay-Barrett-Morena system to the extent of denying San Diego any water therefrom, if necessary, the contract itself provided, in the event of a water shortage, "that the water furnished by the said party of the first part to all its consumers, shall be equitably apportioned among all its consumers, to the end that the said party of the second part shall have and receive for the use of its consumers, and especially for the use of the said City of Coronado, and the inhabitants thereof, the same equitable proportion of the water impounded in the reservoirs, and subject to use, as the City of San Diego, and its inhabitants receive".

If it was desired to adjudicate the rights of the city of Coronado, independent of this contract, to a portion of these waters through dedication and use, evidence should have been received to show the exact position and rights of all the parties, with appropriate findings and conclusions thereon. As the matter now stands, neither the evidence nor the law supports this part of the findings, conclusions and judgment.

[3] The appellant next contends: (1) that the contract of February 6, 1912, clearly requires the respondents to take from the Otay system all of the water which they may need; (2) that even if evidence could be received to explain the meaning of the contract the action of the parties thereto, at the time of and after its execution, supports only the conclusion that these parties so understood and interpreted the contract; (3) that if not so interpreted the contract is void for lack of mutuality; and (4) that the court erred in holding that the respondents have a right to take a part of their requirements from this system but are not obligated to take any particular amount of water therefrom.

For present purposes we may assume that the contract in itself, and as interpreted by the parties thereto at the time, was intended to provide that the respondent water company and its predecessor should take from this system the full amount of water which it needed to supply its customers within the area named. It clearly appears that the original parties to that contract started out by furnishing and taking all of such water, and that when the city of San Diego took over the system and assumed the burden of this contract this practice was continued until it was prevented by a flood in 1916. From that time until 1919, all of the water required by or for the respondents was pumped from the Otay wells. After the Otay dam was rebuilt in 1919, and until 1936, the respondents took only a part of their requirements from the Otay system and continued to pump a part from the Otay wells. The amount of water thus pumped by them during these years

varied from a maximum of 56.05 per cent in 1935 to a minimum of 10.71 per cent in 1926. It clearly appears that this was done with the knowledge of the appellant. As early as 1919 the water officials of the city of San Diego commended the Coronado Water Company for relieving the burden on the Otay system by developing an independent supply of water. In March, 1936, in the settlement of other litigation over the rates to be paid for water supplied to the respondents, it was specifically agreed that the respondent water company would endeavor to develop an additional water supply for the purpose of lessening the burden then resting upon San Diego's water system.

The appellant has taken over the Otay system subject to the burden of supplying the respondents' requirements as set forth in the 1912 contract. Between 1920 and 1936, and even thereafter, the appellant knowingly acquiesced in the respondents' taking only a part of such requirements from this system and encouraged this action as relieving it from a part of its burden. This policy was carried into a definite agreement in 1936, which agreement contained the specific provision that this development of additional water should not be construed as in any way changing the basic contract of February 6, 1912. The development of such additional water would necessarily change the amount to be delivered and purchased under the prior contract and would necessarily change the provision of the prior contract that the respondent water company was to take its full requirements from the Otay system. The only reasonable construction of this portion of the new agreement of 1936 is that the respondents should have the right to develop other waters, and that in so doing and in thus conferring a benefit upon the city of San Diego it was giving up no rights which existed under the basic contract and that this contract should continue in force, as before, with the water company's right to take such remaining water as it might need for its contract purposes remaining unchanged.

[4, 5] It must be held that by this conduct, continued over some sixteen years, and by the new agreement in consideration of the settling of other litigation, the parties so modified or confirmed the original contract of February 6, 1912, whatever its original meaning was, as to agree that the respondent water company might take from the Otay system such amounts of water as it needed and had not developed elsewhere, and that it need not take all of its water requirements from this system. Under these circumstances, it must be held that the appellant city is estopped to now insist upon a different interpretation of the contract as so modified or as so confirmed. In this connection, the appellant contends that the respondents may not rely upon any such modification of the contract of February 6, 1912, because no such modification was pleaded. It is true that the only contract mentioned in the complaint is the original contract of February 6, 1912, and that a modification thereof was not specifically pleaded. However, there were other allegations in connection with the respondent city's action to quiet title to its water rights and the question of modification, with its effects, was rather thoroughly gone into at the trial. Under the record, it cannot now be held that this matter was not in issue or that it was not material to the controversy between the parties.

[6-8] The question remains whether this contract, as so modified or confirmed, is void for want of mutuality since it leaves the amount of water which is to be taken variable and uncertain. The appellant relies on general principles of law requiring mutuality of contracts for the sale of commodities so that the amounts to be delivered and paid for may be determined or determinable, as otherwise the agreement would be purely unilateral or amount to a mere option. It argues that this contract, if interpreted as requiring the water company to take and pay for all water it may require for the purpose of serving the communities named in the contract, would be sustainable (citing Marin Water, etc., Co. v. Town of Sausalito, 168 Cal. 587, 143 P. 767), but insists that if interpreted as permitting the water company to take only that part of its requirements which it does not develop from other sources it is void for uncertainty and lack of mutuality.

In most agreements between individuals and relating to ordinary wares, there is a good reason for the general rule pointed out. We are here confronted with a different situation which justifies an exception to that rule if that be necessary. While water is a commodity its sale is in many instances a matter of public policy and subject to restrictions and to accrued rights which may well necessitate the application of somewhat different rules from those

applicable to ordinary commercial transactions. In this case, the respondents had certain rights in connection with the waters of the Otay and Dulzura rivers before this contract was entered into. These rights were recognized and confirmed in the contract which provided for a continued service of water to the area named. The city of San Diego accepted the Otay system subject to the burden of supplying certain waters for the purpose of continuing the service thereof to the inhabitants of the city of Coronado. City of San Diego v. La Mesa, etc., Irr. Dist., 109 Cal.App. 280, 292 P. 1082. The contract was valid when entered into and no good reason appears why a modification thereof, the effect of which is merely to relieve the party having the duty of furnishing the water from a part of that burden, should be held to be invalid. In this state, the public has an interest in the use of water and public policy favors the conservation of water and requires that all waters be put to a reasonable use. In carrying out this policy a court may protect the right to the future use of water without compelling waste in the meantime. Peabody v. City of Vallejo, 2 Cal.2d 351, at page 371, 40 P.2d 486.

In line with this policy a court should not compel a public utility or a city to take water it does not need under the penalty of losing its right thereto when the interested parties have agreed to the contrary. As between a city operating a water system and another city, or public utility supplying water for such other city, an agreement to supply water to the extent it may be needed only should not be void for lack of mutuality merely because the amount needed may be a variable quantity. As a matter of fact, the amount of water required in a particular year over and above the amount developed from other sources will be as easy to ascertain as the total amount required in future years where no other water is developed. To permit such a contract is in the interest of conservation of water and is in line with our public policy of putting water to its best and most universal use. We therefore hold that the contract as found by the court to be now existing and binding upon the appellant is not void for the reason assigned.

It would seem that this contract, as found by the court to have been modified by the subsequent agreement, is more favorable to the city of San Diego than was the original contract and that that city is thereby relieved of a considerable part of the burden it assumed in taking over the Otay system. An unusual feature of this case is that one party, instead of trying to deprive the other party of water, is insisting that the other party take more than it needs or wants. While the appellant insists that it desires the respondents to take all of their requirement of water from the Otay system, it wants the contract declared terminated if less than the total amount of such requirement is taken. In its answer the appellant offered, in the event of the termination of the contract, to enter into a new agreement by which it would undertake to supply any deficiency that might exist after the respondents had received such water as they could from other sources, such new agreement to provide for adequate and reasonable rates for the water. In effect, it is argued in the briefs that the appellant is willing to do this but that this would constitute a stand-by service, that the court's interpretation of the contract practically imposes upon the appellant the duty of maintaining such a stand-by service, and that such a service is more expensive to maintain and should be compensated for at higher rates than those provided for in the contract in question. Assuming this to be true the contract, as found to be in force by the court, does not permanently fix the rates and under its terms these rates may be now changed at any time by agreement of the parties or through the arbitration which is provided for therein.

[9] The court found that in 1886 a submarine water line was constructed across San Diego bay from what is now the city of Coronado to the foot of Market street in San Diego, and that ever since that pipe line has been connected with San Diego's water system at that point. It was further found that since 1907 water from the Otay system has been delivered at the foot of Market street for use in Coronado and that since 1908 water from Otay dam has also been continuously delivered at the Coronado "Y", except as temporarily interrupted by flood damage in 1916. Apparently based upon these findings, and in passing upon the burdens assumed by the appellant in taking over the Otay system subject to the contract of February 6, 1912, the court, in its conclusions of law, found that "the City of San Diego, is legally obligated to deliver said water at either or

both of two places or points of delivery, namely; the Coronado 'Y' and the junction of the submarine line across the bay of San Diego with the distribution system of defendant, the city of San Diego, at the foot of Market Street". This conclusion of law is carried into the judgment and the effect thereof, if allowed to stand, might be interpreted as giving the city of Coronado the right, at its option, to compel the city of San Diego to deliver all or any part of the waters it may be required to deliver under the contract at the foot of Market street rather than at the Coronado "Y". Such a judgment is not sustained by any evidence in the case. It appears from the evidence that some water was sold and delivered at the foot of Market street both before and after the execution of the contract of February 6, 1912. That part which was delivered before 1912 was obviously not delivered under that contract. That contract provided that all waters covered thereby should be delivered at the Coronado "Y", and made no reference to delivery of water at the foot of Market street. It appears from the evidence that the city of San Diego began delivering some water at the foot of Market street in 1907, expressly as an accommodation to the Coronado Water Company, in accordance with the terms of an ordinance of the city of San Diego, and that some waters have been delivered at that point each year since 1907, with the exception of two years. The only evidence in this connection is that this submarine pipe line has been maintained for emergency purposes and that water was taken through it only at such times as pressure was reduced to a low stage at the northerly borders of the city of Coronado. It appears that the Southern California Mountain Water Company never delivered water to the respondents through this submarine line either before or after the contract of February 6, 1912, was executed. While there is evidence that the city of San Diego delivered water through that pipe line before and after the execution of that contract there is no evidence that it was done under or pursuant to the terms of that contract. In connection with the settlement of the other litigation in 1936 one thing agreed upon was that the city of San Diego "will continue the sale of water at the Coronado 'Y' and at Atlantic and Market Streets in the city of San Diego" at the same rate of compensation. There was no issue raised by the pleadings herein to the effect that the respondents were entitled to receive all of their water or so much as they may desire at the foot of Market street, or that they were entitled to receive any water at that point under the contract of February 6, 1912. The purport and effect of the agreement between the parties in 1936 is that the appellant will continue the sale of water at both points. The only reasonable effect of this agreement in this connection would be that the respondents would have a right to have the delivery of water at the foot of Market street continued to the extent such deliveries had been made in the past. The adjudication of the exact amount of water which must be thus delivered, if desired, would require other and more definite findings than those appearing in the record and that part of the judgment goes entirely too far and must be reversed.

Most of the facts are not disputed and there would appear to be no necessity for a new trial unless the parties desire to retry the issues as to what part of the waters impounded by the dams in the Otay system have been dedicated to the use of the respective parties, independently of the contract, and unless the parties desire an adjudication as to the exact amounts of water which the appellant may be compelled to deliver to them at the foot of Market street rather than at the Coronado "Y". Unless it is desired to settle such questions in this action the findings and conclusions of law may be amended or stricken in accordance with the views herein expressed and a judgment entered in accordance with the findings and conclusions as thus corrected and amended. The decision as to whether the case shall be retried in whole or in part should rest with counsel, and since it is hardly possible to correct the findings in this court and modify the judgment accordingly, it seems advisable to reverse the judgment and remand the cause for appropriate action in the trial court.

The judgment is reversed.

MARKS, J., and WEST, Justice pro tem., concurred.

48 Cal.App.2d 177

In re TIBBETTS' ESTATE.

Appeal of LAWTON.

Civ. 11880.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1941.

Hearing Denied Jan. 29, 1942.

1. Wills ⇐552(3)

An adopted daughter of testatrix' sister who predeceased the testatrix was not an "heir" of the testatrix, on issue whether adopted daughter was entitled to share in portion of estate of testatrix devised and bequeathed to testatrix' sister. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

2. Wills ⇐552(1)

A testatrix' sister was a "kindred" of the testatrix within statute providing that when an estate is devised or bequeathed to any kindred and devisee or legatee dies before testator, leaving lineal descendants, such descendants take the estate in same manner as devisee or legatee would have done had he survived the testator. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Kindred".

3. Wills ⇐552(3)

Under law of California, an adopted child is a "lineal descendant" of adopting parent within statute providing that when an estate is devised or bequeathed to any kindred of testator, and devisee or legatee dies before testator, leaving lineal descendants, such descendants take the estate in same manner as devisee or legatee would have done had he survived testator. Probate Code, § 92.

See Words and Phrases, Permanent Edition, for all other definitions of "Lineal Descendant".

4. Wills ⇐436

Where California resident executed will in California disposing of California property, the California anti-lapse statute must be read into such will. Probate Code, § 92.

5. Wills ⇐552(3)

In determining whether adopted daughter of Massachusetts devisee under testatrix' will executed in California disposing of California property was a "lineal descendant" of the devisee so as to entitle adopted daughter to acquire part of property which devisee would have acquired if devisee had survived the testatrix, that, under Massachusetts anti-lapse statute, adopted daughter allegedly acquired no rights was immaterial; only material statutes of Massachusetts being the statutes relating to adoption. Probate Code, § 92; G. L.(Ter.Ed.) Mass. c. 210, § 1 et seq.

6. Wills ⇐552(3)

An adopted daughter under Massachusetts law of Massachusetts devisee under will executed in California disposing of California property was a "lineal descendant" of the devisee within California anti-lapse statute, and hence adopted daughter was entitled to share equally with devisee's natural child the property devised where devisee predeceased the testatrix. Probate Code, § 92; G.L.(Ter.Ed.) Mass. c. 210, § 1 et seq.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Proceeding in the matter of the estate of Francena Ella Tibbetts, deceased. From those portions of a decree of distribution which distributed to Marion L. Swift a part of the estate of deceased, H. C. Lawton appeals.

Affirmed.

Bohnett, Hill, Cottrell & Boccardo and Henry G. Hill, all of San Jose, for appellant.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by H. C. Lawton from those portions of a decree of distribution which distributed to Marion L. Swift a part of the estate of said deceased.

Francena Ella Tibbetts, deceased, a resident of California, died in this state leaving property herein. She had made a will in this state in 1933 devising and bequeathing one-half of said property to her sister Annie M. Lawton, who was a resident of Massachusetts. Said Annie M. Lawton predeceased the testatrix leaving surviving her H. C. Lawton, her son, and Marion L. Swift, her adopted daughter

who had been duly adopted under the laws of Massachusetts. The probate court distributed the property, which had been devised and bequeathed to said Annie M. Lawton, deceased, to said H. C. Lawton, appellant, and said Marion L. Swift, respondent, in equal shares.

[1] Appellant contends that the probate court erred in distributing any portion of the estate of Francena Ella Tibbetts, deceased, to respondent but we are of the opinion that this contention cannot be sustained. It may be conceded that respondent was not an heir of the testatrix (In re Estate of Stewart, 30 Cal.App.2d 594, 86 P.2d 1071; In re Estate of Pence, 117 Cal.App. 323, 4 P.2d 202), but the question presented here is whether respondent, as the adopted daughter of the deceased sister of the testatrix, was entitled to share in the portion of the estate of the testatrix devised and bequeathed to said deceased sister, by virtue of the so-called anti-lapse section of the Probate Code (sec. 92). Said section reads in part as follows: "* * * when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, * * * such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

[2] It is admitted that Annie M. Lawton, deceased, was a "kindred" of the testatrix and that she died before the death of the testatrix. The only question then is whether respondent, who is admittedly the duly adopted daughter of Annie M. Lawton, deceased, is a "lineal descendant" of said Annie M. Lawton, deceased.

[3] Under the law of this state, there is no doubt that an adopted child is a "lineal descendant" of the adopting parent (Prob.Code, secs. 228 and 257; In re Estate of Mercer, 205 Cal. 506, 271 P. 1067; In re Estate of Winchester, 140 Cal. 468, 74 P. 10), and it has been specifically held that an adopted child is a "lineal descendant" of the adopting parent within the meaning of said section 92 of the Probate Code. In re Estate of Moore, 7 Cal.App.2d 722, 47 P.2d 533, 48 P.2d 28; see, also, 25 Cal.Law Rev., 81, 85. But appellant discusses at some length the law of Massachusetts and he relies strongly upon Gammons v. Gammons, 212 Mass. 454, 99 N.E. 95, in support of his contention.

It appears that an adopted child is also a "lineal descendant" of the adopting parent under the law of Massachusetts and we find no substantial difference between the law of that jurisdiction and the law of this state with respect to the right of an adopted child to succeed to the property of the adopting parent. Chap. 210, General Laws (Ter.Ed.) of the Commonwealth of Massachusetts. But appellant apparently claims that because a child adopted in Massachusetts acquires no rights under the anti-lapse statute of Massachusetts (Gammons v. Gammons, supra), such adopted child may acquire no rights under the anti-lapse statute of California under the circumstances before us. We cannot follow this reasoning.

[4, 5] We are of the opinion that the terms of the Massachusetts anti-lapse statute are wholly immaterial here. The testatrix was a resident of California and made her will here disposing of property situated in this state. The anti-lapse statute of this state must be read into said will (In re Estate of Pew, 10 Cal.App.2d 41, 50 P.2d 1045; Larrabee v. Tracy, 39 Cal.App.2d 593, 104 P.2d 61), and the persons acquiring rights under said statute acquire such rights as "statute-made" devisees or legatees. In re Estate of Pew, supra, 10 Cal.App.2d at page 44, 50 P.2d 1045; Larrabee v. Tracy, supra, 39 Cal. App.2d at page 601, 104 P.2d 61. Such rights are acquired regardless of whether such persons are or are not heirs of the testatrix. The only statutes of Massachusetts which are material here are the statutes of that state relating to adoption and such statutes are material only for the purpose of determining whether respondent attained the status of a "lineal descendant" of Annie M. Lawton, her adopting parent, by virtue of her adoption under said statutes. Whether the state of Massachusetts has or has not an anti-lapse statute, or what the terms of such statute may be, are questions which are of no significance in this discussion. The reference to the law of the adopting state, as found in Re Estate of Moore, supra, 7 Cal.App.2d at page 724, 47 P.2d 533, 48 P. 2d 28, was undoubtedly made only with respect to the law of that state relating to adoption and giving to the adopted child the status of a lineal descendant of the adopting parent and not with respect to the anti-lapse statute, if any, of the adopting state.

[6] We therefore conclude that respondent was a "lineal descendant" of Annie M. Lawton, her adopting parent, and that the trial court correctly distributed the portion of the estate which was devised and bequeathed to said Annie M. Lawton, deceased, to both respondent and appellant.

The portions of the decree from which this appeal was taken are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



48 Cal.App.2d 62

EDWARDS v. CITY OF LOS ANGELES et al.

Civ. 11710.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1941.

Rehearing Denied Dec. 27, 1941.

Hearing Denied Jan. 26, 1942.

1. Innkeepers ⇐4

Ordinance requiring payment of fees proportionate to gross receipts by persons letting rooms in hotels, rooming houses, boarding houses, apartment houses or lodging houses was not a "regulatory penal statute", although carrying penalty clause, but upon its face was an "occupational license tax for revenue".

See Words and Phrases, Permanent Edition, for all other definitions of "Occupational License Tax for Revenue" and "Regulatory Penal Statute".

2. Licenses ⇐7(1)

A legislative body has a wide discretion in enacting license taxes and unless unreasonableness plainly appears, determination of such body should be final.

3. Innkeepers ⇐8

Guests in a hotel, boarders in a boarding house and roomers or lodgers, so called, are generally mere "licensees" and not "tenants" and they have only a personal contract and acquire no interest in the realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee" and "Tenant".

4. Constitutional law ⇐287
Innkeepers ⇐4

Ordinance requiring persons engaged in business of renting rooms in hotels, rooming houses, boarding houses, apartment houses or lodging houses to pay fees proportionate to gross receipts imposes a "license tax" upon those engaged in business of renting accommodations to lodgers whether in a structure called a hotel, apartment, rooming house, boarding house, or lodging house, flat, bungalow court, duplex or single dwelling, and the ordinance does not deny "equal protection of the law" because of unreasonable classification or discrimination.

A "lodger" is one who has no interest in the realty but who occupies part of a tenement which is under the control of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law", "License Tax" and "Lodger".

5. Innkeepers ⇐3

Structures placed side by side, or one in the rear of another, or in a circle or semi-circle, and frequently called "inns" or "courts", do not lose their identity as "hotels", "rooming houses" or "apartments" merely by bestowing upon them a different appellation, if in fact they are used to lodge the public.

See Words and Phrases, Permanent Edition, for all other definitions of "Apartment", "Court", "Hotel", "Inn" and "Rooming House".

6. Innkeepers ⇐4

The construction placed upon terms of ordinance requiring payment of occupational license tax by persons renting rooms in hotels, rooming houses, boarding houses, apartment houses or lodging houses based on gross receipts, should be in conformity with intent of framers thereof, and when such ordinance has been construed to include any person engaging in renting lodgings, as against conferring a tenancy, there should be no departure therefrom.

7. Innkeepers ⇐4

Under ordinance requiring payment of occupational license tax by persons letting rooms in hotels, rooming houses, boarding houses, apartment houses or lodging houses, it is the renting of rooms and not the business of boarding which is the subject of the tax.

8. Innkeepers ⇐4

It is not required in a general occupational tax ordinance, nor in an ordinance requiring payment of fees, based on gross earnings, by persons letting rooms in any hotel, rooming house, boarding house, apartment house or lodging house, that the legislative body should enumerate specifically by title or name every possible phase of the business of renting rooms as lodgings.

9. Innkeepers ⇐3

The statute relating to innkeepers, notwithstanding that tenant is sometimes used therein synonymously with guest or lodger, indicates a general classification of hotel keeper, furnished apartment house keeper, furnished bungalow court keeper, boarding house or lodging house keeper and keepers of furnished cottages as "innkeepers". Civ. Code, § 1859 et seq.

10. Innkeepers ⇐3

An "inn" is a place where the public will be received and accommodations provided to guests for compensation, and the character of an inn is not lost because of difference in structure or surrounding buildings or lands. Civ.Code, § 1859 et seq.

11. Innkeepers ⇐4

When owner of realty engages in business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants and this constitutes an "occupation" or "engagement in business" in the sense which may constitutionally subject him to a license tax under ordinance.

See Words and Phrases, Permanent Edition, for all other definitions of "Engagement in Business" and "Occupation".

12. Innkeepers ⇐4

Ordinance requiring payment of occupational license tax by persons letting rooms in hotels, rooming houses, boarding houses, apartment houses or lodging houses is not indefinite as to what is meant by term "rooms", since when an apartment is rented it is in fact a rental of the room or rooms contained therein, a "room" being an area set apart or appropriated for any purpose, marked off by a partition or lines indicating its extent, and the only rooms that come within purview of ordinance are rooms rented to guests or roomers for lodging purposes and not rooms used as stores or the like, nor rooms leased or let to tenants conferring on them an interest in realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Room".

13. Licenses ⇐42(7)

Payment of an occupational license tax is generally enforceable by fine and imprisonment.

14. Licenses ⇐42(3)

For the enforcement of an occupational license tax, a complaint in a criminal proceeding in the language of the ordinance, alleging necessary essential elements, with sufficient descriptive location of the structure would be sufficient.

15. Constitutional law ⇐48
Municipal corporations ⇐120

Where the terms in a statute or ordinance are capable of different constructions, that upholding the constitutionality thereof is preferable.

16. Municipal corporations ⇐111(1)

Ordinance requiring payment of license fees proportionate to gross receipts by persons engaged in business of renting or letting any rooms in any hotel, rooming house, boarding house, apartment house or lodging house is sufficiently definite to be enforceable.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Edward T. Bishop and B. Rey Schauer, Judges.

Action by David B. Edwards against the City of Los Angeles and others to enjoin the prosecution of plaintiff for failure to pay a license tax to the City of Los Angeles. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting; EDMONDS, J., not participating; SPENCE, J., acting pro tem.

Scott & Eberhard and Ray C. Eberhard, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Frederick Von Schrader and Herbert L. Iasigi, Deputy City Attys., all of Los Angeles, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment against him entered upon the sustaining of defendants' demurrer to his complaint, without leave to amend. The action was brought to enjoin the prosecution of plain-

tiff for failure to pay a license tax to the City of Los Angeles in accordance with the provisions of a general ordinance, No. 77,000 (Art. 1, Chap. 2 of the Los Angeles Municipal Code), imposing a variety of license taxes.

The complaint alleges: "That plaintiff is * * * the owner of * * * real property being improved with a two-story frame apartment house building containing four apartments on the first floor and four apartments on the second floor; * * * that each of said apartments is equipped with a kitchen, bathroom, toilet in addition to rooms intended for sleeping quarters and has living rooms and is intended for and is suitable for a dwelling for persons or families occupying the same; that each of said apartments is completely furnished with all furniture necessary to a place of residence for a family; that plaintiff, as the owner of said premises, does now, and at all times herein mentioned has rented apartments in said building for housekeeping purposes to the public generally." The complaint further alleges a demand by defendants on plaintiff for the payment of a license fee in connection with the above business; the service of a citation requiring the payment of such fee within seven days, and notification that failure to comply would result in a criminal complaint being issued against him.

Section 21.99 of the general ordinance above referred to and applicable herein is as follows: "For every person engaged in the business of renting or letting any rooms in any hotel, rooming house, boarding house, apartment house or lodging house, the same fees as those prescribed for the business referred to in section 21.167 hereof shall be paid." The fees prescribed by section 21.167 are proportionate to gross receipts. Section 21.202 imposes the ordinary misdemeanor penalty for a violation of the provisions of the ordinance.

[1] The ordinance carries a penalty clause for its violation, but it is not a regulatory penal statute. Upon its face it is an occupational license tax for revenue. In re Tepper, 60 Cal.App. 98, 212 P. 220; Barker Bros., Inc., v. Los Angeles, 10 Cal. 2d 603, 76 P.2d 97; City of Los Angeles v. Lankershim, 160 Cal. 800, 118 P. 215.

Appellant contends that the ordinance denies him equal protection of the laws, and contravenes the Constitution of the United States, the state of California and the charter of the city of Los Angeles; that the practice of a landowner to rent his property does not constitute an occupation or engaging in business, and that the ordinance is so indefinite and uncertain as to be invalid as a penal ordinance. He further urges that there is an illegal and arbitrary classification of those on one hand who rent or let rooms in any hotel, rooming house, boarding house, apartment house or lodging house, who must pay the tax, and on the other hand, those renting similar accommodations and flats, bungalow courts, duplexes or single family residences, who, appellant contends, are not required to pay a tax. Respondents take the position that the ordinance does not make such classification. It is their view that a flat, bungalow court, duplex or single family residence may, in the circumstances of a particular case, constitute an apartment house, hotel, rooming house, boarding house or lodging house.

In an opinion of the superior court of the state of California, in and for the county of Los Angeles (People v. Beach, unreported, superior court No. Cr. A-1491, trial court No. 79782), upon an appeal from a judgment of the municipal court, to which opinion a dissent was filed, the constitutionality of the section of the ordinance in question was upheld, the court there saying: "There are, however, differences in the nature of these various things thus referred to, which separate them to some extent from those enumerated in the ordinance, and may, in the mind of the city council, have required a different rate of taxation, or justified their non-taxation." We believe the constitutionality of the section may be upheld upon a broader basis.

[2] The general rule is that a legislative body has a wide discretion in enacting license taxes, and that unless unreasonableness plainly appears the determination of such body should be final. In re Schmolke, 199 Cal. 42, 248 P. 244; Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148. If the ordinance applies to all those conducting like businesses in a similar manner, the ordinance should be upheld, but if it is not uniform in its application and exempts from its operation businesses of identical character, though bearing another name, there is an unreasonable classification, and the ordinance must be held invalid as discriminatory.

[3, 4] The question arises: Is there an intrinsic or natural distinction between the

business of conducting a furnished apartment house, by letting and renting rooms, and conducting the same business in a flat, bungalow court, duplex or single family residence? The evident purpose of the ordinance is to require a license tax upon those engaged in the business of renting rooms for lodging accommodations. A lodger is one who has no interest in the realty, but who occupies part of a tenement which is under the control of another. McDowell v. Hyman, 117 Cal. 67, 48 P. 984; United States of America v. Ackerman, 211 Cal. 408, 295 P. 811. Whether one is a tenant or a lodger is a mixed question of law and fact, the niceties of which need not be discussed herein, but it may be conceded that flats, duplexes and single dwelling houses in some instances offer accommodations to mere lodgers, sometimes referred to as guests or roomers. "Guests in a hotel, boarders in a boarding house, and roomers or lodgers, so called, are generally mere licensees and not tenants. They have only a personal contract, and acquire no interest in the realty." 1 McAdam on Landlord and Tenant, 5th Ed., p. 239. To the extent that an identical business is operated; that is, the renting of accommodations to lodgers, whether in a structure called a hotel, apartment, rooming house, boarding house, or lodging house, flat, bungalow court, duplex or single dwelling is immaterial under the terms of the ordinance, the purpose of which is to collect license taxes in proportion to gross receipts.

[5] An "apartment house" has been referred to as a dwelling house or a tenement house, and sometimes the term is used interchangeably with "flat". 3 C.J.S., Apartment, pp. 1422, 1423; Lignot v. Jaekle, 72 N.J.Eq. 233, 65 A. 221. "Duplex houses" may in fact be apartments or flats. A "flat" may be used as a lodging house; if so, it is, under the terms of the present ordinance, not distinguishable from a rooming house. Structures placed side by side, or one in the rear of another, or in a circle or semi-circle, and frequently called inns or courts, do not lose their identity as hotels, rooming houses or apartments merely by bestowing upon them a different appellation, if in fact they are used to lodge the public. It is immaterial whether the place used for lodging purposes is built of stone or steel, brick or wood, or of a framework of cloth, or whether mother earth constitutes the floor and the high heavens the ceiling, if in fact it is a place sufficiently defined in area, the letting or renting of which to guests, roomers or lodgers is engaged in as a business.

[6] The words used in the ordinance definitely indicate that a license shall be required of one engaged in the business of renting lodging space to a guest or roomer. The construction placed upon the terms of the ordinance should be in conformity with the intent of the framers thereof (Coulter v. Pool, 187 Cal. 181, 201 P. 120; Estate of Roher, 14 Cal.App.2d 669, 58 P.2d 948, and when such ordinance has been construed to include any person engaging in renting lodgings as against conferring a tenancy, there should be no departure therefrom. Blalock v. Ridgway, 92 Cal.App. 132, 267 P. 713.

[7] That the ordinance was intended to be all inclusive and does in fact reasonably cover all lodgings is shown by its terms. If a flat is used as a lodging house, the party engaged in renting rooms therein is not deceived by the language of the ordinance and should know with certainty that if without a license, he is violating its terms. It is the business of renting rooms without a license which is prohibited; the type or form of structure in which the business is conducted is merely an incident thereto. The types enumerated are sufficient, including "boarding house", inserted no doubt so that a boarding house keeper who also rented rooms, might not, under the guise of a boarding house proprietor, defeat the purpose of the ordinance. Of course, it is the renting of rooms, and not the business of boarding, which is the subject of the tax.

[8] It is not required in a general occupational tax ordinance, nor in the section thereof here in question, that the legislative body should enumerate specifically by title or name every possible phase of the business of renting rooms as lodgings. To do so would be an endless task not necessary to the attainment of the result intended by the ordinance. It would be an easy matter to designate the premises in which such a business is conducted by a name not mentioned in the ordinance. In this period of giving to lodging places names indicative of their construction or suggestive of their location, some of which do not intimate the business of renting rooms to lodgers, much confusion would result in the interpretation of the ordinance if any consideration were given such name. It was certainly not in-

tended that one engaged in the business of lodging the public should by the device of operating a place under such name escape payment of the tax.

[9, 10] The article in the Civil Code relative to innkeepers (Div. 3, Pt. 4, Tit. 3, Ch. 2, Art. 4), notwithstanding that "tenant" is therein sometimes used synonymously with "guest" or "lodger", indicates a general classification of "hotel-keeper, furnished apartment house keeper, furnished bungalow court keeper, boarding-house or lodging-house keeper" (§ 1859), and keepers of "furnished cottages" (§ 1861a) as "innkeepers", and provides therein certain rights, privileges and duties as between the innkeeper and guests, boarders and lodgers. The character of an inn is not lost because of difference in structure or surrounding buildings or lands. An inn is a place where the public will be received and accommodations provided to guests for compensation. 14 Cal.Jur., p. 316, § 2.

Appellant attempts to fortify his contention by citations, using language that seems to undermine respondents' position and the trial court's interpretation. An examination of such decisions shows different factual backgrounds. In Barker Bros., Inc., v. Los Angeles, supra, an ordinance placed a license tax on any store commonly known as a department store or any store where a variety of goods, wares and merchandise is displayed in or offered for sale in several departments or sections. Appellant in that case contended that he did not conduct a department store of the kind described. The court held that the ordinance did not sufficiently define "department store", saying at page 608 of 10 Cal.2d, at page 99 of 76 P.2d: "If the owner of the furniture store keeps his stock in helter-skelter disorder, he requires no license; if he arranges it by 'departments or sections,' he must pay a tax. If he sells a 'variety' of household goods or china ware from a general stock, he escapes taxation; if, however, he offers it for sale grouped according to kind, he is then carrying on a business subject to the ordinance. Certainly such classification, so far as the evidence presented in this case shows, is based upon no reasonable distinction." "The term 'commonly known as a department store' cannot be applied with any certainty to a particular business and is too indefinite to be used as a classification for the purpose of taxation." In the present case "apartment house" is not defined; neither is there a definition of hotel, rooming house, boarding house or lodging house; but the ordinance is sufficiently clear to indicate that in any business of letting or renting rooms, a license is required.

Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895, and Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357, cases cited by appellant on the question of requiring a tax on a particular kind of business, with preference given those within the confines of a municipality to the detriment of those without, are not in point with the question here involved, namely, whether there is discrimination against appellant in holding his apartment house to be within the purview of the present ordinance. In City of Los Angeles v. Lankershim, supra, an ordinance claimed to be regulatory, but in fact, as in the present case, simply an ordinance for revenue, imposed an occupational tax on the owners of buildings containing more than thirty rooms. The court pointed out that an owner renting twenty-nine rooms was in the same category, and therefore the classification was unjust and discriminatory. In the present case there is no classification and no discrimination; the amount of the license tax is in proportion to the business transacted, which is permissible under the ordinance. In Justesen's Food Stores, Inc., v. City of Tulare, 12 Cal.2d 324, 84 P.2d 140, a "health measure" expressly exempting one class was held to be unreasonable and arbitrary. In the present case there is no express, and, as appears from an analysis of the ordinance, no implied exception.

[11] Appellant is the owner of the building referred to in the complaint. It is urged that the act of an owner in renting his property does not constitute an occupation or engagement in business in the sense which may constitutionally subject him to a license tax. Section 21.08, defining "Engaged In Business", specifically refers to "owner" in conjunction with "officer, agent, manager, employee, servant or lessee". When the owner of the realty engages in the business of supplying accommodations to lodgers, he is conducting a business different from that of letting property to tenants.

[12] Appellant suggests that a property owner is left entirely in the dark as to what is intended by the term "rooms". He states that he is renting apartments; that is, dwelling accommodations. Needless to say, when

an apartment is rented it is in fact a rental of the room or rooms contained therein. A room is an area set apart or appropriated for any purpose, marked off by a partition or lines indicating its extent. 54 C.J., pp. 1102, 1103. The only rooms that come within the purview of this ordinance are rooms rented to guests or roomers for lodging purposes; not rooms used as stores or the like, nor rooms leased or let to tenants conferring on them an interest in the realty.

[13, 14] Payment of an occupational license tax is generally enforceable by fine and imprisonment. A complaint in a criminal proceeding in the language of the ordinance, alleging necessary essential elements, with sufficient descriptive location of the structure, would be sufficient. The present ordinance, for revenue only, in no manner attempts to regulate the conduct of business. In its penal aspect, only one question need be considered: Is the language used so indefinite and uncertain that the ordinary lay mind would in good faith be deceived, and, whether engaged in the business of renting rooms for lodging accommodations in a dilapidated barn, under the trade name of "barn", or in a sumptuous hotel apartment or apartment hotel, under the trade name of "inn", believe that he was not violating the ordinance? It is not reasonable to assume that one would be misled because lodging accommodations, under any name, are divided or separated horizontally instead of vertically. Even the "common mind" (In re Peppers, 189 Cal. 682, 209 P. 896) would understand that a license tax could not be evaded because a "flat", in which a business of renting lodgings is conducted, is not specifically so defined in a building or health ordinance which enumerates structures conducting identical businesses. Any reasonable person engaged in such business would understand from the terms of the ordinance, having in mind its object, that it covered not only the structures enumerated, but any that might be included in such classifications.

[15] Where the terms in a statute or ordinance are capable of different constructions, that upholding the constitutionality thereof is preferable. In re Application of Flesher, 81 Cal.App. 128, 252 P. 1057.

[16] The ordinance does not attempt to interfere in the conduct of the business; it does not discriminate in the amount of taxes to be paid, nor does it expressly or impliedly exempt or discriminate between persons exercising the same privilege. It is sufficiently definite and certain in its terms to be enforceable.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



48 Cal.App.2d 220

ASSETS CORPORATION v. PERRIN PROPERTIES, Inc., et al.

Civ. 6428.

District Court of Appeal, Third District, California.

Dec. 2, 1941.

Rehearing Denied Dec. 31, 1941.

1. Liens ⇐22

In suit to foreclose liens on timber land created by written agreement and reaffirmed by consent judgment, evidence sustained judgment of foreclosure as against claim of extrinsic fraud in rendition of the consent judgment.

2. Liens ⇐22

The invalidity of judgment allegedly procured by extrinsic fraud may be available as defense to suit to foreclose liens dependent upon judgment without necessity of previously instituting a separate action for that purpose.

3. Trusts ⇐179

A trustee under trust created for benefit of trustor's adult children occupied a fiduciary relationship toward beneficiaries and was bound to disclose to them all material facts within its knowledge, and unknown to them, which would affect beneficiaries' interest in trust property involved in agreement settling differences between trustee, heirs and beneficiaries and in consent judgment incorporating terms of agreement.

4. Liens ⇐22

Where there was substantial evidence that beneficiaries of trust covering timber land, who entered into agreement creating liens on the land and later consented to judgment in accord with terms of agreement, were fully informed of all surrounding cir-

cumstances which might affect sale of the land, and there was no specific offer to show by competent testimony facts regarding trustee's knowledge of a transportation problem which would prevent sale of land, beneficiaries could not avoid foreclosure of liens on ground that judgment was procured by "extrinsic fraud" in failing to disclose to beneficiaries that a transportation problem existed.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

5. Evidence ⇐148, 314(1), 471(1)

Evidence in support of charge of extrinsic fraud in procuring consent judgment was properly excluded where it was either hearsay or incompetent or the questions called for conclusions of witnesses.

6. Evidence ⇐318(4)

Where it was claimed by defendants that consent judgment had been procured by extrinsic fraud in failing to disclose existence of a transportation problem which would prevent sale of timber land, a report on timber land in county was properly excluded as hearsay.

7. Appeal and error ⇐1009(2)

The reviewing court was bound by trial court's determination that alleged oral agreement to refrain from foreclosing liens was never made, where determination was amply supported by testimony of persons in whose presence it was claimed agreement was made, that no such agreement was made by them or in their presence, and by fact that subsequent written contract did not mention the alleged oral agreement.

8. Contracts ⇐245(2)

It is presumed that all material previous oral negotiations regarding terms and conditions of a contract subsequently reduced to writing and signed were included therein.

9. Liens ⇐3

Liens upon real property may be created by contract of the parties. Civ.Code, § 2881.

10. Frauds, statute of ⇐44(1), 56(1)

An alleged oral agreement not to enforce a consent judgment, which reaffirmed a written agreement creating liens on timber land, while bona fide efforts were being made to sell land was in violation of statute of frauds, since it affected an interest in real property and was not to be performed within a year. Code Civ.Proc. § 1973, subd. 1.

11. Frauds, statute of ⇐144

Where plaintiff and beneficiaries of trust covering timber land had entered into agreement creating liens on the land, and a consent judgment had reaffirmed the agreement, the plaintiff, which had not received any benefits from the agreement, was not "estopped" from denying existence of an alleged oral agreement to refrain from foreclosing the liens while bona fide efforts were being made to sell the land.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

Appeal from Superior Court, Tehama County; R. M. Rankin, Judge.

Affirmed.

Suit by the Assets Corporation against Perrin Properties, Inc., and others to foreclose liens created by a written agreement and reaffirmed by a consent judgment on certain timber land, wherein the defendants filed a cross-complaint attacking the consent judgment. Judgment for the plaintiff, and the named defendant appeals.

Judgment affirmed.

Keyes & Erskine, of San Francisco (Leslie L. Roos, of San Francisco, of counsel), for appellant.

George E. Farrand and Edward E. Tuttle, both of Los Angeles, for respondent.

THOMPSON, Acting Presiding Justice.

This is an appeal by one of the defendants, Perrin Properties, Incorporated, from a judgment foreclosing liens created by a written agreement and reaffirmed by a former consent judgment on 34,000 acres of unimproved timber land in Tehama, Trinity and Mendocino counties, to secure the payment of an acknowledged indebtedness of $350,000, together with five per cent interest thereon from August 1, 1934.

It is contended the former judgment is void for extrinsic fraud exercised in procuring consent therefor, consisting of failure on the part of Los Angeles Trust & Savings Bank, trustee of the property involved, to disclose to the defendants the known fact that a "transportation problem" existed which effectively prevented the logging and sale of the timber or the disposal of the lands in question; that the court erred in excluding evidence of that fraud; that the finding of the court that

no agreement was made to forebear instituting foreclosure proceedings while reasonable efforts were being conducted to sell the property, provided taxes and fire protection assessments were paid, is not supported by the evidence, and that plaintiff is estopped from asserting that the oral agreement not to bring foreclosure proceedings is unenforcible and void since it has accepted benefits from the agreement.

The record shows that E. B. Perrin and wife were the owners of the 34,000 acres of unimproved timber land which are described in the complaint, together with a large number of cattle and other property located in Arizona. They were the parents of six children, who are named as defendants in this case. February 15, 1922, Mr. and Mrs. Perrin executed a trust agreement affecting the property which is involved in this suit, by the terms of which the Los Angeles Trust & Savings Bank became trustee thereof for the benefit of the adult children. For several years that trust was administered, during which time the bank advanced to the beneficiaries large sums of money aggregating more than a million dollars, some of which loans were represented by promissory notes. The Los Angeles Trust & Savings Bank was succeeded as trustee by Security First National Bank of Los Angeles, and later by Assets Corporation, the plaintiff in this action. March 26, 1932, the trustor, E. B. Perrin, died. His son, E. B. Perrin, Jr., was thereafter appointed executor of his will. The bank assigned to Assets Corporation its claims for the money advanced. The bank and Assets Corporation threatened suit to enforce payment of the money loaned to the heirs of E. B. Perrin, deceased, who were beneficiaries of the trust. The beneficiaries and heirs subsequently charged the trustees with causing great loss to the estate by means of mismanagement in the administration of the trust. January 30, 1935, the trustee, the heirs and beneficiaries, for the purpose of settling all differences between them, signed a written agreement terminating the trust and stipulating to the existence of an indebtedness on the part of the heirs and beneficiaries in the aggregate sum of $350,000, for which they covenanted to execute notes secured by trust deeds creating first liens on the timber lands in question. The notes representing the agreed indebtedness were dated December 1, 1933, and became due four years from that date. They provided for interest at the rate of five per cent per annum from August 1, 1934, payable yearly. The agreement specifically states that the holder of the notes would rely solely on the liens for satisfaction of the debt, and that there was to be no personal liability on the part of the makers of the notes beyond the security therefor created by the trust deeds. The counterclaims against the trustees were waived. The agreement recited that the instrument was signed by the beneficiaries and that its terms were approved by them after they had investigated the trust and all matters with relation thereto and that they were possessed of full knowledge thereof.

The Perrin Properties, Incorporated, was thereupon organized to take title to the timber lands and properties belonging to the heirs and to the beneficiaries of the trust. Subsequently, by consent of all parties, in lieu of the execution of the notes and trust deeds for $350,000, a suit was commenced March 9, 1936, for the purpose of incorporating the terms of the written agreement of compromise in a formal judgment of court. The appellant in this suit and all interested parties appeared in that action and with full knowledge of its terms consented to the judgment which was duly entered in accordance with the express terms of the written agreement. That judgment determines that the heirs represented by Perrin Properties were indebted to Los Angeles Trust & Savings Bank in the sum of $350,000, due four years from December 1, 1933, together with five per cent interest thereon from August 1, 1934, and reestablished the liens provided for in the written agreement to secure the payment of that agreed indebtedness. No payment on account of either principal or interest on that indebtedness was ever made.

February 7, 1938, more than four years after the notes became due, this suit was instituted to foreclose the liens on the timber lands. The defendants answered the foreclosure complaint admitting their indebtedness and acknowledging their consent to the rendering of the former judgment creating the liens. They also filed a cross-complaint couched in three counts, the second and third of which were voluntarily dismissed at the time of the trial. The first count alleges that the defendants consented to the rendering of the former

judgment but that it was procured by extrinsic fraud of the trustee bank consisting of its failure to disclose to the defendants its knowledge of the fact that a "transportation problem" existed which absolutely prevented the sale of the timber or lands. It was also alleged, as a defense to this suit for foreclosure, that the trustee bank orally agreed not to enforce the former judgment while the defendants were engaged in bona fide efforts to sell the lands provided they paid the taxes and charges for forest fire protection in the meantime, which conditions they fulfilled.

Findings were adopted favorable to the plaintiff in every essential respect. The court specifically found that the allegations of the cross-complaint, with regard to the asserted fraud on the part of the trustee bank, in failing to disclose to the defendants its knowledge of the existence of a transportation problem incident to the operation of a lumber enterprise on the land in question, were untrue. It was also affirmatively determined that the defendants had full knowledge of that problem, and that they were afforded reasonable opportunity to sell the property before this suit was commenced; that neither the plaintiff nor its predecessors in interest promised to refrain from foreclosing the liens for any period of time, but that the defendants owe the debt alleged in the complaint, and are in default with respect thereto.

Judgment for the principal sum alleged with interest and counsel fees was thereupon rendered against the defendants in the aggregate sum of $439,042.33, together with a decree of foreclosure of the liens and for sale of the mortgaged properties in the manner provided by law, to satisfy the indebtedness. It was held that the plaintiff was not entitled to a deficiency judgment for any sum beyond the aggregate amount recovered from the sales of the lands impressed with the liens. From that judgment the defendant, Perrin Properties, Incorporated, has appealed.

[1] We are satisfied the findings and judgment are adequately supported by the evidence. The record is clear that after a controversy between the trustee and the beneficiaries of the Perrin trust, their counterclaims were compromised and settled by the terms of the written agreement dated January 30, 1935, in which all claims against the trustee were waived and it was conceded the defendants owed to the bank, trustee, the sum of $350,000, with interest at five per cent per annum from August 1, 1934, to be evidenced by promissory notes to be executed; that the notes would become due four years from December 1, 1933, and become secured by first liens upon the timber lands described; that the same terms which were incorporated in that written agreement were adopted and incorporated in a judgment which was subsequently rendered against the defendants March 9, 1936, with their full knowledge and by their consent; that defendants do not deny that obligation, but evidently seek, only, to delay the foreclosure until they have further opportunity to sell the lands and to thereby satisfy the debt; that neither principal nor interest has been paid on the indebtedness, and the defendants are in default in that regard. There is now due plaintiff the entire sum of principal and interest as provided by the terms of the written agreement and by the former judgment of court.

It will be observed the defendants' cross-complaint does not allege that the former judgment is void on account of the asserted extrinsic fraud in failing to inform them of an existing "transportation problem" which prevented sale of the land. There are neither allegations in the pleadings to that effect nor proof of the nature of said alleged problem. There are neither allegations nor proof that the defendants relied solely upon the proceeds derived from selling the timber or the encumbered lands from which to pay their acknowledged indebtedness. The evidence is undisputed that there was a definite depression in the lumber business during that period of time, which rendered it very difficult to sell lands of that character at reasonable prices, but, except for that fact, there is no evidence in the record and no specific offer to prove any particular transportation problem peculiar to the land in question which prevented its sale. We are therefore of the opinion the findings and judgment are supported by the evidence.

[2] It is true that the invalidity of a judgment alleged to have been procured on the ground of extrinsic fraud may be available as a defense to a suit to foreclose liens dependent upon that judgment without the necessity of previously instituting a separate action for that purpose. J. B. Colt Co. v. Freitas, 76 Cal.App. 278, 287, 244 P. 916; In re Estate of Co-

ver, 188 Cal. 133, 140, 204 P. 583; Stiles v. Bodkin, 43 Cal.App.2d 839, 111 P.2d 675; 12 Cal.Jur. 786, § 52.

In the present case, however, the issue of extrinsic fraud was determined adversely to the defendants.

[3] There is no doubt the trustee occupied a fiduciary relationship toward the defendants and that the bank was bound to disclose to them all material facts within its knowledge and unknown to them, provided the suppression of such facts detrimentally affected their interest in the property which was involved in the subject-matter of either the written agreement or the consent judgment. Allen v. Meyers, 5 Cal.2d 311, 54 P.2d 450; 26 R.C.L. 1375, § 236; 26 C.J. 1071, § 14; 1 Restatement of the Law of Trusts, 619, § 217.

[4] In the present case, however, there is no substantial evidence, and there was no specific offer to prove by competent testimony that material facts regarding plaintiff's knowledge of a transportation problem which would prevent the sale of the timber or land was suppressed. The reading of the record leaves the impression that no such problem existed. Moreover, there is substantial evidence that the defendants were fully informed of all the surrounding circumstances and conditions of the depressed lumber market and of all facts which might affect the sale of the lands. E. B. Perrin, Jr., one of the defendants, was appointed executor of his father's estate in March, 1932, and it was his duty to inform himself regarding the lands and property belonging to that estate. Mr. Resleure for many years had been particularly active in the interest of the heirs of the Perrin property. We think there is little merit in appellant's contention that the former judgment was procured by extrinsic fraud.

[5] The court did not err in excluding testimony regarding the existence of a transportation problem incident to the lands in question. The evidence upon that subject, to which objections were sustained, was either hearsay, or incompetent, or the questions called for conclusions of the witnesses. After a diligent search of the record, we are unable to discover that counsel for the defendants ever made a statement to the court of any competent evidence which they desired to adduce, tending to show that a transportation problem existed incident to the land, or what the nature of that alleged problem was, or that it prevented the marketing of the lumber or the sale of the property. No witness who claimed to have knowledge of those asserted facts was called or examined. In truth, Mr. Resleure, who was the attorney and president of the Perrin Properties, Incorporated, and who personally participated in the conferences which led to the compromise incorporated in the written agreement and in the prior judgment, testified that no such problem actually existed. On the contrary, he said that the alleged inaccessibility of the timber was a mere "legend or fable". It is true that the witness testified "We have contacted practically every possible buyer of timber lands" and that "no buyers wanted the property at any price because nobody had any need for it". But it appears the refusal to purchase the property was for the reason that a general depression then existed, rendering it extremely difficult to market lumber. It does not appear the land was unsalable because some logging transportation problem existed peculiar to that particular property. Moreover, it is specifically stated in the written agreement, which was signed by all interested parties, that "they and/or their counsel have fully investigated said trust and all matters related to the conduct thereof by the Bank and its predecessors, and that the foregoing release is made after full investigation and with full knowledge on the part of them and each of them of all their claims against the persons and corporations above mentioned and each of them".

[6] The first alleged erroneous order of the court, of which the appellant complains, occurred when plaintiff objected to the introduction or to the marking for identification of a report by Alexander W. Dodge on the timber land in Tehama county, which report was received by Mr. Resleure from the bank after a letter, dated March 25, 1937, was sent to the defendants demanding payment of interest on the obligation in question. The attorney for defendants stated to the court that the report indicated there was no transportation problem incident to the land. The court sustained the objection to evidence of the report on the ground that it was hearsay. Clearly the report consisted of the hearsay statements of Mr. Dodge. It was therefore incompetent. If Dodge knew there was a transportation problem in connection with the land, and the defendants wished to prove

that fact, the plaintiff was entitled to have him called as a witness so they might have the opportunity of cross-examining him in that regard. The court properly excluded the report as hearsay. There was no error in refusing to mark the report for identification since it does not appear to have been competent evidence in this case for any purpose whatever.

[7] Finally, the appellant contends that the plaintiff is estopped from foreclosing the liens by an oral agreement to refrain from doing so while the defendants were attempting in good faith to sell the property, provided they paid the taxes and fire protection assessments in the meantime. It is asserted the defendants consented to the rendering of the previous judgment only because they relied on plaintiff's fulfillment of that oral agreement. The court specifically found that no such agreement to forbear instituting foreclosure proceedings was made, and that the defendants did not consent to the judgment in reliance upon such an agreement. The last-mentioned findings are amply supported by the evidence and this court is absolutely bound by the determination of the trial court in that regard. Black v. Black, 203 Cal. 173, 263 P. 234; 2 Cal.Jur. 921, § 543.

[8] Three witnesses testified on behalf of the defendant that the preceding alleged oral agreement was made December 9, 1935, by and in the presence of Mr. Grigsby, Vice-President of the Security First National Bank, Walter L. Nossaman, attorney for that bank, and W. H. Meservey, President of the plaintiff, Assets Corporation. In rebuttal of defendants' evidence in that regard, each of the three men last mentioned took the witness stand and positively denied that any such agreement was ever made by them or in their presence. Such an oral agreement would be inconsistent with the terms of the previous written agreement and with the terms of the judgment which was subsequently rendered by consent of the defendants after full investigation and knowledge of the surrounding circumstances and conditions. It is contrary to the well-established presumption of law that all the material previous oral negotiations regarding the terms and conditions of a contract which is subsequently reduced to writing and signed by the respective parties are included therein.

September 21, 1936, nine months after the alleged oral agreement was asserted to have occurred, the defendant corporation signed a written agreement by its president, J. F. Resleure, and its secretary, with the plaintiff and all interested parties, for the purpose of correcting certain alleged errors which occurred in the descriptions of some of the timber lands involved in the former judgment. In that subsequent written contract, the alleged oral agreement to forego foreclosure proceedings was not mentioned. But the agreement does recite the entry of the consent judgment by which it declares there "was established a lien upon the real property therein described, to secure an indebtedness due and owing to first party herein (Assets Corporation) in the principal sum of $350,000.00, with interest at the rate of 5 per cent per annum from August 1, 1934, until the principal shall have been paid, and providing that said second party herein (Security First National Bank of Los Angeles) shall convey to third party herein (Perrin Properties, Incorporated) the real property in said judgment described, subject to the said lien securing said $350,000.00 indebtedness."

[9-11] The alleged oral agreement, if made, would effectively nullify the important provision of the former written agreement creating the liens by contract of the parties. Liens upon real property may be created by contract of the parties. § 2881, Civ.Code. Such an oral agreement would also nullify the terms of the subsequent judgment which by consent of all parties reestablished those liens. Moreover the alleged oral agreement to forego foreclosure proceedings, since it affected an interest in real property and was not to be performed within a year from the asserted making thereof would violate the express terms of the statute of frauds. § 1973, subd. 1, Code Civ.Proc. The plaintiff is not estopped from denying the alleged oral agreement to refrain from foreclosing the liens. They have not yet received any benefits from the written agreement. If defendants' contention regarding the oral agreement were found to be true, the plaintiff would be likely to be deprived of all benefits which might flow from that written agreement and from the judgment determining the amount of the indebtedness and establishing the lien to secure its payment.

It is sufficient to hold that we may not interfere with the findings and judgment with respect to the alleged oral agreement, for the reason that there is a conflict of

evidence on that subject, and there is an abundance of testimony to support the findings of the court.

The judgment is affirmed.

TUTTLE, J., concurred.



48 Cal.App.2d 120

PEOPLE v. SOLANO.

Cr. 2205.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

1. Criminal law ⇐507(1)

In prosecution for grand theft through certain tricks and devices in card games, witnesses for the prosecution who according to defendant had suggested the games but had not stolen or attempted to steal their own money were not "accomplices" whose testimony was required to be corroborated under statute defining an accomplice as one who is liable to prosecution for the identical offense charged against the defendant. Pen. Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⇐511(1)

In prosecution for grand theft through certain tricks and devices in card games, even if witnesses for the prosecution were accomplices, their testimony was sufficiently corroborated to sustain convictions for two offenses. Pen.Code, § 1111.

3. Criminal law ⇐1134(1)

Defendant could not urge as a ground for reversal of convictions on informations charging two offenses of grand theft through certain tricks and devices in card games that there was no evidence that defendant engaged in a conspiracy, where conspiracy was not a factor of the offenses charged, and any evidence on that subject came into the case incidentally.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Tony Solano was convicted on two informations charging the commission of two offenses of grand theft, and he appeals from the judgments and from orders denying his motions for a new trial.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

In the trial court the defendant was charged by two informations, with the commission of two offenses of grand theft. To each charge he entered a plea of not guilty. For the purpose of the trial the two actions, numbered respectively 32371 and 32375, were consolidated and the actions were tried by the court sitting with a jury. The jury returned verdicts finding the defendant guilty on both charges. In each action the defendant made a motion for a new trial. The motions were denied. The court sentenced the defendant to imprisonment in San Quentin Prison and provided that the second sentence should run concurrently with the first. The defendant appealed from the judgments and from the orders denying him a new trial, and has brought up typewritten transcripts.

In his brief the defendant states that the judgments should be reversed for four reasons, stating them, but he argues and presents only one, "that the verdict is contrary to law". That is, he claims the case presented by the prosecution involved a conspiracy, that there was no evidence the defendant conspired, and that the evidence showed the prosecuting witness was an accomplice but his testimony was not corroborated. We think these claims may not be sustained.

It was the theory of the prosecution that the defendant concocted a scheme by which through certain tricks and devices he did steal and take from the prosecuting witness a large sum of money. That in the offense alleged in action No. 32371 he did so steal from C. M. T. Carvajal money in the sum of $1,500 and in the offense alleged in action No. 32375 he did steal from Frederico Francisco money in the sum of $700. In action No. 32371 the offense was alleged to

have been committed on December 28, 1940, and in action No. 32375 the offense was alleged to have been committed on March 20, 1939.

The prosecution called as its first witness Frederico Francisco. He testified as follows: He met the defendant in March, 1939, at Kearny and Jackson streets. The witness gave defendant his address. Later the defendant called at the room of the witness. He brought with him a deck of cards. The witness testified he did not know how to play cards. The defendant showed him how to play draw poker. The defendant said he had $25, that he would give it to the witness and they would go to the Hansa Hotel and play cards with a man who had lots of money and win some of it. The witness testified that in the same conversation the defendant showed him a number of signals he would give the witness. One finger would indicate one pair, two fingers two pair, and three fingers would indicate three of a kind. A closed fist would mean a full hand. The defendant said he would stand behind the other player and give signals to the witness. Later the witness and the defendant went to Hansa Hotel, engaged a room, each paid one-half, both registered and they went directly to the room. The defendant gave $25 to the witness. A little later a Chinaman by the name of Chinn came to the room. The defendant produced a deck of cards. Chinn produced another deck. On the table were some poker chips. The witness did not know who produced them. In a few moments after the witness and defendant arrived, playing commenced. At first the witness and defendant played. After Chinn arrived the defendant gave up his seat and Chinn and the witness played. The defendant took a position back of Chinn and from time to time gave the witness the signals. The latter won many games. When the witness had won about $500, Chinn said he had no more cash and that he would get a check for $2,500 cashed and then return. He went out. The witness and defendant remained. Later Chinn returned, exhibited a roll of bills and the playing commenced again. In about half an hour when playing one game Chinn "called the witness" and said "* * * if you have got any money all right, if you don't call this pot you lose all the money on the table". As to that hand defendant gave no signal. But when Chinn made the above mentioned statement the defendant said to the witness, "If you have money in the bank, go get it and call the pot or else you will lose all". He said, "Go ahead and call him". The witness, accompanied by the defendant, went to his bank and drew out $700. The witness took his cards with him. Chinn remained in the room, but gave his cards to the defendant. The latter showed the hand to the witness. It was two jacks and three queens. The witness held three tens and two eights. After drawing the $700 out of the bank the witness and defendant returned to the hotel. Defendant gave Chinn his cards and the game continued. Here it must be remembered that the witness at all times claimed he did not know how to play draw poker except as told by defendant and the latter having seen Chinn's hand directed Francisco to "call the pot". Certainly word of mouth meant as much to him as a signal. The witness bet his $700. When the hands were shown Chinn had the best hand and took all of the money. The witness produced his bank book showing a withdrawal of $700 on March 20, 1939. At all times the defendant acted as game master. Each player paid him for chips and the game was played with chips.

The next witness called by the prosecution was C. M. T. Carvajal. He testified to a set of facts similar in many respects to those recited above. On or about December 27, 1940, the defendant and Pedro Templo arranged another game. It was held in the Rite Hotel. The defendant loaned Carvajal $30, and promised to watch and give him signals. The defendant furnished the cards and chips and acted as banker. He sat alongside of the Chinaman who was to play. That Chinaman was named Lee. He produced a roll of bills which he claimed amounted to $5,000. The defendant put the roll in his box and gave the Chinaman chips. At a certain time in the game Carvajal was induced to go to his bank and draw out $1,500. When he put it on the table the defendant took the money, placed it in the box and gave Carvajal chips. After the game was renewed the defendant gave a signal that the Chinaman held no hand. Carvajal bet all he had. He was called and when the cards were thrown down the Chinaman had a full house and Carvajal had only two aces. He had lost all his money. The Chinaman took all of the money and left.

The prosecution also called Carlos Carvajal, Jr., who was present when defendant

and Pedro Templo called at his father's house on December 22, and December 28, 1940. He gave testimony almost exactly the same as given by his father as to the times said calls were made.

After the prosecution rested the defendant took the stand as a witness in his own behalf. He admitted the testimony given by Francisco and Carvajal; except, he claimed each of those men suggested the poker games and that he did not. All else happened as testified by the complaining witnesses.

[1,2] The defendant asserts that in each case the complaining witness was an accomplice and there was no corroboration. We think neither contention is supported by the record. Section 1111 of the Penal Code is as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." As shown above, neither Francisco nor Carvajal was "liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice * * *" was given. Neither had stolen nor attempted to steal his own moneys. Therefore the offenses were not identical. People v. Troutman, 187 Cal. 313, 318, 201 P. 928. But, assuming merely for the purposes of this opinion that they were accomplices, there was an abundance of corroboration. As we have shown above, the testimony of Francisco and of Carvajal was corroborated in many particulars by the testimony of the defendant. The testimony of Carvajal was corroborated, at least in part, by the testimony of Carlos Carvajal, Jr. And, finally, the evidence in action No. 32371 was corroborated by the evidence in action No. 32375 and vice versa, that is, the facts recited above show another offense, similar in all respects, committed by the same defendant, and based on the same plan. People v. Thorne, 10 Cal.2d 705, 76 P.2d 491.

[3] The defendant's claim that there was no evidence that the defendant conspired with Chinn or Lee is, in effect, the presentation of a false issue. Conspiracy was not a factor of the offense charged in the information. Any evidence on that subject came into the case incidentally. Furthermore, the facts recited raise an inference that the defendant and Chinn in the one case, and the defendant and Lee in the other case, were acting jointly.

The judgments and orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 90

PEOPLE v. WHITE.

Cr. 3501.

District Court of Appeal, Second District, Division 2, California.

Nov. 27, 1941.

1. Criminal law ⇐511(1)

In prosecution for forgery of checks, evidence *held* sufficiently to corroborate testimony of accomplices to authorize conviction. Pen.Code, § 1111.

2. Criminal law ⇐510

Where the "corpus delicti" was established by testimony of accused's accomplices in prosecution for forgery of checks, "corroboration" was not required. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti" and "Corroboration".

3. Criminal law ⇐511(10)

In order to convict on testimony of an accomplice, it is necessary only to connect accused with commission of the crime by proof other than that of accessories. Pen. Code, § 1111.

4. Criminal law ⇐511(7)

If, by accused's extrajudicial declaration or by her testimony or stipulation in open court, her participation in forgeries charged against her was established, the statute requiring "corroboration" of accomplices to authorize conviction on their tes-

timony would not shield accused from conviction if from such proof jury believed accused uttered the checks intending to defraud. Pen.Code, § 1111.

5. Criminal law ⇐511(7)
Forgery ⇐44

Evidence justified jury in finding that accused knew that person who drew checks was not person whose name was signed, that checks were drawn to cheat persons who might honor them, that accused passed them with knowledge that they were so drawn, and that checks were therefore "forgeries" with commission of which accused connected herself by her own testimony, authorizing conviction on such testimony and testimony of accomplices. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Forgery".

6. Criminal law ⇐511(2)

Evidence "corroborating" testimony of an accomplice is sufficient if it tends to connect accused with crimes charged, though it be slight if standing alone. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroborating Evidence".

7. Criminal law ⇐511(1)

Evidence necessary to "corroborate" testimony of an accomplice need not tend to establish precise facts testified to by accomplice. Pen.Code, § 1111.

8. Criminal law ⇐511(4)

Accused's contradictory statements respecting forgeries charged, her immediate flight after commission of crimes charged, and her subsequent use of fictitious name, were sufficient "corroborating evidence" to authorize conviction. Pen.Code, § 1111.

9. Forgery ⇐47

In prosecution for forgery of checks, intent to defraud and accused's knowledge of the forgeries were questions for the jury, under evidence.

10. Forgery ⇐44

In prosecution for forgery of checks, evidence *held* sufficient to sustain conviction.

Appeal from Superior Court, Los Angeles County; Thos. L. Ambrose, Judge.

Leona White was convicted of forgery, and she appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Having been convicted on two counts of the crime of forgery and a new trial having been denied, defendant brings this appeal.

Her sole point for reversal is that the verdicts were contrary to law in that the only evidence tending to convict her of the forgeries was the testimony of her two accomplices, Kenneth Henson and Vernon Howey. Henson was 23 years of age when he met appellant. He was at that time steadily at work at Van's Electric Repair shop at Burbank. He testified that in October, 1940, she employed him to perform a menial task; that later she employed him to move her into the country. Seemingly to gain his confidence, she made divers statements to him for the purpose of convincing him of her wealth and financial responsibility; of a claim that she had settled, of lands that she owned, of a sale under negotiation of land to the Lockheed Aircraft Company. She employed him to drive her in his car. Although she paid him only one week's wage, he was constantly reassured that her inability to do so was due to her payment of taxes. On their visit to the Lockheed plant, she returned to the automobile with a $20,000 post-dated check, which she explained could not be used until the completion of the escrow but that if he would get some checks, she would cash them for immediate funds and would pay them before they could reach the drawee bank. In the meantime he had made her acquainted with Howey whose testimony parallels that of Henson. Howey had been working for the Bloomfield Company which had an office in association with Van's Electric Repair shop. The trio thereafter operated together. Acting upon appellant's suggestion Henson took three blank checks from the check book of Van's Electric Repair company and with the pen of appellant's landlady drew them for the respective sums of $19.76, $23.64 and $24.46 in favor of

E. A. DeBode, an erstwhile consort of appellant and signed them with a fictitious name.

Later Howey took six checks from the office of the Bloomfield company and inserted the amount upon each with the check protector. Henson prepared two of them and Howey prepared four with Henson's fountain pen under the direction of appellant at her home for a total of $130.10, five of them being in the sum of $22.10. All were made payable to appellant and signed with the name of R. L. Bloomfield. Henson drove the trio to various markets at which appellant cashed the checks, made a few small purchases and kept all of the money but $9.

It was stipulated at the trial that all of the six checks bearing Nos. 895-900 were forgeries; that they were prepared at her home by her confederate; and that all six were payable to appellant and endorsed and cashed by her.

When confronted by the police with the six checks bearing her endorsement, appellant admitted that the signatures were her own; that she received and cashed them all on the same day; that she had inserted on all checks "73 North Magnolia" although she then lived at "71 North Magnolia"; that Henson had driven her to the various market places where she cashed the checks and Howey was present. At the same time she denied practically all the statements later detailed by Henson on the witness stand and maintained that Howey had called at her home to ask her to cash a check for $22.10, the odd amount being used to deceive his partner.

At the trial also she denied making to Henson any of the statements he had accredited to her or that she had caused him or Howey to write any checks. She testified that she had known Howey as Bloomfield, half-owner of a soap factory a short distance from her home; that on December 28th, the "boys" lunched with her and drove her to Sears Roebuck in Hollywood where she loaned them money to buy clothing and shoes; that they visited Palm Springs and upon their return they owed her $129; that on January 3d, she demanded her money in order to make a trip to Arizona; that Howey drew a check from his pocket and wrote it out for $22.10; that Howey told her that he had to write six checks; that his firm owed five bills for $22.10 each and one for $19.10; that in that way he would deceive his partner into the belief that he was paying labor and not spending; that on January 4th Howey returned and made out the six checks; that thereupon Henson and Howey took her to six different markets at each of which she cashed a check; that after obtaining these funds at 11 p. m., they arranged to go to Arizona; that at 5 o'clock on the morning of January 5th she was up and had everything packed for the journey; that they drove to Las Vegas, Nevada, where they gambled and drank liquor; that she did not sleep wondering if those checks were good; that following an argument with Henson, when he told her the checks were forged, she gave him $129 to make good the checks and "thought no more about them"; that they visited points in Arizona, returned by way of Riverside and Victorville and arrived in Los Angeles 33 days after their departure; that she located on New Hampshire street where she was residing at the time of her arrest, February 13, 1941; that she had been at one time engaged to DeBode, lived under that name and cashed a check at Sears Roebuck at Riverside by endorsing it "Leona DeBode" although she had left him some time before.

[1-4] The contention that there is no sufficient corroboration of her two accomplices is without support. The record is surfeited with proof of appellant's guilt aside from the testimony of the two wayward boys. The soap factory in which she says she understood Howey owned one-half interest was only half a block from her residence. While she was believing, according to her testimony, that Howey was Bloomfield, the soap manufacturer who had presented her with perfume marked with the price of $25.50 upon it, yet she admitted that he came to the cafe where she worked at a wage of $2 per day and ate his meals for which she paid because of his impecunious circumstances and that she supplied him with money to buy his clothing. Thus, out of her own mouth she connected herself with the crimes. The corpus delicti was established in each case by the testimony of Howey and Henson Corroboration of such proof is not required. Pen.Code, sec. 1111. In order to convict upon the testimony of an accomplice, it is necessary only to connect the accused with the commission of the crime by proof other than that of the accessories. If, by her

extra-judicial declaration, or by her testimony or by her stipulation in open court, her participation in the crimes was established, the cited section will not shield appellant from the wrath of the law if from such proof the jury believed that she uttered the checks intending to defraud, as indeed they did.

[5] She informed the officer that this soap manufacturer had called at her home to cash a check; at the trial she testified that she had loaned him money and that the checks were in repayment of her loans. The signature of "R. L. Bloomfield" on two checks was so dissimilar to that on the other four that she could not have believed the author in good faith. She could not have believed that the checks were in payment for labor; they were all but one for the same amount and all were made payable to herself. Still other inconsistencies and contradictions in her testimony are significant in evaluating the corroboration she supplied, namely: (1) She cashed the check at Riverside under the name of Leona DeBode though she had long prior thereto ceased her association with the man of that name; (2) she cashed each check at a different market; (3) all of the checks were for odd amounts; (4) one check for $22.10 she said was in repayment of a $25 loan; (5) although she insisted that she knew Howey as Bloomfield, the soap manufacturer, she testified that she knew him by the nickname of Vern; (6) she paid for his meals at the cafe where she worked because he was broke; (7) she bought him clothes and loaned him money; (8) moreover, she herself got the money on the checks; (9) she fled with her confederates from the state, sojourned in Nevada where she lost and won at gambling, visited various points in Arizona, traveled and visited for 33 days before her return to the scene of her crimes. Upon arriving at Los Angeles she did not loiter near the cafe, or at Pacoima or Burbank, where she was known, but domiciled herself in the heart of the metropolis.

Without analyzing all of the evidence, it must be obvious that the jury was amply justified in finding that appellant knew that Howey was not Bloomfield; that the checks were drawn for the purpose of cheating those who might honor them; that she passed them with knowledge that they were so drawn; that they were therefore forgeries with the commission of which appellant connected herself by her own testimony.

[6-8] Corroborating evidence in such cases is sufficient if it tends to connect the accused with the crimes charged, even though it were slight if it stood alone. People v. Martin, 19 Cal.App. 295, 125 P. 919. It was not necessary that the corroborating proof be sufficient to establish the precise facts attested by the accomplice. People v. Tinnin, 136 Cal.App. 301, 304, 28 P.2d 951; People v. Solomon, 6 Cal.Unrep. 305, 58 P. 55. Defendant's own testimony proved her participation. Her contradictory statements with reference to the crime convinced that she was not truthful; her immediate flight to distant points showed her fear of being apprehended; her subsequent use of a fictitious name demonstrated her zeal to conceal her whereabouts; all of these are such evidence as were calculated to prove her connection with the offenses of which she was accused and convicted. People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000; People v. Taylor, 70 Cal.App. 239, 232 P. 998; People v. Cleveland, 49 Cal. 577.

[9, 10] Since it appears from a review of the evidence that appellant's connection with the crime was fairly and reasonably to be inferred, the corroboration was sufficient and the verdict must not be disturbed. People v. Nikolich, 93 Cal.App. 356, 269 P. 721. Inasmuch as it could have been fairly inferred from the testimony of appellant that she knew Vern was Howey and not Bloomfield and that he was not the soap and perfume manufacturer but a penniless young man of 24 years who lived from hand to mouth by his daily wage unless he enjoyed the bounty of her sinful gains, the verdict cannot be altered. People v. Wiley, 33 Cal.App.2d 424, 91 P.2d 907; People v. Payton, 36 Cal.App.2d 41, 96 P.2d 991. The intent to defraud and appellant's knowledge of the forgeries were questions for the jury and both were properly inferred from her statements and her testimony. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Roche, 74 Cal.App. 556, 559, 241 P. 279; People v. Chesney, 72 Cal.App. 570, 237 P. 793.

The authorities cited by appellant People v. Shaw, 17 Cal.2d 778, 112 P.2d 241; People v. White, 35 Cal.App.2d 61, 69, 94 P.2d 617; People v. Kempley, 205 Cal. 441, 271

P. 478; People v. Robbins, 171 Cal. 466, 154 P. 317, are readily distinguishable. There was no corroborative evidence in those cases but suspicion only.

The judgments and order are affirmed.

WOOD and McCOMB, JJ., concurred.



48 Cal.App.2d 157

GARCIA v. GARCIA et al.

Civ. 13310.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1941.

1. Husband and wife ⇐283(1), 299(4)

A wife whose husband entered into a bigamous marriage with another woman was entitled to separate maintenance and to a judgment setting aside a voluntary conveyance made by husband for purpose of defeating wife's right to such maintenance.

2. Husband and wife ⇐299(2)

Where husband conveyed property on which he and his wife had been living to himself and woman with whom he entered into a bigamous marriage, and such grantees subsequently conveyed property to the woman, who thereafter executed deed conveying property to grantee to hold as security for fees of husband's attorney, who was acquainted with facts, wife's lien arising from judgment for separate maintenance was superior to the claims of the other persons.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Mary Garcia against Eleuterio Garcia, Mary Willis, and others, to recover separate maintenance. From that portion of the judgment providing that separate maintenance payments should be a lien on certain real property superior to the interests of the defendants, the last-named defendant appeals.

Judgment affirmed.

John H. Myers, of Los Angeles, for appellant.

Fernando de la Vega and Charles W. Wolfe, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff obtained judgment against her husband, defendant Garcia, for separate maintenance, attorney's fees and costs. It provided that the payments thereof should be a lien on certain real property superior to the interests of defendants. Defendant Willis appeals from the portion of the judgment establishing the lien.

The record discloses that in April, 1936, defendant Garcia married plaintiff and that they lived together as husband and wife until June 30, 1939, in a house located on land owned by the husband as his separate property. On June 8, 1939, Garcia deeded the property to himself and defendant Gonzales (naming her as Dolores Garcia). On June 30, 1939, Garcia left home and entered into a bigamous marriage with Gonzales. Attorney John H. Myers, who now represents appellant, saw plaintiff Mrs. Garcia in his office a few days later. She showed him her marriage license and told him she was Garcia's wife. He told her she would have to start paying rent for the house, which she refused to do. On July 6, 1939, Garcia and Gonzales executed a deed to the property naming Gonzales as grantee. The next day they were both arrested and soon thereafter were convicted of bigamy. Myers was their attorney. Gonzales signed a deed dated July 8th and acknowledged July 12, 1939, naming defendant Willis as grantee, to hold the property as security for Myers' $500 attorney's fee. Myers drew up all three of the deeds and took the notarial acknowledgment of the first two.

On July 7th, the day Garcia was arrested for bigamy, Myers brought suit in his behalf against Mrs. Garcia for unlawful detainer of the property, and on July 17th, when the two men came into court together, Myers heard Garcia testify that he, Garcia, at that time was the owner of the property and had not transferred it to anyone. August 4, 1939, Myers brought suit on behalf of Willis for possession of the property based on the deed to her dated July 8th, and recovered default judgment against Mrs. Garcia and possession of the premises.

Attorney Myers is the real party in interest on this appeal, since the title to the property is in Willis solely as security for his attorney's fees. Even before Garcia and Gonzales were arrested for bigamy on July 7th Myers knew that Mrs. Garcia was Garcia's lawful wife, living in the home which she had helped to maintain for over three years. He is in no sense an innocent party so as to entitle him to assert any right superior to that of the aggrieved wife, but on the contrary was attorney for active participants in proceedings which offended and harassed the only innocent party, the plaintiff in the case.

[1, 2] Plaintiff had the right to recover judgment providing for separate maintenance and setting aside a voluntary conveyance made for the purpose and with the design of defeating her right to such maintenance (Dixon Lumber Co. v. Peacock, 217 Cal. 415, 19 P.2d 233), and the judgment declaring her lien to be superior to that of the other parties was equitable and proper.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 199

STEPHAN v. OBERSMITH.

Civ. 13306.

District Court of Appeal, Second District, Division 2, California.

Dec. 1, 1941.

Hearing Denied Jan. 29, 1942.

1. Quieting title ⇐44(3)

In action to cancel an option agreement covering house and furniture because of fraud in obtaining agreement, judgment for plaintiff was sustained by the evidence.

2. Quieting title ⇐44(3), 52

In action to cancel option agreement covering house and furniture and to quiet title thereto, judgment for plaintiff was sustained by amended complaint, findings and evidence although complaint was irregular where it was sufficient on the whole to state a cause of action for fraudulent procurement of option and the evidence supported it and defendant had not been deprived of any substantial rights.

3. Action ⇐38(2)

A complaint to quiet title and, as incidental thereto, to have declared void the instrument under which the defendant asserts title, states but a single cause of action.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Erna Stephan against Caroline Obersmith to cancel an option agreement and to quiet title. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Hearing denied; EDMONDS and HOUSER, JJ., dissenting; SPENCE, J., acting pro tem.

S. S. Hahn and W. O. Graf, both of Los Angeles (David Silverton, of Los Angeles, of counsel), for appellant.

Chris Wilson, of Long Beach, for respondent.

SCOTT, Justice pro tem.

From judgment for plaintiff in an action to cancel an option agreement covering certain property and to quiet title thereto defendant appeals.

The evidence shows that plaintiff's husband died May 31, 1937, and she decided to sell her house and furniture. When she returned from work on June 15, 1937, tired, hungry and still suffering from the shock of her husband's death, she was persuaded to sign an agreement giving defendant an option to purchase them, for which defendant paid her $10. Prior to that time she had never met defendant and knew nothing of the legal effect of such an option. The sale price in the option agreement was $2,750, although plaintiff valued the house at $3,500 and the furniture at $400. Defendant at the time assured her that the option really meant nothing and had no legal effect, and that defendant would pay her $3,500 for the house and furniture notwithstanding the lower figure contained in the option agreement. Because of plaintiff's mental and nervous condition she was induced and persuaded to sign the agreement without intending or expecting thereby to become obligated to divest herself of her small estate for an inadequate consideration. It may have been indicative of plaintiff's state of mind that she signed her name

not with ink but with blueing. The next day defendant had a notarial acknowledgment affixed to the document and two days later had it recorded.

Defendant returned to plaintiff's home on the evening of June 16 and announced her intention to exercise her option. Thereupon plaintiff protested that she had made no agreement to sell, and could not even identify the document as being the one she signed, at least in the form and containing the terms as above indicated. Defendant then remarked to a friend of plaintiff who was present: "I am willing to give this lady $3,500 for the property." This declaration, however, may have been induced by the fact that this friend, a lady of some 84 years of age, on learning of the terms of the option agreement grabbed defendant by the neck called her a "crook" and threatened to throw her out of the house. On June 18, when defendant again called at the house, plaintiff handed her the $10, which upon its refusal by defendant fell to the floor. Eleven days later defendant told plaintiff over the telephone that she had decided to take her money out of escrow and that she did not want the property. Shortly thereafter plaintiff's written notice of rescission was served on defendant.

[1] The trial court's determination favorable to plaintiff is supported by sufficient evidence. The complaint and findings are assailed by defendant as being insufficient and conflicting. On January 20, 1938, plaintiff filed her original complaint containing three counts, the first and third charging fraudulent alteration of the option agreement and the second count alleging ownership in plaintiff and an adverse wrongful claim by defendant. At the conclusion of the trial, and on February 2, 1940, plaintiff filed an amended complaint to conform to the proof. Five counts were set out. Count one alleged ownership in plaintiff; that defendant induced and persuaded her to execute the option; that the property was worth $3,900; that defendant had altered the option; that plaintiff had rescinded and offered to return the consideration, and that the price given in the option is grossly inadequate. The court found the charge of alteration was not sustained and found the other allegations to be true. Count two alleged fraudulent representation by defendant, relied on by plaintiff, that the former would pay $3,500 for the property notwithstanding the terms of the option. Count three alleged an absence of voluntary consent due to plaintiff's mental and nervous condition. Count four alleged that at the time the option was signed it was agreed by the parties that it was of no force or effect and that a subsequent written agreement would be required to obligate plaintiff to sell the property. Count five alleged ownership in plaintiff and adverse wrongful claim of defendant. The allegations of counts two, three, four and five were found to be true. None of them alleged rescission. The prayer of the amended complaint asked cancellation of the option and a decree quieting title in plaintiff, which the trial court granted. Damages were also sought but were disallowed.

[2] Considered separately the various counts of the amended complaint might be considered vulnerable to a demurrer, and we should not be understood to approve the obvious irregularities appearing in the pleading. In the interest of justice we have been constrained to look beyond the imperfections of the record and to ascertain: (1) Does the amended complaint taken as a whole state facts sufficient to constitute a cause of action against defendant to cancel the option agreement and quiet title to the real property and furniture in the plaintiff? (2) Has the trial court found these essential allegations to be true? (3) Does the evidence support these findings? (4) Has defendant been deprived of any substantial right, especially that of fully and fairly presenting her case, due to being misled or surprised or for any other reason for which plaintiff may be held responsible? We conclude that the complaint, findings and evidence, thus considered, support the judgment and that defendant has had her day in court.

[3] A complaint to quiet title and, as incidental thereto, to have declared void the instrument under which the defendant asserts title, states but a single cause of action (Earl v. Lofquist, 135 Cal. App. 373, 27 P.2d 416); and it is apparent that counts two, three and four herein are intended to be and are no more than elaborations of the charge of fraudulent inducement and persuasion set out in count one.

The testimony of plaintiff and her witnesses was sufficient to support the findings of the trial court that there was no contract between the parties; that the signature of plaintiff was induced by the statements

and promises made by defendant as specified in the second paragraph of this opinion; that the statements were not true and that the promises were made without any intention on the part of defendant of performing them. That evidence established the fraudulent purpose of defendant to obtain plaintiff's property to the latter's detriment. Contradictory statements by defendant are of no avail in view of our conclusion that the evidence supports the findings of the trial court in favor of plaintiff. Plaintiff's signature on a document which she did not understand and which purported to bind her to consent to do that which she did not wish or intend to do was followed by a rescission when its purport became clear. She is entitled to be relieved of the burden thus wrongfully placed upon her.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 589

LEFTRIDGE et al. v. CITY OF SACRAMENTO et al.

Civ. 6759.

District Court of Appeal, Third District, California.

Dec. 19, 1941.

1. Mandamus ⇐187(5)

In proceeding for a writ of mandate, the superior court had no power to enter a judgment nunc pro tunc where the effect was to deprive one of the litigants of the right to appeal in respect to the new adjudication, and hence so far as appealing parties were concerned the amendment was "functus officio", and the original judgment was the final determination of the proceedings.

See Words and Phrases, Permanent Edition, for all other definitions of "Functus Officio".

2. Judgment ⇐294

Though a court has the power to correct its orders and judgments after entry, the superior court had no power to make an amendment which was not a correction of the original judgment but was a new adjudication on an issue not theretofore disposed of.

3. Judgment ⇐731

In proceeding for a writ of mandate to compel the Civil Service Commission and the city council to fix prevailing wage scale to be paid petitioners under city charter, and to compel city to pay back wages for difference between amount which had been paid to petitioners and prevailing wage, superior court's finding that commission had not made any findings concerning prevailing wage scale and had not found that wages paid petitioners diverged from any prevailing scale was not "res judicata" of issue whether petitioners were entitled to back pay.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Appeal and error ⇐790(3)

In proceeding for a writ of mandate to compel the Civil Service Commission and city council to fix prevailing wage scale to be paid petitioners, and to compel city to pay back wages for difference between amount which had been paid to petitioners and prevailing wage, where the superior court found that petitioners were not entitled to back pay and then granted a peremptory writ of mandate ordering commission to determine if any back pay was due, commission's finding that there was no divergence between amount paid petitioners and prevailing wage disposed of the issue, and it was useless for petitioners to appeal from amended judgment denying relief with respect to back pay.

5. Appeal and error ⇐82(1)

Under statute providing that an appeal may be taken from any special order made after final judgment, such an order is appealable if it affects the judgment in some manner or bears some relation to it either by way of enforcing it or staying its execution. Code Civ.Proc. § 963, subd. 2.

6. Appeal and error ⇐82(1)

Where a peremptory writ of mandate directed the Civil Service Commission to ascertain if there was any divergence between wages paid petitioners and prevailing wage, and commission filed its return showing full compliance with writ and reported that there was no divergence, an order discharging com-

mission from further compliance with writ was appealable under statute as a "special order made after final judgment" having a direct bearing upon enforcement of judgment. Code Civ.Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order Made After Final Judgment".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Nathaniel Leftridge and another against the City of Sacramento and others for a writ of mandate, wherein a peremptory writ of mandate was issued. From an order discharging defendants from the writ and from an amendment to judgment and judgment entered against petitioners, petitioners appeal, and defendants move to dismiss the appeal.

Motion granted in part and denied in part.

Albert E. Sheets, Anthony J. Kennedy, and Carl Kuchman, all of Sacramento, for appellants.

Hugh B. Bradford, City Atty., of Sacramento, for respondents.

TUTTLE, Justice.

On the 3rd day of April, 1941, appellants gave and filed a notice of appeal from:

"1. That certain order discharging respondents from peremptory writ of mandate, made and entered herein on the 10th day of March, 1941, and from the whole of said order; and

"2. That certain amendment to judgment, and judgment, entered herein against petitioners and in favor of respondents on the 24th day of March, 1941, and from the whole of said amendment to judgment, and judgment."

Clerk's and reporter's transcripts were filed in due time in this court.

On the 8th day of October, 1941, respondents filed notice to dismiss said appeal upon the following grounds:

"1. That the amendment relates back and the original judgment stands, and therefore the attempted appeal is too late. (See Grounds of Motion to Dismiss Appeal from the Judgment.)

"2. That the amendment to the judgment was not a readjudication of the case; it was simply the correction of a ministerial error.

"3. That the court has power on its own motion at any time to amend the entry of the judgment to make same correspond to the judgment as rendered.

"4. That the said appeal is frivolous in that:

"A. The subject matter of said amendment to judgment, to-wit: denial of claim for back wages, was passed upon by the court and recorded twice: (1) in the minutes of the court as set out on page 40, Clerk's Transcript, lines 23, 24; (2) in the Findings of Fact as set out on page 46, Clerk's Transcript, lines 16 to 20; that the judgment of the court rendered included the denial of claim for back pay even though it was not included in the formal judgment as entered by the clerk;

"5. That no prejudice is shown and no academic appeal is permitted.

"6. That the attorney for appellants drafted not only the findings, but the judgment, and is now estopped to take advantage of his own error in omitting from the judgment the decision of the court on the matter of back pay."

The action sought to be dismissed arises out of a petition for a writ of mandate, wherein appellants, civil service employees of the City of Sacramento, seek to compel respondents, as members of the Civil Service Commission and city council, to fix the prevailing wage scale which should be paid appellants, under the following provisions of the city charter: "It shall be the duty of the Civil Service Board to familiarize itself with the scale of wages paid to all classes of employees both in and out of the City service, and for that purpose it shall, whenever it may be deemed necessary, hold investigations to ascertain the prevailing scale of wages. Whenever it shall be found that the City has diverged from such scale, the Board shall transmit, in writing, to the City Council, notice of such divergence and it shall be the duty of the Council to adjust the wages paid to said prevailing scale. (Art. VIII, Sec. 52, City Charter.)"

Further relief was sought in the matter of compelling the City to pay back wages for the difference between the amount appellants had been paid and the prevailing wage; the latter is stated to be eighty-five cents per hour.

After a trial of the issues, in which considerable evidence was presented to the

court, findings and conclusions of law were filed. The court found that respondent Civil Service Board "did not make any findings therein as to the prevailing scale of wages for petitioner or the class of employees of petitioner in said employment, nor did it find therein that the scale of wages then being paid to petitioner and said other employees, diverged from any prevailing scale of wages for similar work in the City of Sacramento; that it is not true that there was any evidence before said Board from said investigations which justified it in making a finding as to the prevailing scale of wages for the employment of petitioner or the class of employees of petitioner, or a finding of a prevailing scale of wages of 85c per hour for said employment."

The foregoing finding was made in respect to appellant Leftridge. As to appellant Jacobson, the findings are practically the same: "That there was no evidence before respondent Civil Service Board or the members thereof, during the course of said investigations which justified it in making any finding of a prevailing scale of wages for the position of petitioner or the class of employees of petitioner in the sum of 85c per hour or in any sum at all; that it is true as alleged in Paragraph III of said fourth allegation of facts and causes for issuance of a writ of mandate herein, that petitioner has not received a wage at the rate of 85c per hour for said employment at any time from and after the 7th day of April, 1939; that it is not true there was or is due, owing or unpaid to petitioner as compensation for his services to said City in said position, a difference or balance between the wages paid to him and a wage at the rate of 85c per hour."

The court concluded that appellants were entitled to a peremptory writ of mandate, which was thereupon issued. By its terms, respondent Civil Service Board was ordered to hold investigations to determine the prevailing wage scale for work performed by appellants, under the terms of the city charter. It was ordered that if the board found that there was a divergence between the amount paid petitioners and the prevailing wage, notice of such divergence should be sent to the city council; that upon receipt of such notice, the latter were ordered to adjust the wages of appellants to correspond to the prevailing wage scale.

Thereafter, the Civil Service Board filed its return to said writ, and a "further return", wherein it set forth that after an investigation, which included public hearings, it found that there was no divergence in wages paid appellants and the prevailing wage scale. Objections filed by appellants to said returns were overruled by the court. Thereafter, and on March 10, 1941, the court made the following order:

"It is Hereby Ordered:

"1. That the return and the further return of respondents to the Peremptory Writ of Mandate issued herein be accepted by the above entitled court, and the same hereby is so accepted, as full compliance by respondents and each of them with the orders and directions contained in said Writ;

"2. That petitioners' objections and each of them to said return and said further return to the Peremptory Writ of Mandate issued herein be, and the same hereby are, overruled and denied;

"3. That respondent Civil Service Commission of the City of Sacramento, and the respondents Joseph T. Stacy, Leroy Deise, B. W. Cavanaugh, and each of them, as the members thereof, be, and said respondents hereby are, discharged of all further duty or obligation to hold investigations or otherwise proceed to ascertain the prevailing scale of wages for petitioners or either of them under the Peremptory Writ of Mandate issued herein;

"4. That all other respondents and each of them herein be, and they hereby are, discharged of all duty or obligation under the Peremptory Writ of Mandate issued herein."

On March 22, 1941, the court, of its own motion, entered the following order:

"Although this court found on the issues hereinafter incorporated in this amendment to the judgment heretofore made and entered, yet through inadvertence and clerical mistake the same were left out of and omitted from the judgment, hence the court hereby orders this amendment to be added to the judgment heretofore so made and entered herein:

"The court having found that it is not true that there was or is due, owing or unpaid to petitioners, or either of them, as compensation for their services to said City of Sacramento a difference or balance between the wages paid to petitioners and a wage at the rate of 85c per hour, it is ordered and adjudged that petitioner Nathaniel Leftridge take nothing by virtue of his alleged cause of action set forth as a

further, second, separate and distinct allegation of facts and causes for issuance of writ of mandate in the first amended petition herein; and likewise it is ordered and adjudged that petitioner Chris Jacobson take nothing by virtue of his alleged cause of action set forth as a fourth, separate and distinct allegation of facts and causes for issuance of a writ of mandate in the said first amended petition herein.

"This amendment to the judgment shall be entered nunc pro tunc as of the date of the original judgment, to-wit, September 11th, 1940."

[1, 2] The court had no power to enter a judgment nunc pro tunc where the effect would be to deprive one of the litigants of the right to appeal in respect to the new adjudication. Spencer v. Troutt, 133 Cal. 605, 65 P. 1083; 2 Cal.Jur., sec. 170, p. 403. It follows, that so far as appellants are concerned, the amendment is functus officio, and the original judgment must be the final determination of the proceedings. Furthermore, the amendment is not a correction of the original judgment, but it is a new adjudication upon an issue not theretofore disposed of. While a court has the power to correct its orders and judgments, after the entry thereof, we do not believe that the amendment here comes under that category.

[3, 4] It is true that the court found that appellants were not entitled to back pay, and that it also appears that the judgment did not dispose of that issue, but it is quite clear that the reason that such issue was not adjudicated by special reference thereto in the judgment was the fact that the Civil Service Board had made no finding thereon. The portion of the findings quoted above clearly indicates this. We do not consider that the finding makes such issue res adjudicata. The sole purpose of the judgment was to compel respondents to fix the prevailing wage scale, and until that had been determined, the court could not say whether or not there would be any back pay due petitioners. The object of the proceeding was to compel the board to determine the matter. The reason that back pay was denied in the findings was not based upon any legal consideration, but, as the court says, upon the fact that the board had never investigated and reported to the council upon the question of compensation due appellants. If the council had the matter before it, we do not regard the judgment or the amendment thereto, as having the effect of precluding the granting of any back pay found due. Furthermore, the peremptory writ directed the city council, if there was a divergence, to fix the compensation due appellants under the terms of the city charter. It must be assumed that if any back pay was due appellants, under the law, the council would order it. Summing up this phase of the case, the court found that appellants were not entitled to back pay, and then granted a peremptory writ of mandate ordering the board to find and determine if any back pay was due. The situation is confusing, but we have endeavored to unravel it with as little prejudice as possible to all concerned. As the board finally found that there was no divergence, this disposed of the issue. It would seem a useless proceeding to appeal, assuming that the amendment was allowed to stand.

[5, 6] Turning to the appeal from the order discharging respondents from the writ, respondents contend that it must be dismissed because such order is not appealable. Section 963, subdivision 2 of the Code of Civil Procedure provides that an appeal may be taken "from any special order made after final judgment". If such order affects the judgment in some manner or bears some relation to it either by way of enforcing it or staying its execution, it is appealable. Lake v. Harris, 198 Cal. 85, 89, 243 Pac. 417, citing several cases. The order here, made after the final judgment, discharged respondents from further compliance with the writ of mandate. It had a direct bearing upon the enforcement of the judgment, and was therefore appealable.

The motion to dismiss the appeal from the judgment, and the purported amendment thereof, is granted. The motion as to the appeal from the order is denied.

THOMPSON, Acting P. J., concurred.

HARBOUR v. HARBOUR.

Civ. 2953.

District Court of Appeal, Fourth District, California.

Nov. 27, 1941.

1. Divorce ⇐303(3)

Evidence that mother and stepfather swore at children, that they drank liquor in presence of children, that stepfather exposed his person to daughter and gave son beer, that mother showed little affection for children, and that daughter was afraid of stepfather, who had been arrested for statutory crime committed on person of daughter, supported order modifying divorce decree so as to give custody of children to divorced father. Pen.Code, § 288.

2. Divorce ⇐303(3)

The fact that superior court had previously, in interlocutory divorce decree and final decree, found mother to be a proper person to have custody of children, did not place burden of proving a changed condition on father seeking custody of children because their home life had been changed on mother's remarriage.

3. Divorce ⇐312

On wife's appeal from order modifying divorce decree so as to give custody of children to husband, wife's motion to take further evidence was denied where proffered evidence could not help her case, but tended to show that her home and influence had made daughter a bad girl and that when removed therefrom, she had become a good girl.

4. Divorce ⇐312

On wife's appeal from order modifying divorce decree so as to give custody of children to divorced husband, affidavit of mother's counsel did not support motion to take further evidence relating to trial of stepfather on charge of crime against person of daughter, in which daughter and her maternal grandmother were called and testified for people, notwithstanding charge against stepfather was dismissed for lack of evidence. Pen.Code, § 288.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action for divorce by Hilda Harvey Harbour against Newell E. Harbour. From an order modifying a decree of divorce whereby the custody of the children was changed from the mother to the father, the plaintiff appeals.

Affirmed.

Robert E. O'Neill, of Los Angeles, for appellant.

Guthrie & Curtis, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order modifying a decree of divorce whereby the custody of the two children of the marriage was changed from that of the mother to that of the father.

Plaintiff and defendant were married December 28, 1929. Plaintiff secured an interlocutory decree of divorce on March 29, 1937, in which the custody of the two children was given to her until further order of court. This provision was repeated in the final decree of divorce.

At the time of the hearing of the order to show cause why the decree should not be modified by awarding the custody of the two children to defendant, their father; Betty Louise, the daughter, was ten years old, and Robert, the son, was six.

Both the father and mother had remarried. The father and his present wife live in Fullerton. The mother, now Mrs. Witt, lives in Los Angeles.

Both Mr. and Mrs. Witt were employed and the actual care of the two children was left to Mrs. Witt's father and mother who lived with them.

[1] The evidence supporting the order modifying the decree was furnished by Mrs. Witt's father and mother. This evidence shows that Mr. and Mrs. Witt swore at the children; that they drank liquor in the presence of the children; that Mr. Witt exposed his person to Betty; that he gave Robert beer to drink; that Mrs. Witt showed little affection for the children; that Betty was afraid of Mr. Witt; that in October, 1940, Mr. Witt was arrested and charged with the crime denounced in section 288 of the Penal Code committed on the person of Betty; that Mr. Witt admitted to the grandmother that he was guilty of that offense. Both grandparents testified that defendant was a fit and proper person to have custody of the children.

Mrs. Witt testified in her own behalf and denied practically all of the foregoing evidence.

On this conflicting evidence the trial judge found that Hilda Harvey Witt was not a fit and proper person to have the custody and control of the children and that her home was not a fit and proper home for them; that Newell E. Harbour was a fit and proper person to have custody of the children and that their best interest and welfare required that their custody be awarded to him.

The order modifying the decree is amply supported by this evidence.

[2] Plaintiff argues that as the superior court found her to be a fit and proper person to have the custody of the children in the interlocutory decree rendered in 1937, and in the final decree rendered in 1938, the burden of proving a changed condition rested on defendant (Kettelle v. Kettelle, 110 Cal.App. 310, 294 P. 453) and that he has not sustained that burden of proof.

This argument is too fallacious to need serious consideration. The condition of the home life of the children had changed due to the remarriage of plaintiff.

[3] This case was first placed on the calendar of this court of October 14, 1941. At the earnest solicitation of counsel for plaintiff and for the reason, as stated by him, that he desired to argue the case, it was continued to a special calendar of October 28, 1941. Although he was notified of the continuance he did not appear and the matter was submitted. On October 31, 1941, after the submission, he filed a notice of motion to take further evidence which was supported by two affidavits, one by Katherine Stevens, and the other by counsel for plaintiff, setting forth the evidence plaintiff desired to have taken.

From the Katherine Stevens affidavit it appears that Betty had been placed in her care by the juvenile department of the superior court of Los Angeles county; "that said child has been quite a difficult problem for affiant in that when said child first came under her care and supervision, she was subject to tantrums, ill-tempered and unmanageable; that said Betty Harbour rarely told the truth and told lies about matters which it would have been easier for her to tell the truth about than to lie. That on occasions too numerous to mention, and the exact times of which affiant does not now remember, Mrs. Violet E. Harvey, the maternal grandmother of said Betty Harbour conversed with said Betty Harbour over the telephone; that after said conversations with said Mrs. Harvey, said Betty Harbour told falsehoods concerning her conversations with Mrs. Harvey. That affiant has worked and succeeded in bringing to said Betty Harbour a sense of honor, truthfulness, and a healthy outlook on life; that such habits, however, have been developed during the last six weeks; that now Betty Harbour has gained in weight and improved in disposition and is now given to telling the truth; that she is morally sound, though rather dull and negative."

If this evidence were produced before this court the only effect to be given to it would be to strongly support the order in question here. The inference to be drawn from it is that the environment of plaintiff's home and the influence there made Betty a very bad girl; that this was not the natural reaction of the child, because, when removed from that environment she became a very good girl.

[4] The affidavit of counsel for plaintiff relates to the result of the trial of Mr. Witt in the superior court on the charge we have mentioned. It recites that Betty and her maternal grandmother were called and testified for the People; that at the close of the People's case the trial judge dismissed the case because of lack of evidence.

It should be sufficient to remark that the fact that Mr. Witt had been arrested and charged with the crime against Betty and that she had appeared as a witness against him during the trial in the superior court would make it very difficult for the child to remain a member of his household.

As the proffered evidence could not help the case of plaintiff, her motion to take further evidence is denied. In denying this motion we are not holding that it was regularly presented in a timely manner.

The order modifying the decree is affirmed.

BARNARD, P. J., and GRIFFIN. J., concurred.

STANIELS v. COPELAND.

Civ. 11876.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

1. Executors and administrators ⇐423

In suit upon a so-called creditor's bill to adjudge a transfer of realty fraudulent, a complaint alleging that plaintiff's assignor obtained a judgment against defendant and defendant's mother, that judgment had not been paid, that defendant, after judgment was obtained, had been discharged by an order in bankruptcy, that defendant's mother thereafter, before her death, made a gift deed to defendant of realty and alleging, upon information and belief, that transfer was fraudulent and that realty at no time was exempt from execution, did not state a cause of action.

2. Executors and administrators ⇐423

If a judgment creditor's assignee had any cause of action, such as that asserted under a so-called creditor's bill to adjudge a transfer of realty fraudulent, against judgment debtor who had died after judgment was obtained, the action could be maintained only against debtor's legal representative. Probate Code, §§ 579, 580.

3. Executors and administrators ⇐423

Where complaint in suit in equity upon a so-called creditor's bill against deceased judgment debtor's grantee to adjudge a transfer of realty fraudulent pleaded a judgment enforceable against deceased alone and also pleaded nonliability of grantee, deceased's estate was a "necessary and indispensable party" to litigation, and until those proceedings were had no cause of action was stated against grantee. Probate Code, §§ 579, 580.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary and Indispensable Party".

4. Fraudulent conveyances ⇐241(4)

A judgment creditor may not sue in equity upon a so-called creditor's bill to adjudge a transfer of realty by debtor fraudulent until creditor has exhausted his legal remedies.

5. Executors and administrators ⇐423

A creditor's bill against the estate of a grantor who has conveyed land after a judgment has been obtained against him must plead that legal remedies have been exhausted.

6. Executors and administrators ⇐423

Where plaintiff claimed that his assignor had obtained a judgment against defendant and defendant's mother, that judgment had not been paid, that defendant had been discharged of liability by an order in bankruptcy, and that defendant's mother, before her death, made a gift deed of realty, which was not exempt from execution, to defendant and that transfer was fraudulent, plaintiff's remedy, if any, was a creditor's bill against the mother's estate.

Appeal from Superior Court, City and County of San Francisco; Thos. M. Foley, Judge.

Suit in equity by H. Staniels against Irma Elizabeth Copeland upon a so-called creditor's bill to adjudge a transfer of real property fraudulent. From a judgment sustaining a demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

Robert E. Hatch, Carl Conradi, Jr., and Charles H. McDonald, all of San Francisco, for appellant.

James L. Feely and Reginald M. Watt, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued in equity upon what is termed a creditor's bill to adjudge a transfer of real property fraudulent and to impress the property by execution and sale to the discharge of an existing indebtedness. A demurrer to the complaint, both general and special, was sustained without leave to amend. The appeal from the judgment raises the single point: "Did the complaint in this case state a cause of action?"

The complaint alleges that on October 7, 1932, plaintiff's assignor obtained a judgment against defendant and her mother; that said judgment has not been paid; that in February, 1939, plaintiff obtained an order of court permitting him to enforce the judgment; that in October, 1933, the defendant filed a petition in bankruptcy and was duly discharged of all liability on February 26, 1934; that in November, 1938, defendant's mother made a gift deed to her of certain real property and thereafter deceased, leaving no other property or assets. Upon information and belief it is then alleged that the transfer was fraudulent

and without consideration. But it is also alleged that at no time was the property exempt from execution under the judgment of plaintiff's assignor.

[1-6] The demurrer was properly sustained. The defendant's obligations under the judgment were discharged by the order in bankruptcy. If plaintiff had any cause of action against the mother of defendant that action could be maintained against the legal representative of the deceased only. Secs. 579, 580, Prob.Code. Here the complaint pleads a judgment enforceable against the decedent alone, it also pleads the nonliability of the only defendant sued. The estate of the decedent is therefore a necessary and indispensable party to the litigation, and until those proceedings are had no cause of action is stated against the grantee under the deed; and until the creditor has exhausted his legal remedies, he may not sue in equity. 7 Cal.Jur., pp. 802, 804, 805; Smedberg v. Bevilockway, 7 Cal.App.2d 578, 580, 46 P.2d 820. The appropriate remedy, therefore, was a creditor's bill against the estate of the grantor. But such a bill must plead that the legal remedies have been exhausted. Here the bill pleads that "at no time herein concerned was said real property exempt from execution issuable upon said judgment". The pleader has thus closed the door to any equitable relief.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



COATES v. KLETTE, Judge of Superior Court of Fresno County et al.

Civ. 6670.

District Court of Appeal, Third District, California.

Dec. 2, 1941.

Hearing Granted Jan. 30, 1942.

See 125 P.2d 500.

1. Criminal law ⇐1012

A writ of certiorari does not lie to review judgment of a justice court after appeal taken and determined in superior court, because an "adequate remedy" lies by appeal to superior court from a judgment in excess of jurisdiction. Code Civ.Proc. § 1086.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy".

2. Criminal law ⇐1083

An appeal from a conviction in a justice court transfers jurisdiction to superior court.

3. Criminal law ⇐1081½

Since appeal from conviction in justice court transfers jurisdiction to superior court, petition for writ of certiorari to review the validity of the judgment of conviction states no cause of action against justice court.

4. Criminal law ⇐260(4)

If judgment of a justice court convicting accused is in excess of its jurisdiction, superior court order affirming the judgment is likewise in "excess of jurisdiction".

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

5. Criminal law ⇐1011

Where judgment of conviction in justice court is affirmed by superior court on appeal, there is no remedy by appeal from superior court, and certiorari is proper method of presenting question to a higher court.

6. Criminal law ⇐1011

Where superior court affirms judgment of justice court, certiorari lies to review any act of the superior court which is alleged to be in "excess of its jurisdiction".

7. Certiorari ⇐28(2)
Dismissal and nonsuit ⇐55
Prohibition ⇐10(1)

In its ordinary sense, for purpose of determining right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is given to term "jurisdiction" than its fundamental meaning, and term may be applied to a case where, though court has jurisdiction over subject matter and parties in fundamental sense, it has no power to act except in a particular manner, or to give certain kinds of relief, or to act without occurrence of certain procedural prerequisites.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

8. Certiorari ⇐28(2)

Where a statute authorizes prescribed procedure, court's action contrary to the authority thus conferred is in "excess of jurisdiction", and certiorari will lie to correct the excess. Code Civ.Proc. § 1086.

9. Criminal law ⇐260(4)

Affirmance of a judgment of justice court by superior court cannot impart "jurisdiction" where none existed in the justice court.

10. Statutes ⇐190

There is no room for application of rules of statutory construction where language of statute is clear.

11. Fraud ⇐68

The provision of Petroleum Products Fraud Prevention Law of 1931, that each day when sales are made in violation of statute is a separate offense, is clear and unambiguous, and fact that several sales may be made on same day does not constitute more than one offense, hence, where nine sales in violation of act were made on one day and ten on another day, there were only two offenses committed, not 16 as found by lower courts. St.1931, p. 1320, § 17.

12. Constitutional law ⇐70(3)

The attorney general's contention that to construe an unambiguous statute according to its obvious meaning would lead to absurdities is matter which should be addressed to legislature rather than to the court.

13. Criminal law ⇐1179

Where question in certiorari proceeding against superior court to review validity of judgment of justice court affirmed on appeal by superior court involved solely a "question of law", the entire matter would be disposed of by District Court of Appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

Petition for certiorari by Mabel L. Canham Coates against Ernest Klette, as Judge of the Superior Court of Fresno County, and others, to review the validity of a judgment of a justice court of the County of Fresno, which was affirmed on appeal by the named defendant, wherein petitioner was found guilty of violating the Petroleum Products Fraud Prevention Law of 1931 by selling a product purporting to be gasoline when it did not conform to the standards prescribed by the act.

Order annulled.

Rae B. Carter, of Fresno, for petitioner.

Earl Warren, Atty. Gen., Ralph H. Cowing, Deputy Atty. Gen., and W. C. Tupper, Dist. Atty., of Fresno, for respondents.

TUTTLE, Justice.

In this petition for a writ of certiorari it is alleged that on September 12, 1940, petitioner was conducting, managing and operating five service stations in the city of Fresno. On that day a criminal complaint was filed in the justice's court of that county, wherein it was charged that in nineteen separate acts, nine of them occurring on August 12, 1940, and ten on August 16, 1940, petitioner permitted to be sold a product purporting to be gasoline, when such product did not conform to the standards prescribed in the Petroleum Products Fraud Prevention Law of 1931. Stats.1931, p. 1313. This act provides in part as follows:

"Sec. 17. Any person, firm, * * * or employee thereof, who violates any of the provisions of this act shall be guilty of a misdemeanor * * *. Each such person, firm, * * * or employee thereof, shall be deemed guilty of a separate offense, for each day during any portion of which any violation of any provision of this act is committed, continued or permitted by such person, firm, association or corporation, and shall be punishable therefor as provided in this act."

After a denial of guilt and a trial thereon in the justice's court, petitioner was found guilty upon each of the nineteen counts, as set forth in the complaint, and after the denial of the motion for a new trial, the respondent justice's court imposed fines upon petitioner upon each of the several counts. Thereafter, a motion in arrest of judgment was presented and denied. An appeal was then taken to the respondent superior court, which court affirmed the judgment and sentence on each of the nineteen counts.

Thereupon, the defendant sought to review the action of the justice's court and the superior court by this writ of certiorari and alleges that the justice's court, in imposing the fines, and the superior court, in affirming the convictions, acted in excess of their jurisdictions in that, as as-

serted in the petition, the act permits the charging of but one offense for each day, irrespective of the number of sales made during said day.

To this petition, respondents have, by demurrer, challenged the legal sufficiency of the petition. Both sides concede that neither the judge of the superior court, nor the justice of the peace are proper parties in this proceeding for a writ of certiorari, and that as to them the demurrer is well taken, but the sufficiency of the petition as to the two courts still remains to be examined.

[1-5] Referring to respondent justice's court, the rule is stated in Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317, 318, to be as follows: "This court has never recognized the right of a petitioner to a writ of certiorari to review the judgment of a justice's court after appeal taken and determined in the superior court." Portnoy v. Superior Court, —— Cal.App.2d ——, 116 P.2d 804, is to the same effect. The reason for the rule is that an adequate remedy lies from a judgment in excess of jurisdiction by an appeal to the superior court. The writ must be denied where there is a "plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ.Proc., § 1086. Furthermore, the effect of the appeal is to transfer jurisdiction to the superior court. No cause of action was therefore stated against the justice's court. On the other hand, a cause of action was stated against the superior court, as will appear later. If the original judgment of the justice's court was in excess of its jurisdiction the order of the superior court in affirming such judgment is in the same category. There is no remedy by appeal from the latter court, and certiorari is therefore a proper method of presenting the question to a higher court.

[6, 7] Turning to the demurrer relating to the superior court, it is well settled that where such court affirms a judgment of the justice's court, certiorari will nevertheless lie to review any act of the superior court which is alleged to be in excess of its jurisdiction. Sherer v. Superior Court of Lassen County, 94 Cal. 354, 29 P. 716. In recent years our courts have given a much broader meaning to "jurisdiction" than formerly prevailed. In the case of Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 947, 132 A.L.R. 715, it is said:

"But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. * * * On a number of occasions the courts of this state have recognized the conflicting senses in which the term 'jurisdiction' is used, and have emphasized the point that in applications for prohibition or certiorari, the broader meaning is involved. In our own recent decision, Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, 112, we said: '* * * some confusion exists with reference to what constitutes an excess, and what constitutes an error, in the exercise of jurisdiction. However, it seems well settled (and there appears to be no case holding to the contrary) that when a statute authorizes prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction, and certiorari will lie to correct such excess.'"

The following excerpt from the Rodman case, [13 Cal.App.2d 262, 89 P.2d 112], mentioned in the foregoing quotation, is clearly applicable to the situation presented here:

[8] "In Spreckels S. Co. v. Industrial Acc. Comm., 186 Cal. 256, 199 P. 8, the point is discussed at some length. There the statute specifically designated what award the commission should make to partial dependents in the event of the death of an employee. The commission made an award larger than that permitted by the statute. This court held that such action could be corrected by certiorari. In 186 Cal. at page 260, 199 P. at page 9 it is stated: 'The difficulty arises from the different shades of meaning which the word "jurisdiction" has. As sometimes used, it means simply authority over the subject-matter or question presented. In this sense the Commission undoubtedly had jurisdiction in this case and its award was not without jurisdiction on its part. But the word is frequently used as meaning authority to do the particular thing done,

or, putting it conversely, a want of jurisdiction frequently means a want of authority to exercise in a particular manner a power which the board or tribunal has, the doing of something in excess of the authority possessed. A good illustration of a want of jurisdiction of this latter sort is the imposing by a court upon a person convicted of crime of a sentence in excess of that permitted by the statute. The court had jurisdiction to sentence the convicted person, but it did not have jurisdiction to impose a sentence not permitted by law; that is, it acted in excess of its power in so doing. Such excesses of jurisdiction can be reviewed on certiorari. The code section so provides (sec. 1068, Code Civ.Proc.) * * *. Upon the facts found the statute prescribed the amount to be allowed as a death benefit, and the Commission in allowing a different amount, rendered an unlawful award, and one in excess of its authority.' "

[9] It would appear that the affirmance of the judgment by the superior court cannot impart jurisdiction where none existed in the justice's court. The cases relied upon by respondents involve attacks upon a judgment which are based upon errors at law, and not questions of excess of jurisdiction.

[10-12] The language of the statute here is clear, and there is no room for the application of rules of statutory construction. There is a separate offense provided for each day during any portion of which any violation of any provision of the act is committed. If one sale is made in the morning and another in the afternoon of the same day, such sales were made in different portions of the same day, and but one offense is committed. Nine of the sales were made here on one day, and ten on another. The statute provides that each day when a sale or sales are made is a separate offense. The action should go back to the justice's court for a new judgment predicated upon the basis that the complaint states but two offenses, instead of sixteen. The attorney general argues that to construe the statute according to its obvious meaning would lead to absurdities. Petitioners point out that to adopt the theory of the prosecution would be also absurd. The absurdities would seem to be about equally balanced. Such arguments might well be addressed to the legislature. Here, the latter has explicitly defined what shall constitute a separate offense under the act, and it is not within our province to alter and change such definition.

It is conceded by petitioner that the demurrer in respect to respondents judge of the superior court and justice of the peace, should be sustained. We have pointed out that the same rule should apply to respondent justice's court. As to respondent superior court, the demurrer should be overruled. It will be so ordered.

[13] As the question is one of law alone, it would seem proper that the matter should be finally disposed of at this time.

The order is annulled.

THOMPSON, Acting P. J., concurred.

ALTRAMANO et al. v. SWAN et al.*

Civ. 13326.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1941.

Hearing Granted Jan. 27, 1942.

1. Husband and wife ⇐149(1)

Under statute, a bank account of a wife is her "separate property" and may be reached by her husband or his creditors only where, by evidence, it is shown that she acquired it through fraud or through an agreement to hold it in trust, or where, as a matter of law, a trust should be raised against her because of her conduct against husband, and, if husband cannot recover on any theory of trust, the husband's creditor may not, unless creditor additionally can show a fraud perpetrated upon him. St. 1929, p. 444, § 15a.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

2. Creditors' suit ⇐51

In judgment creditors' suit to impress judgment as a lien on postal savings bonds standing in name of debtor's daughter, the creditors claiming that daughter held bonds upon a constructive trust for debtor, title to bonds should have been decreed to be in daughter where she had purchased them with money withdrawn by debtor's wife from a bank account which stood in wife's name and in which account debtor claimed no rights, and there was no showing which would have permitted debtor to recover bonds on theory of a trust, or that a fraud had been perpetrated upon creditors. St. 1929, p. 444, § 15a.

3. Husband and wife ⇐264

A "pink slip" to an automobile in a wife's name means that automobile is wife's "separate property" and not "community property". Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

4. Husband and wife ⇐264

In judgment creditors' suit to impress judgment as a lien on an automobile standing in name of debtor's wife, the creditors claiming that wife held automobile upon a constructive trust for debtor, the automobile should have been found to be wife's property and not "community property", where "pink slip" to automobile was in wife's name more than a year prior to time when obligation represented by judgment was incurred by debtor. Civ.Code, § 164.

5. Evidence ⇐171

The "best evidence rule", which requires the production of written instruments in evidence, has no application where terms of a writing are not in issue and question of existence of writing is merely collateral to the issue, and in that situation parol evidence may be given even though such evidence covers the same ground as contents of writing.

See Words and Phrases, Permanent Edition, for all other definitions of "Best Evidence Rule".

6. Evidence ⇐171

In judgment creditors' suit against debtor and debtor's wife and daughter to impress judgment as a lien upon items of personalty on theory that personalty belonged to debtor although title thereto stood in names of wife and daughter, the wife was not precluded from testifying to deposits which she had made in a bank by the fact that deposits were shown on bank's books.

7. Evidence ⇐171, 318(3)

In judgment creditors' suit against debtor and debtor's wife and daughter to impress judgment as a lien upon personalty on theory that personalty belonged to debtor although title thereto stood in names of wife and daughter, the branch manager of a bank who purported to have personal knowledge of extent of wife's deposits with bank was entitled to testify thereto without producing or testifying from bank records, which were "hearsay".

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Suit by Tony Altramano and others against W. W. Swan and others to impress a judgment as a lien upon items of personal property. From a judgment for plaintiffs, defendants Lillian J. Swan and another appeal.

Reversed.

* Subsequent opinion 128 P.2d 353.

James B. Fredericks, of Los Angeles, for appellants.

Frederick M. Kraft, of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is an action in equity by judgment creditors to impress their judgment as a lien upon two items of personal property on the theory it belonged to the debtor, W. W. Swan, even though title thereto stood respectively in the names of his wife and daughter. From a judgment in favor of the creditors the wife and daughter have appealed.

The complaint is in five counts. The court found for the appellants on the first three counts and against them on the last two counts. Except for the adoption therein of the allegations of the first count, all of which were found by the trial court to be untrue, the fourth count contains but a single paragraph which merely alleges that the wife and daughter acquired from the debtor Swan, without consideration, the respective properties standing in their names, in trust for him at a time when he was insolvent. Likewise the fifth count, except for its adoption of the allegations of the first count, sets forth but a single paragraph wherein it is averred that the wife and daughter acquired from the debtor, without consideration, the respective properties standing in their names, and *"by reason thereof"* the wife and daughter each held their respective properties upon a constructive trust, with the debtor Swan as the beneficiary thereof.

It is undisputed that the plaintiffs on April 6, 1939, recovered a judgment against W. W. Swan in the principal sum of $3,000, interest and costs, and that it is unsatisfied.

Without detailing the findings, it will suffice to say that the court found that at the time the creditors procured their judgment against Swan he was the owner and in possession of a 75 per cent interest in an Oldsmobile and a deposit account in a bank in the sum of $2,545.47, the two items of personal property involved, even though title as to each was of record in the wife, because—so the court found—she held the same in trust for the husband. The court further found that the wife had withdrawn the deposit account and transferred, without consideration, $2,500 thereof to the daughter, who had purchased therewith postal savings bonds, and accordingly it found she should be deemed to hold the bonds in trust for her father. The court additionally found that the Oldsmobile was transferred by the husband to the wife on June 1, 1937, and that the bank account was the resultant of various amounts of money transferred by the husband to the wife in the period between March 23, 1936, and April 22, 1940. Upon the findings as made the court adjudged that the judgment creditors had a lien on the Oldsmobile and the postal savings bonds for the amount of their judgment of $3,000 with interest and costs.

The errors assigned are (1) that the complaint does not state a cause of action and that it is insufficient upon which to base a judgment, (2) that the evidence was insufficient to sustain the findings and (3) that the findings do not support the judgment.

We are not entirely clear from the brief comments in the trial record upon what theory the court reached the conclusion that the property involved was held upon a trust for the husband. However, as the court did not find, as plaintiffs alleged, that the husband was insolvent, or was made insolvent by any of the transfers, or that there was any intent to defraud creditors, it seems apparent that the court was of the view that the property was originally community property and so continued despite any transfers thereof and regardless of the names in which it was held. This view derives support from the statement made to the court by counsel for respondent upon the appellants' motion for nonsuit, the court's brief comment in response thereto in denying the motion, and from counsel for respondents' "counter statement" in his brief of the question involved on appeal. Accordingly, it seems plain that we have before us no question involving the credibility of witnesses nor the weight that should be ascribed to the evidence, which, so far as it is material, is uncontradicted. While counsel for respondents devotes a goodly portion of his brief to his disbelief of the defendants' testimony, yet we may observe that if there had been a finding that the creditors had been defrauded there would have had to be a reversal on this record. Accordingly, the controlling issue here is one of law, i. e., whether the property was community property of the husband and wife or whether it had achieved the status of separate property either before the obligation was incurred by the

husband to the respondents or before the judgment was rendered.

[1, 2] The bank account in question was opened by the wife in her own name by an initial deposit of $600, derived from another account standing in her name. Her husband had no right to check on it. He never claimed any such right or any part of the account. Subsequent to 1920 the wife acquired more than $12,000 in cash by way of gift, which was her separate estate. During a considerable portion of time after the bank holiday in 1933 the wife kept currency in her safety deposit box, largely in excess of $3,000. The box was in her name and the husband had no access to it. The only money which belonged originally to the husband and went into his wife's bank account was the sum of $623.50, and none of this went into the account after March 2, 1937, which was eighteen months prior to the time the husband first became obligated to the plaintiffs. By section 15a of the Bank Code, St.1929, p. 444, a bank account of a wife is her separate property, and it may be reached by her husband or his creditors only where by evidence it is shown she acquired it through fraud or through an agreement to hold it in trust, or where as a matter of law a trust should be raised against her because of her conduct against the husband. See De Hart v. Allen, 43 Cal.App.2d 479, 111 P.2d 342. If the husband cannot recover on any theory of trust the creditor of the husband may not either, unless the creditor additionally can show a fraud perpetrated upon him. There was no such showing here. Moreover, the husband testified he had no interest in the account or in the postal savings bonds—purchased with part of the proceeds of the account and held by the daughter. Title to the bonds should have been decreed to be in the daughter.

[3, 4] It was shown that the wife had the so-called "pink slip" to the Oldsmobile more than a year prior to the time the obligation was incurred by the husband to the plaintiffs. His rights and those of his creditors are here essentially the same as to the bank account. A pink slip to a car in the name of a wife means the car is her separate property and not community property. Civ.Code, sec. 164. See, also, People v. One 1939 La Salle, etc., 45 Cal.App. 2d 709, 115 P.2d 39. The Oldsmobile should have been found to be the property of the wife and not community property.

Counsel for respondents cites and quotes from a considerable number of cases. The language quoted, when read alone and without reference to the facts of each case, goes far to sustain his position. However, when the cases are read, as we have read them, they not only are far afield and in no manner in point, but what is more the language quoted when dissected from its setting is very misleading. This manner of quoting from cases is not to be commended. No doubt the trial court had the case presented to him in much the same manner, and in the hurry which is incident to the trial of causes did not take time to read the cases cited and so was misled as to the law.

[5-7] In view of the conclusion reached on this branch of the case it is not necessary that the other contentions of the appellants should be discussed. It would seem, however, in view of the fact that the case is reversed for a new trial, we should point out that the best evidence objection was inapplicable wherever made throughout the trial below. The best evidence rule, which requires the production of written instruments in evidence, has no application where the terms of a writing are not in issue and where the question of the existence of that writing is merely collateral to the issue. Then, in that situation, parol evidence may be given even though such evidence covers the same ground as the content of the writing. In other words, under such circumstances the witness is permitted to testify to a fact although the same fact could be proved or disproved by the writing. As was said in Marriner v. Dennison, 78 Cal. 202, at page 213, 20 P. 386, at page 391, "we understand the rule to be that, where the question is not as to the contents of a writing * * * and the question comes collaterally in issue, it may be proved by parol". So in the instant case, as the witness Mrs. Swan sought to testify to deposits she had made in a bank she was not foreclosed from so doing by the fact that such deposits were shown on the books of the bank. Her endeavor was not to testify to the contents of those records, but to facts, which were nevertheless facts even though they were contained in a bank record. Likewise, the branch manager who purported to have personal knowledge of the extent of Mrs.

Swan's deposits with his bank was entitled to testify thereto without producing or testifying from the bank record. The bank was not a party to the lawsuit and its records were hearsay. See Wigmore on Evidence, secs. 1252–1254; Coonrod v. Madden, 126 Ind. 197, 25 N.E. 1102; Wood, Pr.Ev., p. 4; Thayer, Preliminary Treatise on Evidence, 489.

For the reasons indicated the judgment is reversed.

MOORE, P. J., and McCOMB, J., concurred.



Tony ALTRAMANO et al., Respondents, v. RODEO DEL LEGIONARRO, Inc., et al., Defendants; Lillian J. SWAN, et al., Appellants.

Civ. 13327.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1941.

Hearing Granted Jan. 27, 1942.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Reversed.

James B. Fredericks, of Los Angeles, for appellants.

Frederick M. Kraft, of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is a companion case to Altramano et al. v. W. W. Swan, Lillian J. Swan and Juanita Swan, 119 P.2d 401, this day decided.

As the parties have filed a stipulation in this case stating that our decision in the companion case above mentioned will be decisive of this appeal, and that the same judgment should be entered herein as is entered therein, the order appointing the receiver in this case is accordingly reversed.

MOORE, P. J., and McCOMB, J., concurred.

48 Cal.App.2d 110

NEFF v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

Civ. 11863.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

Hearing Denied Jan. 27, 1942.

1. Appeal and error ⇐1008(3)

Whether an ambiguity or uncertainty exists in a contract is a "question of law", on which trial court's finding is not binding on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

2. Appeal and error ⇐1008(3)

When trial court's construction of ambiguous contract is reasonable and consistent with intent of parties, appellate court will not substitute its own construction therefor.

3. Evidence ⇐448

Where one party urges an interpretation of an ambiguous contract which would be unreasonable and would not favor natural rights, trial court may receive evidence to show the true meaning of contract.

4. Appeal and error ⇐1008(3)

Where a trial court's interpretation of ambiguous contract in light of evidence admitted to show true meaning thereof is reasonable and fair, appellate court will not interfere.

5. Insurance ⇐84(6)

In action for commissions earned by plaintiff's assignor as a soliciting agent for life insurance company, findings that assignor was not entitled to commissions on premiums on term insurance policies which had been written by him, but which were subsequently converted by another agent into ordinary life policies, because insured refused to deal with assignor under any circumstances, and that assignor had been fully compensated for services previously rendered, were warranted by evidence.

6. Insurance ⇐84(6)

In action for commissions earned as soliciting agent for life insurance company, evidence sustained trial court's finding that company's agreement to "protect" business obtained by agent was not intended to mean

that agent who sold term insurance policies would for all times thereafter and under all circumstances have exclusive or "vested" right to full commissions if conversion of policies into ordinary life policies was effected prior to expiration of period of term insurance, nor where insured refused to deal with the agent and services of another agent were required to carry out the conversions.

7. Appeal and error ⇐1008(3)

Where meaning of a written contract by life insurance company to pay agent commissions for soliciting insurance and of supplemental oral contract was ambiguous and depended on extrinsic evidence, a "question of fact" was presented as to reasonable interpretation of contracts.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

8. Customs and usages ⇐15(1)

Where written and oral contracts to pay commissions to agent for life insurance obtained by him were ambiguous, parol evidence was admissible as to custom in vicinity respecting allowance of commissions under circumstances involved.

9. Insurance ⇐84(2)

Where written contract provided that insurance company would pay soliciting agent certain commissions on first year's premiums secured without assistance from other agents, and supplemental oral agreement provided that in consideration of taking agency contract agent would be "protected" on policies written by him, contracts could not reasonably be construed as entitling agent to commissions on another agent's conversion into ordinary life insurance of term insurance policies obtained by original agent, on insured's refusal to deal with original agent under any circumstances, and such unreasonable result should be avoided if possible. Code Civ.Proc. § 1866.

10. Evidence ⇐443(2)

In action on a written agreement between life insurance company and soliciting agent for payment of commissions according to scale specified in agreement, evidence as to collateral oral agreement, allegedly made to induce agent to sign agency contract, which specified that agent was to be protected and paid commissions on policies theretofore written was admissible.

11. Insurance ⇐84(6)

In action for commissions earned by soliciting agent for insurance company, evidence as to oral contract that in consideration of acceptance of appointment as soliciting agent company would protect business written by agent, including certain term insurance policies, was insufficient to establish claim to commissions in converting the term policies into ordinary life policies through services of another agent on insured's refusal to have any dealings with soliciting agent, even to extent of permitting policies to lapse.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Elsie Neff against the Mutual Life Insurance Company of New York and others to recover commissions claimed to have been earned by plaintiff's assignor as soliciting agent for named defendant, in which, by way of cross-complaint, named defendant made L. P. Anderson a party defendant. From an adverse judgment, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., not participating.

Glensor & Schofield and Pierce J. Deasy, all of San Francisco, for appellant.

F. Eldred Boland, James W. Archer, and Knight, Boland & Riordan, all of San Francisco, for respondents.

Robert E. Hatch, of San Francisco, for respondent L. P. Anderson.

NOURSE, Presiding Judge.

Plaintiff sued to recover certain commissions claimed to have been earned by her assignor as a soliciting agent for the defendant company. By way of a cross-complaint the defendant made Anderson a party. The trial court found that plaintiff was not entitled to recover any of the commissions claimed, that the services were rendered by Anderson, another soliciting agent of the company, and that he alone was entitled to payment of the commissions.

There is no substantial dispute as to the material facts upon which the controversy rests. Plaintiff's assignor, one Max A. Arns, held a written contract, as assignee of one Abrams, with the insurance company under which the latter agreed to pay him as agent "during the life of this contract the following scale of commissions on first year premiums secured and remitted by you, in cash, without assistance from other agents". Acting under the contract, in December, 1932, he solicited and secured from one Oliver eight policies of insurance

amounting in all to $200,000, designated as "five year term insurance automatic continuance on ordinary life". In the year 1935 the insured indicated a desire to exercise the option of converting some of this term insurance into ordinary life but declined to deal with plaintiff's assignor as agent. By agreement between the company and Arns defendant Beckett, another agent of defendant company, was permitted to contact the insured and through his efforts $100,000 of this insurance was converted to the permanent or ordinary life plan, and the commissions for those services were paid by the company to Arns and Beckett by mutual agreement. Some time later Mr. Oliver indicated an intention of permitting the remaining term insurance to lapse. In that insurance the beneficiary was a corporation of which Oliver was president. The corporation notified the defendant company of its desire to permit these policies to lapse. About this time a suggestion was made that Oliver either convert or renew the policies and designate members of his family or dependents as beneficiaries. But during all this time the insured steadfastly refused to have any dealings with plaintiff's assignor. Thereupon the defendant company directed Anderson to make contact with Oliver and in January, 1937, four policies of ordinary or whole life insurance, each in the amount of $25,000, were issued by the defendant company to Oliver, and the full commissions thereon were paid to Anderson.

[1-4] Two basic issues were tendered to the court: first, whether under the terms of the written contract plaintiff's assignor was entitled to recover the conversion commissions on the four policies which were converted by Oliver through the efforts of another agent; and, second, whether if plaintiff's assignor is not entitled to recover these commissions under the written contract he is nevertheless entitled to recover under the terms of an alleged oral agreement between Arns and the local manager of the defendant company made at the time Arns was appointed agent in 1933. These were the issues which were tendered to the trial court and they are the only substantial issues before this court on appeal from the judgment. A determination of these issues calls for an interpretation of both contracts and the real controversy here is whether the trial court gave to each an interpretation within the meaning and intent of the parties. This is controlled by these settled principles—the question whether an ambiguity or an uncertainty exists in a contract is one of law upon which the finding of the trial court is not binding on appeal (Brant v. California Dairies, Inc., 4 Cal.2d 128, 133, 48 P.2d 13); but when the construction adopted by the trial court is reasonable and consistent with the intent of the parties the appellate court will not substitute its own construction. McKee v. Lynch, 40 Cal.App.2d 216, 226, 104 P.2d 675; In re Estate of Bourn, 25 Cal.App.2d 590, 600, 78 P.2d 193. Hence, if the oral evidence of custom and usage were all eliminated, we would still be impelled to hold that the only reasonable interpretation of the written contract was that adopted by the trial court. In so far as the oral contract is concerned the ambiguity is demonstrated by appellant's insistence upon his proposed interpretation. We are in full accord with the finding of the trial court that such interpretation would be wholly unreasonable and would not favor natural rights. Hence, when a party urges such an interpretation of a contract the trial court may receive evidence to show the true meaning of the contract and when an interpretation is thereupon given which is reasonable and fair, the appellate court will not interfere.

[5-7] Now the trial court made full and comprehensive findings disclosing that both the written and oral contract were in need of interpretation and then, on the basis of the evidence tendered, made findings as to what the parties meant and what they did not mean; the conditions under which the appellant would be entitled to be paid commissions; the conditions under which the commissions would be paid to another; the uniform custom and usage prevailing in the community relating to operations under such contracts; and the accepted meaning of the undertaking of the company to protect the agent. Thus it was expressly found that the word "protect" as used by the parties was not intended or understood to mean that an agent who originally sold policies such as those involved in this action would for all times thereafter and under all circumstances have an exclusive or vested right to the full commissions if the conversion was effected prior to the expiration of the period of the term insurance and was not intended to cover commissions for the conversion of such insurance in cases where the insured refused to make use of the services of the original agent and the services of another and new agent would be required. The findings that the appellant's

assignor was not entitled to recover commissions on premiums for the converted insurance under the terms of the written contract was fully supported by the uncontradicted evidence that this insurance was written and the premiums secured by other agents, and that no service was rendered by appellant's assignor for which he had not been fully compensated. The finding involving the court's interpretation of the meaning of the oral contract to protect the business of the agent is fully supported by competent and substantial evidence. Appellant suggests that this evidence of the custom generally prevailing among insurance companies and agents in the community was improperly admitted because this oral contract was not ambiguous. The argument is not persuasive. The interpretation placed upon the contract by the trial court is wholly reasonable and sensible; it is supported by the undisputed evidence of uniform custom and practice. The interpretation urged by appellant would be unreasonable and unfair. In the final analysis the appellant does not present any substantial legal question. The case is essentially a "fact" case calling for a reasonable interpretation of the contracts of the respective parties. This issue was fully heard and determined by the trial court, and the views of the learned trial judge were summarized in a memorandum opinion from which we quote with approval:

"There are two fundamental questions in this case. The first question is whether under the provisions of the Abrams contracts and under the circumstances shown to have occurred, plaintiff's assignor is entitled to recover the conversion commissions on the four Oliver policies in controversy that were 'converted' by Oliver in 1937. The second question is whether in the event that plaintiff as the assignee of Mr. Arns is not entitled to recover under the Abrams contracts she is entitled to recover under the agreement alleged to have been entered into by Arns at the time he was appointed agent for the defendant company in June, 1933.

"A careful review of the evidence has led me to the conclusion that under neither theory is plaintiff entitled to recover. The theory upon which Mr. Arns bases his first contention that he is entitled to judgment is that he originally brought about the issuance by the defendant company of the Oliver policies. He contends that under the language of the Abrams contracts with the defendant company under which contracts he, Arns, was acting when the policies were originally issued he became entitled to the conversion commission upon the conversion of the policies from term into life policies. * * * He claims that he is entitled to such commission even though the insured may have expressly refused to make use of his services in connection with the conversion, and even though another agent of the company may have effected the conversion as I find is the case. The theory of the defendant is that policies of the type here involved are always subject to conversion prior to the expiration of the term period by any agent of the company that issued the policies without the company being liable for the conversion commission to another agent who may originally have written the policies.

[8] "In my opinion the Abrams contracts are ambiguous on this point.

"Hence parol evidence of the custom obtaining in this vicinity with reference to allowing conversion commissions under similar contracts in the circumstances shown to have occurred was allowed by the court (see Brett v. Vanomar Producers, 45 Cal. App. 286, 289, 187 P. 758).

[9] "The evidence introduced on this point has convinced me that the construction contended for by the plaintiff cannot be sustained. My conclusion in this respect is fortified by my opinion that to follow plaintiff's contention to its logical conclusion must lead to an unreasonable result. Under that construction, even though the insured convinced the insurance company which had issued the policies involved that rather than permit the agent who had written the insurance to collect the conversion commission he would allow the policy to lapse, the company would still be helpless. That is to say it could not sanction the intervention of another agent through whom the conversion might be effected without subjecting itself to liability for the commission to both agents. Such a result impresses me as wholly unreasonable and one that the court should avoid if possible (see C.C.P. sec. 1866, and Stein v. Archibald, 151 Cal. 220, 90 P. 536).

[10, 11] "The second theory advanced by plaintiff is in my opinion likewise unsound. It involves the agreement between Mr. Arns and the company whereby in consideration of Mr. Arns taking an agency contract he was to be 'protected' and paid the commission on the policies that had theretofore been

written. So far as the evidence of the collateral agreement relied on is concerned, I am still of the opinion that it is admissible (see 22 Corpus Juris, page 125, sec. 1665, and cases cited). None of the California cases cited by defendants in my opinion precisely covers the point here involved. However, in view of my ultimate conclusion on this point the question of the admissibility of the evidence becomes academic. The position taken by plaintiff is that at the time Mr. Arns was appointed agent for the defendant company it agreed that in consideration of his undertaking the agency it would protect him and pay him the disputed commissions, and also that it would not deal with any other agent with reference thereto. But the evidence offered in support of this claim does not adequately support the position taken. Thus Mr. Arns testified that Mr. Murray and Mr. Hathaway on various occasions promised that if Arns would accept the appointment as agent for the defendant company it would 'protect' the business written by him, 'including the Oliver policies'; also that there would be no difficulty so far as 'twists' were concerned. In my opinion the evidence that was introduced by the respective parties does not permit such a construction as is contended for by plaintiff being placed on the 'protection' promised by the company. The evidence offered by the defendant on this subject took the form not only of proof of the meaning generally attributed to the term protection in the insurance world, but also proof of the custom generally prevailing among insurance companies, as to protecting agents, and also of proof of the practice followed in numerous concrete cases involving the same type of policies and conversions under comparable circumstances in which the original agent was not paid the conversion commission. * * *

"It will be recalled that according to Mr. Arns' admission he could recall no communication, oral or written, that he had had with Oliver between the date that Beckett first appeared on the scene about April, 1935, and the date of the conversion of the policies here involved in January, 1937. I cannot conceive of an insurance company entering into a contract with an agent under which the company would tie its own hands so as to foreclose itself from making use of the services of another agent in converting policies of the type here involved after the agent who wrote the policies found himself unable to transact any business with the insured with reference to the policies. Such an agreement could have been made, but it would be in my opinion obviously an unreasonable one for the company to enter into. The evidence in this case has not satisfied me that the defendant company did make such an agreement. I am also unable to conceive of a custom growing up where an insurance company would carry the 'protection' of an agent to the extent of providing that he be paid a commission under the circumstances here involved."

For the reasons given the judgment is affirmed.

SPENCE, J., and DOOLING, J., pro tem., concurred.



48 Cal.App.2d 52

GALLAGHER v. CHAVALAS.

Civ. 11612.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1941.

1. Libel and slander ⇐80

A complaint, which alleged that statements published by defendant falsely asserted that plaintiff was an active member of Communist Party, asserting that such party maintained strong arm committees to compel obedience to party's mandates by force, and that by such statements defendant intended, as readers understood, to refer to a person subscribing to doctrine of seizure of private property by workers, and that, as a result thereof, plaintiff had been injured in his occupation and exposed to hatred, contempt, ridicule, and obloquy, was sufficient to state a cause of action for libel.

2. Libel and slander ⇐86(2)

Where defamatory utterances are actionable in themselves, no innuendoes need be pleaded, but if the words have some occult meaning or local signification, or the meaning is ambiguous and susceptible of a harmless as well as an injurious effect, innuendoes must be pleaded in order to point out the meaning which plaintiff claims to be a

true one and on which he relies to sustain his action. Civ.Code, § 45.

3. Libel and slander ⇐100(8)

When the plaintiff by innuendo places a meaning on statements relied upon as defamatory, he must abide thereby and may not during the trial set up a different construction.

4. Libel and slander ⇐91, 123(2)

In libel action, where plaintiff by innuendo places a meaning on statements relied upon as defamatory, defendant may either deny utterance of the statement or admit utterance but deny that they convey the meaning imputed to them, or plead that the statements were true either with or without the alleged meaning, and it is then for the jury to say from proofs whether plaintiff's innuendo is sustained. Civ.Code, § 45.

5. Libel and slander ⇐97

In action for libel, before a demurrer to complaint containing innuendoes can be properly sustained, it must appear that the publication is not reasonably susceptible of the defamatory meaning and cannot reasonably be understood in the defamatory sense pleaded, and if the words used are susceptible of more than one meaning, one of which is the libelous meaning alleged in complaint, whether the words are defamatory or of innocent import should be left to the jury, even though the covert meaning ascribed to them is improbable. Civ.Code, § 45.

6. Libel and slander ⇐7(1)

If alleged defamatory words are reasonably calculated to induce reader thereof to believe that a person is guilty of a criminal offense and the words are false, they are sufficient to support an action for libel. Civ. Code, § 45.

7. Libel and slander ⇐81, 86(3)

Innuendoes and extrinsic facts, when necessarily pleaded, form an essential portion of the statement of a cause of action for libel which must be considered in determining the legal sufficiency of the complaint. Civ.Code, § 45.

8. Libel and slander ⇐87

In action for libel, an allegation that the publication, set out verbatim in a preceding paragraph of complaint, was false and defamatory and was willfully, falsely, etc., made by defendant with knowledge of such falsity and defamatory nature of publication with intent to injure plaintiff, was a sufficient allegation that statements contained in publication and relied upon as defamatory were not true. Civ.Code, § 45.

9. Appeal and error ⇐1078(3)

On appeal from a judgment for defendant, entered following the sustaining of a demurrer to the complaint, a ground of special demurrer, concerning which no argument had been presented, was "abandoned".

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by P. J. Gallagher against James A. Chavalas to recover general and exemplary damages for libel. From an adverse judgment, entered pursuant to order sustaining demurrers to the complaint without leave to amend, plaintiff appeals.

Judgment reversed with directions to overrule the demurrer.

William H. Hollander, of Oakland, for appellant.

James H. Boyer, of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff sued to recover general and exemplary damages he claims to have sustained as the result of an alleged libel. The demurrer to the complaint was sustained without leave to amend, and from the adverse judgment entered pursuant to the order made in that behalf plaintiff appeals. The grounds of demurrer were that the complaint did not state facts sufficient to constitute a cause of action, and in the four particulars specified in the demurrer was ambiguous, uncertain and unintelligible.

In paragraph I of the complaint it is alleged that plaintiff is a citizen of the United States and of the state of California; that on July 17, 1939, he was appointed director of the state relief administration of the state for the county of Alameda, with his principal office in Oakland, and served as such up to and including April 23, 1940.

Paragraph II is as follows: "That said plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that on or about the 6th day of February, 1940, the defendant published, in a letter addressed to, received and read by,

Mrs. Mitchell Tyson, 2071 Oakland Avenue, Piedmont, California, Benjamin Mallory, 154 Sonia Avenue, Piedmont, California, T. P. Geraghty, Sacramento, California, and numerous other persons whose identity is at this time unknown to the plaintiff, the following words relating to plaintiff, of and concerning the plaintiff in his capacity and profession as Director of the State Relief Administration of the County of Alameda, and as a citizen of the United States of America and of the State of California: 'Supplementing our report of December 1939, it is interesting to note *that Patrick J. Gallagher, the SERA director for Alameda County, during the Presidential Campaign of 1936 and thereafter, was an active member of the Communist Party, and known to Soviet circles as an "observer", that is, a secret or "underground" member, who was accorded the privilege of having his identity concealed from the public and most of the C. P. members. Comrade Gallagher and his son, John, were frequent attendants at the meetings of the Communist "fractions" (now called Units) that were held in the rear of the Communist book-store, on the second floor of the building numbered 419-12th Street, Oakland. This bookstore is now known as "The Twentieth Century Book Shop" and is located at 2475 Bancroft Way, Berkeley, and is still a rendevous for the higher strategists in the Communist ranks. At such meetings Comrade Gallagher associated with such well known Communists as Carroll Barnes, George Beers, Roy Nofts, and a Communist speaker named "Green". During the past six years the Communists in Alameda County have maintained strong-arm committees or "Beef Squads", whose function was to compel obedience to the mandates of the Communist Party by force.* These beef squads and the other C. P. members were advised by the State leaders that in case of their arrest, or other entanglement with the law, to immediately contact one or more of the following attorneys: Comrades Gladstein, Grossman & Margolis, of San Francisco, or Comrade John C. Stirrat of Oakland, the latter now the manager of the State Compensation Insurance Fund. Upon the recommendation of Comrade Stirrat various medical work connected with the State Compensation Insurance Fund has been recently allocated to Comrade Dr. Samuel A. Twain of Berkeley, who, a short time ago, had his medical license suspended on being found guilty of narcotics charges. Many of the present employees in the local SERA are now holding their positions through the influence of Comrades Stirrat and Gallagher, who actively cooperated with The Workers Alliance and the Labors Nonpartisan League, the two chief political fronts of "The Soviet Fatherland". The latter organizations have recommended Comrade Dr. Twain for appointment as medical advisor for the Alameda County SERA. Comrades Knopf and Colliver, who were recently discharged from the local SERA, and Comrade Raymond Barry, now employed in Fresno, in the Department of Immigration & Housing, likewise secured their positions through the recommendation of Comrade Stirrat. Political Purification League of California by (Signed) James A. Chavalas, Pres. 577-14th Street, Oakland, Calif.'" (All italics ours.)

[1] The portions of the publication above italicized are repeated in paragraph III of the complaint, and with respect thereto it is alleged that the words employed therein "were, at the time of said publication, known and understood to mean a person subscribing to the doctrines of Bolshevism, Sovietism and Communism, and are, each and all of them, opprobrious epithets when applied to a loyal American citizen. That at the time and place of said publication it was intended by the defendant, and it was understood by the recipients of said letter, that said words above quoted meant a person who did not believe in obedience to Laws, but who did believe in the doctrine of having all workers unite and, by violence and sabotage, seize and appropriate from their lawful owners all lands and buildings and means of production and transportation, and the said words aforementioned were used in the sense and in the meaning above defined and had been, prior to the date of said publication as alleged in Paragraph II hereof, used in many newspapers and publications throughout the United States and were familiar words to the recipients of the said letter mentioned in Paragraph II hereof, and were intended by the defendant to describe a person believing in the doctrines hereinbefore set forth and were so understood by the recipients of said letter. That the quoted words foregoing, falsely described plaintiff and were understood by the recipients of said letter to mean that plaintiff was disloyal to the United States of America, to the State of California, and to the duties of his office as Director of the State

Relief Administration of the State of California in and for the County of Alameda, and that plaintiff was unfit to perform the trusts and duties of his said office." Plaintiff then goes on to allege: "That all of the quoted words aforementioned were, and now are, false and untrue, and did injure said plaintiff in his said occupation, in this: That plaintiff was, and now is, in fact, a true, loyal and patriotic citizen of the United States of America and of the State of California; that said plaintiff has always conducted himself with honesty and fidelity, and that by reason thereof enjoyed a reputation for truth, honesty, integrity and fidelity. That by reason of the foregoing plaintiff has been, and is, greatly injured and prejudiced in his reputation as aforesaid, and has suffered great personal embarrassment and mental anguish, and has been exposed to hatred, contempt, ridicule and obloquy, all of which has caused said plaintiff to be shunned and avoided, and the same has had, and still has, and will continue to have, a tendency to injure said plaintiff in his said occupation or any other occupation that he may desire to follow. * * * That said publication was false and defamatory, and was wilfully, falsely, scandalously and maliciously made by the defendant with knowledge of the said falsity and defamatory nature of the said publication, with the intent and purpose to injure plaintiff and plaintiff's reputation, to expose him to hatred, contempt, ridicule and obloquy and to cause him to be shunned and avoided, and with the further intent and purpose to injure plaintiff in his position and occupation as Director of State Relief Administration in and for Alameda County; to blacken his name as a citizen of the United States of America and of the State of California, and with the officials of the Federal and State Administrations. * * *" It is our conclusion that the foregoing allegations of the complaint are legally sufficient to entitle plaintiff to have the question of the alleged defamatory meaning of the publication passed upon by a jury.

[2-5] As defined by section 45 of the Civil Code, "Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." With respect to the question of the sufficiency of a complaint based on said section it is held that where the defamatory utterances are actionable in themselves no innuendoes are necessary, but that if the words have some occult meaning or local signification, or the meaning is ambiguous and susceptible of a harmless as well as an injurious effect, innuendoes are essential to point out the meaning which the plaintiff claims to be the true one, and on which he relies to sustain his action (16 Cal.Jur. 88); and "if the words are capable of the meaning ascribed to them, however improbable it may appear that such was the meaning conveyed, it is properly the province of the jury to say whether they were in fact so understood". Newell on Slander and Libel, 4th Ed., p. 589. Moreover, when the plaintiff by innuendo places a meaning on the language uttered, he must abide thereby, and may not, during the trial, set up a different construction. 16 Cal.Jur. 89. As pointed out in Newell on Slander and Libel, 4th Ed., p. 599, sec. 546, the presence of the innuendo in fact operates to the advantage of a defendant rather than to his embarrassment for he can either deny having uttered the words or admit having done so but deny they conveyed the meaning imputed to them; or he can plead that the words were true either with or without the alleged meaning; and it is then for the jury to say from the proofs whether the plaintiff's innuendo is sustained. In other words, the general rule is that before a demurrer to a complaint containing innuendoes may be properly sustained it must appear that the publication is not reasonably susceptible of the defamatory meaning and cannot reasonably be understood in the defamatory sense pleaded; and that where the words used are susceptible of more than one meaning, one of which is the libelous meaning placed upon them by the plaintiff in the allegations of his complaint, then the question of whether the words are defamatory or of innocent import should be left to the jury for determination under proper instructions, even though the covert meaning ascribed to them be improbable. Toomey v. Jones, 124 Okl. 167, 254 P. 736, 51 A.L.R. 1066; Washington Times Co. v. Murray, 55 App.D.C. 32, 299 F. 903, and authorities cited therein; Pfitzinger v. Dubs, 7 Cir., 64 F. 696; Culmer v. Canby, 6 Cir., 101 F. 195; Newell on Slander and Libel, supra.

In the present case, as will be noted, innuendoes are pleaded, and they follow closely those pleaded in Toomey v. Jones, supra, wherein as here it was alleged that the words claimed to be defamatory were known and understood to mean that the plaintiff was a person subscribing to and believing in the doctrines of Russian Bolshevism and Sovietism; and the related matters pleaded there and here concerning those doctrines and the understanding had thereof generally by the ordinary reading public find substantial support in the decision of the Circuit Court of Appeals of the United States of the Ninth Circuit, written by Circuit Judge Haney and filed on February 23, 1937, in the case of Branch v. Cahill, 88 F.2d 545. The trial court in the Toomey case granted the defendant's motion for judgment on the pleadings; but on appeal the Supreme Court reversed the judgment. In doing so, it said in part: "It requires no argument to demonstrate that if an individual is held forth in a publication to be a person conniving at disobedience to law and to be a person believing it to be proper, by force, to appropriate the property of others, such publication would tend to expose such person to public hatred, contempt, ridicule, and obloquy, and tend to deprive him of public confidence and to injure him in his occupation * * * although the language may not charge the commission of any overt criminal act." [124 Okl. 167, 254 P. 738, 51 A.L.R. 1066.]

[6] Furthermore, it is well settled that if alleged defamatory words are reasonably calculated to induce readers thereof to believe that a person is guilty of a criminal offense and the words are false, they are sufficient to support an action for libel. 16 Cal.Jur. 49. Here, as will be seen, the alleged defamatory article goes further than stating that in "1936 and thereafter, [plaintiff] was an active member of the Communist Party, and known to Soviet circles as an 'observer', that is, a secret or 'underground' member". It states that during the past six years, which included the several months plaintiff occupied an official position in Alameda county, the Communists in that county "maintained strong-arm committees or 'Beef Squads', whose function was to compel obedience to the mandates of the Communist Party by force". It would seem, therefore, that it is the province of a jury to say whether the latter statement, reasonably construed in the light of the other portions of the article, might be understood as conveying the meaning that at some time during the period mentioned plaintiff was a party to activities amounting to criminal offenses.

In the second cited case, Washington Times Co. v. Murray, supra, the alleged defamatory article was similar to the one here involved in that it was there stated in effect and in part that the plaintiff was "linked" to the Soviet government as a "secret agent". Innuendoes based on those words were pleaded, and at the close of the testimony the defendant, Washington Times Co., moved for a directed verdict upon the ground that the publication was not susceptible of a libelous interpretation. The motion was denied and the jury returned a verdict in the plaintiff's favor. On appeal the judgment entered on said verdict was affirmed, the court saying in part [299 F. 906]: "The nature of the Soviet government of Russia, its proclaimed purposes and declared activities, beliefs, and teachings, as commonly understood in this country, are such that the article is clearly capable of being understood in a defamatory sense by the readers thereof, and it was the duty of the court to submit its meaning to the jury."

[7] The defendant relies largely upon the opinion written by a trial judge in ruling on a motion for dismissal in the case of Garriga v. Richfield, 174 Misc. 315, 20 N.Y.S.2d 544, 549, decided June 10, 1940; but it is apparent that for several reasons the opinion rendered therein cannot be accepted here as a controlling authority. There the action for libel was based on certain words embodied in one of the allegations of a complaint for slander theretofore filed by Richfield against Garriga, and which words were subsequently, on Garriga's motion, stricken from the complaint upon the ground that the allegation in which they were embodied was "irrelevant, redundant, repetitious, unnecessary, impertinent and scandalous". Upon the filing of the complaint for libel in Garriga v. Richfield, the latter moved for a dismissal upon the ground that inasmuch as the alleged defamatory matter upon which the action was based was embodied in a pleading, it was privileged. The motion was granted, but thereafter the court permitted the motion for dismissal to be reargued, at which time it was urged and the trial judge held that the alleged defamatory words were not libelous per se; and the judge then went on to hold that on account

of a technical rule of pleading prevailing in that state the effect of the innuendoes and extrinsic facts pleaded in the complaint in that action could not be considered because the plaintiff did not "aver special damages". In so holding the court said: "* * * where the words complained of are not in themselves libelous, and recourse is had to extrinsic facts to show their defamatory nature, the plaintiff must aver special damages in order to state a good cause of action. The plaintiff here has utterly failed to do so. Hence, his complaint must be dismissed. This conclusion makes it unnecessary to decide whether the innuendo ascribed by plaintiff to the publication in suit, attaches to its words a meaning of which they are not capable." The technical rule of pleading there invoked does not prevail in this state. Here, as already pointed out, innuendoes and extrinsic facts when necessarily pleaded, form an essential portion of the statement of a cause of action which must be considered in determining the legal sufficiency of the complaint.

[8] In further support of the trial court's ruling, defendant in the present case contends that "The complaint herein contains no averment that any of the statements in the quoted report are untrue, nor does it negative the verity of any of the remarks in said published report"; also that appellant "failed to include in his charge of falsity the assertion that he had been an active member of the communist party in 1936, or any reference to his communist activities. By not pleading that such statements were false plaintiff impliedly admitted them to be true." It will be noted, however, that in paragraph III of the complaint wherein the portion of the publication alleged to be defamatory is quoted, plaintiff alleges "That all of the quoted words aforementioned were, and now are, false and untrue, and did injure said plaintiff in his said occupation, in this: * * *" With respect thereto defendant argues that by adding the words "in this" plaintiff limited his accusation of the alleged falsity of the quoted words to the particulars specified by him in the language following the two added words. It is apparent, however, that if the added words did operate as a limitation of the allegation, such limitation affected only that clause relating to the injuries sustained by plaintiff by reason of the alleged false and untrue words. In any event, further on in paragraph III plaintiff specifically alleges, in broad and unlimited terms, "That said publication was false and defamatory, and was wilfully, falsely, scandalously and maliciously made by the defendant with knowledge of the said falsity and defamatory nature of the said publication, with the intent and purpose to injure plaintiff and plaintiff's reputation, to expose him to hatred, contempt, ridicule and obloquy and to cause him to be shunned and avoided * * *", etc.; and in view of such unqualified allegations it cannot be successfully maintained that plaintiff failed to allege that the words of the publication quoted in paragraph III were false.

[9] The first three of the grounds of special demurrer relate to the question of whether or not the alleged defamatory publication justified the construction or innuendo placed upon them by plaintiff. That question has already been disposed of; and since no argument has been presented in support of the fourth ground of special demurrer, it may be deemed abandoned.

The judgment is reversed with instructions to the trial court to overrule the demurrer.

PETERS, P. J., and WARD, J., concurred.



48 Cal.App.2d 180

PEOPLE v. MARVIN.

SAME v. LESH.

Cr. 3479.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1941.

Hearing Denied Dec. 29, 1941.

1. Criminal law ⇐1144(13)

In determining sufficiency of the evidence, reviewing court must assume in favor of the verdict the existence of every fact which jury could have reasonably deduced from the evidence.

2. Conspiracy ⇐47
Licenses ⇐42(4)

Evidence sustained conviction of violating and of conspiracy to violate the Corpo-

rate Securities Act and to commit grand theft. St.1917, p. 673, as amended.

3. Criminal law ⇐26

The substance and not mere form of transactions is the proper test of their real character, in order to prevent circumvention of statutes framed for the protection of the public.

4. Conspiracy ⇐44½, 45

In prosecution for conspiracy to violate Corporate Securities Act and to commit grand theft, evidence that accused met a parolee, who had been convicted of conspiracy to violate the act, at penitentiary, and drove such parolee to a city where parolee was to work for a corporation organized by accused, was properly admitted, where such parolee was named in information as a coconspirator, and hence it was incumbent upon prosecution to establish connection between parolee and accused in order to prove the fact of conspiracy. St. 1917, p. 673, as amended.

5. Conspiracy ⇐45

In prosecution for conspiracy to violate Corporate Securities Act and to commit grand theft, evidence as to transactions of a parolee who was named in information as a coconspirator was not inadmissible on ground that evidence related to parolee's independent transactions, since whether transactions of the parolee were independent or part of conspiracy was for jury. St. 1917, p. 673, as amended.

6. Criminal law ⇐339

In prosecution for conspiracy to violate Corporate Securities Act and to commit grand theft, permitting a witness to identify a person charged with coconspiracy as the man who by another name called on witness, from a photograph of such person of the type taken for police records, was not error, especially where it was not shown that a more acceptable photograph was available. St.1917, p. 673, as amended.

7. Criminal law ⇐808½

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, instruction in language of statute that whenever a person with intent to commit a crime does any act within California in execution or part execution of such intent, which culminates in commission of crime, within or without the state, such person is punishable in California in same manner as if it had been committed entirely within the state, was not erroneous, where several acts were committed in California which resulted in consummation of transactions in Utah. St.1917, p. 673, as amended; Pen.Code, § 778a.

8. Licenses ⇐18½

Documents, shares and participating interests in a corporation are "securities" within definition of security in Corporate Securities Act. Gen.Laws 1937, Act 3814, § 2, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

9. Criminal law ⇐766

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, where documents, shares and participating interests upon which the state relied for conviction were clearly securities within meaning of term "security" as defined in the act, trial court properly instructed jury that the documents involved constituted "securities" as matter of law. Gen.Laws 1937, Act 3814, § 2, subd. 7.

10. Criminal law ⇐815(4)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, an instruction that certain documents constituted securities within the act was not erroneous on ground that it omitted element of selling or issuing as a necessary requisite to a criminal act, since element of selling or issuing a security plays no part in statutory definition of a "security." Gen.Laws 1937, Act 3814, § 2, subd. 7.

11. Conspiracy ⇐48
Licenses ⇐42(5)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, instructions that it is unlawful knowingly to sell, offer for sale or take subscriptions without first applying for a permit, that the term "sale" or "sell" includes every disposition or attempt to dispose of a security or interest in a security for value, and includes a contract of sale, exchange and attempt to sell, an option of sale, a solicitation of sale, and subscription or an offer to sell, and that where no consideration is received security is not sold for value, fully covered question of necessity of selling or issuing securities as basis of conviction. Gen.Laws 1937, Act 3814, § 2, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale" and "Sell".

12. Conspiracy ⇐48
Licenses ⇐42(5)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, an instruction that good faith or advice of counsel affords no immunity to one accused of a violation of the act and is not a defense was proper, where shares involved were sold a considerable time after date for expiration of permit, and hence there could be no question of advice as to existence or nonexistence of a permit, and shares sold were not owned personally by accused. St.1917, p. 673, as amended.

13. Criminal law ⇐823(4)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, instruction that if, while permit for sale of securities was in effect, defendants made any sales of stock in violation of permit, they would be guilty of violation of act, was not erroneous on ground that permit was issued to corporation, and so long as corporation issued the stock in accordance with its terms there was no violation of law, where sales were not those of defendants' personal stock, and court also instructed that bona fide owner who transfers his stock need not obtain a permit. St.1917, p. 673, as amended.

14. Criminal law ⇐814(5)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, an instruction that a security issued contrary to terms of permit may be rendered valid by subsequent ratification of Commissioner of Corporations was properly refused, where the proposition, even if tenable, did not apply to the facts. St.1917, p. 673, as amended.

15. Criminal law ⇐829(3)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, requested instruction that after a security has been issued, whether pursuant to a permit in a state requiring a permit or without a permit, it becomes personal property and may be transferred by owner without obtaining of a subsequent permit was properly refused, where it constituted a mere repetition in other language of proposition that owner of stock may sell or give it away for his own benefit without necessity of obtaining a permit, upon which proposition jury was amply instructed. St.1917, p. 673, as amended.

16. Criminal law ⇐814(3)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, a requested instruction to effect that a conspiracy could be terminated was properly refused, where applied to evidence instruction could have served no purpose except to confuse the jury, in that evidence presented did not warrant such instruction. St.1917, p. 673, as amended.

17. Conspiracy ⇐48
Licenses ⇐42(5)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, whether the stock transferred was owned by defendants individually or by the corporation was for jury. St.1917, p. 673, as amended.

18. Criminal law ⇐814(3)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, failure to give requested instruction applicable to a case where facts showed that stock in escrow was personal property of an individual was not prejudicial error, even if proposed instruction correctly stated principle of law involved, where jury found that the stock was not the personal property of the defendants. St.1917, p. 673, as amended.

19. Conspiracy ⇐48

In prosecution for conspiracy to violate Corporate Securities Act and to commit grand theft, an instruction that if defendant had conspired only to violate the act or to commit grand theft defendant should be found not guilty was properly refused St.1917, p. 673, as amended.

20. Criminal law ⇐829(1)

An instruction that before considering conversations or acts of coconspirators jury must find that existence of a conspiracy has been proven beyond a reasonable doubt was properly refused, where substance of such request was covered by instructions given.

21. Criminal law ⇐427(5)

A conspiracy need not be established beyond reasonable doubt before evidence of acts and declarations of a coconspirator may be considered.

22. Criminal law ⇐829(1), 830

Requested instructions which were either covered in substance by instructions given or failed to state correctly the proposition of law involved were properly refused.

23. Criminal law ⇐656(3)

An assignment of misconduct of trial judge in prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft reflected no error, where assignment was based largely on remarks of judge made in apparent attempt to point out that certain testimony being elicited on behalf of defendants and certain documents sought to be introduced in their behalf were not necessary, and the judge merely revealed an effort to lessen, if possible, the amount of purely cumulative matter. St.1917, p. 673, as amended.

24. Criminal law ⇐730(14)

In prosecution for violating and for conspiracy to violate Corporate Securities Act and to commit grand theft, prosecuting attorney's reference to accused and a parolee who was also charged with conspiracy as "dear old pals," and remarking that it would be more appropriate to refer to them as "dear old cell mates," was not prejudicial, where reference to "cell mates" was stricken upon objection. St.1917, p. 673, as amended.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Harold Marvin and Lawrence J. Lesh were convicted of violating the Corporate Securities Act, and the first-named defendant was also convicted of conspiracy to violate the act and to commit grand theft, and they appeal.

Affirmed.

Eugene L. Wolver, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty. of Los Angeles County, and Jere J. Sullivan and H. L. Arterberry, Deputy Dist. Attys., all of Los Angeles, for respondent.

DORAN, Justice.

Appellants were prosecuted under separate informations charging violations of the Corporate Securities Act, St. 1917, p. 673, as amended, and a conspiracy to violate the same and to commit grand theft. With their consent, appellants were jointly tried and now appeal from the respective judgments of conviction severally rendered against them, and from the orders denying appellants' motions for a new trial. The information against appellant Marvin alone contained the count for conspiracy to violate the Corporate Securities Act and to commit grand theft. Appellant Marvin was convicted upon fourteen counts, including that of conspiracy; and appellant Lesh was convicted on three counts. Appellants contend that the evidence adduced at the trial is insufficient to sustain the convictions; that errors of law were committed at the trial, requiring a reversal of the judgments; and that misconduct of the court and the prosecutor prevented the appellants from having a fair and impartial trial.

Evidence adduced at the trial revealed the following: In July or August of 1937, appellant Marvin became the owner of a certain lease on property at Rozel Point, Box Elder County, Utah. Thereafter appellant Marvin negotiated with a Mr. Phil Dunn regarding rights in the said lease, and on January 1, 1938, entered into a formal agreement with Mr. Dunn, which recited that appellant Marvin was interested in forming "a legal and financial entity" for the purpose of developing the above-mentioned lease. The agreement provided that if the property, lease and all matters pertaining thereto were found satisfactory to Mr. Dunn, an "entity" would be formed with a capitalization tentatively agreed upon as $100,000; that 15% of the total should be vested in both appellant Marvin and Dunn "for the mutual and common use of both parties as outlined"; and that any sale of the 15% or any portion thereof should result in the moneys so obtained being used in starting and carrying on a deep test oil well; "and should a plan develop wherein this money be returned from the above purpose it shall then be at the disposal of both parties as they mutually see fit". The remaining 85% was to be divided as follows: 60% to Marvin and his associates, M. R. Yant and Lee Lawhon, the remaining 25% to go to Dunn. In consideration of the premises Dunn agreed to place $5,000 at the disposal of the "entity" to be used by the "entity" for the purpose of developing the lease. Dunn's interest was thereafter increased to 40%. Under date of January 19, 1938, Marvin and Dunn entered into a formal agreement between them, denominated "sublease and trust agreement", which recited Dunn's obligation to expend $5,000 in prospecting upon and developing the lands in question, the said sum to be deposited in a Salt Lake City, Utah, bank

to the account of "Phil T. Dunn, Trustee". The agreement provided that Dunn's interest in all net profits was to be 40%, and that of Marvin was to be 60%; and that both parties should have the right to assign any or all of their said respective interests. The agreement also stated that it was made for the purpose of starting the the development on the land in question and that it was contemplated that a corporation should be formed to assume the responsibilities of the lessee and trustee. In the agreement Dunn was named as trustee and Marvin as lessee. On January 20, 1938, there was formed a Utah corporation known as the Globe Development Corporation; and sales of the shares of this corporation form the basis of most of the charges in the informations filed against appellants. On August 20, 1938, a permit to sell the shares of this corporation was issued by the Commissioner of Corporations of the State of California, authorizing the issuance of such stock until August 21, 1939. After the issuance of said stock and as a result of a hearing held thereon, a notice of the suspension of said permit was mailed on February 9, 1939, and a notice of the revocation of said permit was mailed on March 3, 1939. There is some question as to whether appellants received such notices. However, appellants were acquitted of the charges of selling stock without a permit after such notices were sent and before August 21, 1939, and the question of the notices is not material, insofar as the charges here considered are concerned.

L. E. Marchand, one of the witnesses, was an elderly man, age 83, and a friend of Dunn's. He testified that he was acquainted with both appellants Marvin and Lesh and knew one Milfred R. Yant, Marvin's associate. He first met Marvin at the apartment house where Marchand lived in Long Beach, California. This was in January, 1938. Yant was with Marvin at the time and the meeting appears to have been arranged through Dunn, who had previously interested Marchand in the Utah venture. Marchand paid appellant Marvin $1,000 at the time of the meeting, which appears to have been on or about January 19, 1938. At a subsequent meeting in Long Beach between Marvin, Yant and Marchand, Marchand paid Yant $500, and later, about February 23, 1938, he paid Marvin another $1,000. At the time of this last payment Marvin gave Marchand a receipt for $2,500, reciting that the payment was for a 20% interest in Marvin's right and title to maltha production from the lease above mentioned in Box Elder County, Utah. Maltha is a substance apparently similar to asphalt. The receipt also stated: "It is proposed that a corporation is to be formed and that he (Marchand) will hold 20 per cent of same." The receipt was signed by Marvin. Subsequently, Marchand at various times paid various amounts to Marvin at Marvin's instance and request; $40 in payment of the taxes on 20,000 shares of stock of the corporation to be issued to Marchand, $1,000 as a loan to the Globe Development Corporation, $500 apparently for a similar loan, another $1,000 for a like loan, $200 to apply in payment for a Delco plant for lights on the lease. Later, in August, 1940, Yant and Marvin came to see Marchand in Long Beach to ask for money, stating that it was needed to purchase a new boiler, and in response thereto Marchand gave them his 2% interest in certain stock of a corporation known as Los Angeles Basin Drilling Company, for which Marvin and Yant allowed him $800, and gave him a note executed by Marvin as president of the Globe Development Corporation. The note had not been paid at the time of the trial.

Another witness, Nora S. McCullough, had received 450 shares of Globe Development Corporation stock in 1938, but appellant Marvin was acquitted of the charge as to violation of the Corporate Securities Act relating to this transaction. However, in or about September, 1939, Miss McCullough transferred to Marvin an Iowa farm, of which she was the owner, for the purpose of Marvin's obtaining an increased loan on the farm for her. Marvin obtained an increased loan on the farm and Miss McCullough received 2,150 shares of Globe Development Corporation stock for the increased amount of the loan. It should be noted that appellant Lesh appears in the above deal through certain correspondence written to Miss McCullough by him, which showed his connection with and interest in the matter.

About September 20, 1939, Marvin solicited one Mrs. K. Marie Bergez to purchase 500 shares of stock in the above-mentioned corporation. She purchased the same with a down payment of $100, the balance to be paid out of dividends. Shortly prior to this purchase Marvin had obtained from Mrs. Bergez the sum of

$350 as a loan and had given her his post-dated check for $425. This check was never paid. About September 5, 1940, a Mr. Lehr or Lear, whom Mrs. Bergez identified at the trial as Milfred R. Yant, called on her and stated that he desired to purchase her Globe Development stock for $1,250. At the time, Mrs. Bergez owned 1,000 shares thereof. Mrs. Bergez told him that she had not received the certificate for the last 500 shares, which she had not fully paid for. "Lear" offered to obtain it for her, stating that it would cost $175 to obtain the same. "Lear" later returned with the stock certificate dated September 20, 1939, for 500 shares. The certificate was signed by Marvin as president, with the purported signature of Lesh as secretary. At this time "Lear" gave Mrs. Bergez a receipt for $178.50, the total amount paid to him on delivery of the certificate for 500 shares above mentioned, and on the bottom of this receipt was the notation, "Must pick up check of H. Marvin for $350". "Lear" also gave Mrs. Bergez a written offer to purchase 1,000 shares of Globe Development Corporation stock at $125 per share, signed "Potts, Potts and Dink, by L. Lear". Mr. Lear never returned.

The witness Mrs. Anna Kuhn testified that she lived with her daughter, Mrs. Erna M. Swyers, at the time she met appellant Marvin, about November 10, 1938, and that she purchased from Marvin 300 shares of the Globe Development Corporation stock, paying therefor 20,214 shares of American Metal stock, which she and her daughter informed appellant Marvin was worth a penny and a half a share. It should be noted that the permit issued by the corporation commissioner provided that the stock of the Globe Development Corporation was to be sold at par for cash, or for not less than 25% in cash. Par value of the stock is given as $1 per share. After that, Mrs. Kuhn and her daughter made an additional investment, Mrs. Kuhn purchasing 600 shares at $300 and her daughter 400 shares at $200, being at the rate of 50¢ a share.

A witness, James Carrier, testified that on or about January 13, 1940, in Los Angeles, California, he had purchased from Marvin 1000 shares of Globe Development stock for $750; and that subsequently, about February 28, 1940, he had likewise purchased an additional 1,500 shares for $750. Pursuant to a subsequent deal, the details of which need not here be set forth, appellant Marvin offered Carrier 20,000 shares of Globe Development stock, which shares were delivered to Carrier by appellant Lesh in December, 1940.

Minnie A. Porter, another witness, testified that she first met Marvin about December 29, 1939, at which time she purchased from him 500 shares of Globe Development Corporation stock for $350, giving a check therefor payable to Marvin. She placed the certificate with Marvin for resale and on January 18, 1940, Marvin returned and gave her $500. At that time Marvin said that the stock would sell for more and wanted Miss Porter to take 2,000 shares, which she did, paying therefor the $500 above mentioned and a check for $937.50. Marvin called at Miss Porter's home a number of times when there was no business transacted. Then on April 25, 1940, Miss Porter exchanged her 2,000 shares of stock for a half interest in a 1/24th overriding royalty in the Globe Development Corporation. Marvin held the other half interest in the royalty. In addition to her shares of stock, Miss Porter also paid about $1,875 for the royalty interest. Later, about June 24, 1940, Marvin had a conversation with Miss Porter about a refinery that was to be built on the Globe Development Corporation property. Marvin said money was needed to build this refinery and Miss Porter agreed to advance money on the project. She appears to have advanced $3,000 therefor, for which Marvin gave her a post-dated check for $3,000. Marvin told Miss Porter that he was giving her a present of the $3,000 interest in the refinery. At the request of either Lesh or Marvin, Miss Porter held the $3,000 check and accepted in lieu thereof a check for $1,000 to be paid immediately and a $2,000 check to be paid later. After two attempts to collect the proceeds of the $1,000 check, Miss Porter received a telegram from Lesh stating that she would get her money. She then took the check to her bank and it was paid. The $2,000 check was never paid.

It was also established that in November, 1939, Marvin sold one A. J. Burley 1,000 shares of stock of the Globe Development Corporation. The persons involved in the above related transactions all appear to have been residents of Los Angeles county, California, at the time, and the various negotiations and sales appear to have been entered into in that county.

In addition to the above, it should be stated that the document which evidenced the title of Miss Porter and Marvin in the 1/24th overriding royalty was executed by Marvin as president and Lesh as secretary of the Globe Development Corporation. In connection with the Burley transaction above mentioned, Mr. Burley received his certificate for the stock enclosed with the following letter on the letterhead of the Globe Development Corporation:

"Box 543, Brigham City, Utah,
"January 8, 1940.
"A. J. Burley, 335 Raymond Avenue,
"Glendale, Calif.
"Dear Mr. Burley:

"We are enclosing Certificates No. A83 and A84 for one hundred twenty-five and one thousand shares respectively. We regret the delay in forwarding these certificates which has been due to confusion during the holidays from which we are gradually getting untangled and the fact that I have been out of town.

"Mr. Marvin has requested me to further advise you that he has sold the 500 shares and asks you to endorse the 1000-share certificate and return. He will then send you a new certificate and the $500.

"We trust that this will meet with your approval and I hope that the delay upon my part has not caused you an inconvenience for which you will not forgive me.

"Very truly yours,
"L. J. Lesh,
"Secretary-Treasurer."

In December of 1940, Lesh called at Mr. Burley's home and delivered the new stock certificate in exchange for that enclosed in the above-quoted letter, and at that time stated that they were going to declare a dividend about the 31st of December. Burley never received such a dividend, though he appears to have received a dividend at an earlier date. Lesh also told Burley that the stock was becoming more valuable all the time and offered to sell Burley 1,000 more shares for $750. It appears that prior to this visit by Lesh, on the same day Burley received over the phone what purported to be a telegraph message from a party in San Francisco offering to purchase Burley's stock for $1.25 a share and inquiring how many shares Burley held. Mr. Burley never received a written telegram confirming the phone message, nor was he ever able to locate such a telegram.

Appellant Marvin contends that the sales of stock in which he was involved were sales of his own stock, not that of the corporation, that the sale of the interest to Marchand was a sale of Dunn's interest in the undertaking and not that of Marvin. Appellant Marvin disputes the sufficiency of the evidence as to any conspiracy and as to any attempt to commit grand theft. Evidence was offered at the trial to show that Marvin had paid cash for shares of the corporate stock. Appellant Lesh contends that there was no evidence to show his implication in the charges of which he was found guilty. All such contentions serve merely to raise questions of facts, all of which appear to have been decided by the jury adversely to appellants.

[1, 2] "The rule, upon an appeal in a criminal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt." People v. Hennessey, 201 Cal. 568, 571, 258 P. 49, 50. The summary of the evidence given above alone reveals sufficient facts to sustain the verdicts rendered, without taking into consideration other pertinent evidence adduced at the trial but not here discussed.

In passing, it should be noted that the trend of events in the instant case is in many respects similar to that in People v. Yant, June, 1938, 26 Cal.App.2d 725, 80 P.2d 506. The defendant in that case was convicted of conspiring to violate the Corporate Securities Act and to commit grand theft, and of violation of the act in question, all concerning certain transactions in connection with oil lands near Newhall, California. It would appear that the Milfred R. Yant, the defendant in that case, was the same Milfred R. Yant concerned with certain of the transactions in the instant case. This is revealed by the testimony of appellant Marvin on cross-examination wherein he admitted that he, Marvin, was a salesman for Yant at Newhall; and that when Yant was released on parole from San Quentin, Marvin drove Yant to Salt Lake City. Marvin also admitted under cross-examination that Yant had been paroled to appellant Lesh for the purpose of working for the Globe Development Corporation.

[3] Regarding the contentions of appellants herein, it is pertinent to quote the fo[1]

lowing from the decision in the Yant case, affirming Yant's conviction, (26 Cal.App.2d 736, 80 P.2d 506, 511): "It should be and is an established principle of law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true, it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public."

[4, 5] Appellants contend that it was error to admit evidence of the history of Milfred R. Yant and evidence as to Yant's independent transactions. They object particularly to the introduction of the evidence above referred to, elicited from Marvin under cross-examination; also to having permitted the witness Mrs. Bergez to identify Yant as the man "Lear", who called on her, from a photograph of Yant of the type taken for police records. As to permitting the prosecution to elicit from Marvin the fact that Marvin met Yant at San Quentin, upon Yant's release on parole, and drove Yant to Salt Lake City in order for Yant to work for the Globe Development Corporation, it should be borne in mind that Yant was named in the information against Marvin as a co-conspirator of Marvin. It was incumbent upon the prosecution, therefore, to establish the connection between Yant and Marvin in order to prove the fact of conspiracy. "Accordingly, it is competent for the prosecution to prove all the circumstances bearing in any way upon the fact of conspiracy, or upon the acts done in pursuance thereof. This proof may cover a very extensive and varied field of inquiry, and include evidence of collateral facts in which the defendant bore a principal part." 8 Cal.Jur. 121. See People v. Yeager, 194 Cal. 452, 229 P. 40, holding that previous felonious acts on the day in question were admissible in proof of a conspiracy; and People v. Tinnin, 136 Cal.App. 301, 28 P.2d 951, 959, wherein it was held that in view of the claim of conspiracy, the trial court did not err in admitting in evidence, for the purpose of showing a close relationship between defendant and a co-defendant, a portion of the transcript of defendant's preliminary examination on a robbery charge, from which it appeared that the co-defendant acted as his attorney, and a portion of the transcript of testimony at another trial, from which it appeared that said co-defendant appeared as an alibi witness for defendant, and a "ticket of leave" granted defendant when he was released from prison on parole. A hearing was denied by the Supreme Court in People v. Tinnin, supra. Appellants speak of Yant's "independent" transactions; but whether the transactions of Yant brought into evidence were independent transactions or part of a conspiracy was a question of fact for the jury. Evidence of such transactions, therefore, was properly introduced and submitted to the jury.

[6] As pointed out by respondent, under the circumstances, it does not appear that the prosecution was required to produce a more respectable photograph of Yant. In fact, it is not shown that a more acceptable photograph was available. Appellants cite People v. Covington, 121 Cal. App. 61, 8 P.2d 490, in support of their contention in this respect. There the attempt of the prosecutor to have a witness identify the defendant from a "Rogue's Gallery" picture was held misconduct, though not prejudicial. The distinction between that situation and the one in the case at bar is clear. There could be no necessity to identify the defendant in a criminal case from a photograph. The defendant is present in the courtroom. The purpose of the production of such a photograph under such circumstances could only be that of casting an unfavorable light upon the defendant. Appellants have cited no authority holding that identification of any other person may not be made from a photograph such as that produced in the instant case, and no authority to that effect has been found.

In support of their contentions above noted appellants rely strongly upon People v. Gilliland, 39 Cal.App.2d 250, 103 P.2d 179, a case involving a prosecution for conspiracy to violate and for violation of the Corporate Securities Act, decided by this court in May, 1940. The Gilliland case is in no way applicable to the facts of the case at bar. In People v. Gilliland, evidence had been improperly admitted of an asserted attempt of a co-defendant to induce a witness to give false testimony; certain other evidence in the nature of hearsay had also been admitted, as well as much other irrelevant testimony. The evidence there admitted could have no possible bearing upon proof of the fact of conspiracy, and was highly improper under any circumstances.

[7] Appellants complain that it was error for the trial court to instruct the jury in the language of section 778a of the

Penal Code that whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state. Appellants contend that the instruction misled the jury "since several acts were committed in California, which resulted in the consummation of transactions in Utah". That being the case, appellants by their argument concede the applicability of such an instruction to the facts presented, and the instruction in question was essential to a proper consideration of the facts.

[8-11] Appellants contend that the court erred in instructing the jury that the documents referred to as securities in certain of the overt acts of the count on conspiracy and in the other counts of both informations were securities. A security is defined in the Corporate Securities Act as follows (sec. 2, sub. 7, Act 3814, Deering's Gen.Laws): "The word 'security' shall include any stock, bond, note, treasury stock, debenture, evidence of indebtedness, certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining title or lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings, guarantee of a security and any certificate of deposit for a security." There can be no question that the documents, shares and participating interests covered by the above-mentioned instruction came within the definition of a security contained in the Corporate Securities Act. It was therefore within the province of the trial court to instruct the jury that the documents referred to constituted securities as a matter of law. People v. McCalla, 63 Cal.App. 783, 220 P. 436; People v. Dutton, 41 Cal.App.2d 866, 107 P.2d 937. In this connection, appellants complain that the above-mentioned instruction as to certain documents being securities omitted "the element of selling or issuing as a necessary requisite to a criminal act". The element of selling or issuing a security plays no part in the statutory definition of a security. As to the necessity of finding that the defendants sold or issued securities in order to find them guilty of violating the Corporate Securities Act, it should be noted that the trial court gave the following instructions:

"It is unlawful for any company or any individual to knowingly sell, offer for sale, or take subscriptions for any security of the company's or of his own issue until such individual or such company shall have first applied for and secured from the Commissioner of Corporations, a permit authorizing such sale or subscription."

"You are instructed that the term 'sale' or 'sell' as used in the Corporate Securities Act shall include every disposition or attempt to dispose of a security or interest in a security for value and shall include a contract of sale and exchange and attempt to sell, an option of sale, a solicitation of a sale, subscription or an offer to sell."

"You are instructed that where a corporate security is delivered to a person who pays therefor no consideration, nor does the person delivering or transferring the same to him or her receive any consideration for such delivery or transfer, such security is not sold or issued for value."

The above-quoted instructions, together with other instructions given, indicate that the question of the necessity of selling or issuing securities was fully and fairly covered by the trial court in its instructions to the jury.

[12] The trial court instructed the jury that good faith or advice of counsel affords no immunity to one accused of a violation of the Corporate Securities Act and is not a defense. While appellants concede that such an instruction would be proper upon an issue of whether a permit to issue a security were necessary, and advice of counsel were relied on in this regard (People v. McCalla, 63 Cal.App. 783, 220 P. 436), yet it is the contention of appellants that the instant case is one within the rule of People v. Flumerfelt, 35 Cal. App.2d 495, 96 P.2d 190, and that the situation in the instant case is the same as that in Russell v. Ruffcorn, 132 Cal. App. 215, 22 P.2d 597, 23 P.2d 1014. People v. Flumerfelt, supra, was concerned with the factual existence or nonexistence of a permit and advice of counsel as to such existence. Appellants here argue that the instruction complained of was inapplicable principally because of the situation

governing the issuance of the 20,000 shares of stock to James Carrier, as alleged in overt act 21 of count I in the information against Marvin. Marvin testified that these 20,000 shares represented 20,000 shares of stock that Marvin put up in escrow in California in accordance with the requirements set forth in the permit of the Corporation Commissioner. The appellants therefore argue that this particular stock was Marvin's personal stock; and that after the revocation of the permit to sell stock the impounded shares belonging to Marvin were ipso facto released from the terms of the escrow and Marvin was thereafter free to sell the same as his own stock, and that he was so advised by a Utah attorney. This argument is based upon the case of Russell v. Ruffcorn, supra, which appears to have held that personal shares of stock so impounded were released from escrow upon the revocation of a permit to sell corporate securities under which the personal shares were placed in escrow. However, in the case at bar the 20,000 shares in question were sold to Carrier a considerable time after the date for the expiration of the California permit. There can therefore be no question of advice as to the existence or non-existence of a permit, since under the circumstances here presented appellants must have known that the permit to sell shares had in any event expired at the time they consummated the transaction regarding the said 20,000 shares. People v. Flumerfelt, therefore, is not applicable. As to Russell v. Ruffcorn, supra, the court in that case expressly found that the shares of stock there sold were the personal property of the individuals concerned. In the case at bar, however, it would appear from the verdicts returned by the jury that the jury had found otherwise with respect to the shares claimed to have been owned personally by Marvin. Hence, the rule in Russell v. Ruffcorn is also inapplicable; and the instruction here given with respect to advice of counsel would appear properly applicable to the facts of the instant case, in accordance with the rule enunciated in People v. McCalla, supra.

[13] Appellants complain of an instruction to the effect that "if, while said permit was in full force and effect, the defendants made any sales of stock contrary to or in violation of the provisions of said permit then and in that event he or they would be guilty of a violation of the Corporate Securities Act the same as if no permit had been granted". Appellants argue that the permit was issued to the corporation and it was not what Marvin received on the sale of the stock but what the corporation received that determined whether or not the permit was violated, and as long as the corporation issued the stock in accordance with the terms given it there was no violation of law. Such argument assumes that the evidence uncontrovertibly showed that the corporation had received par value for the shares issued and that the sales here in question were those of defendants' own personal stock. It has already been pointed out that the jury in arriving at its verdicts presumably found the opposite to be true. In this connection, reference should here be made again to the quotation from People v. Yant, above given. It should also be pointed out that the jury could not have been misled by the instruction here complained of, since the court also instructed the jury that the bona fide owner of stock who sells his stock for his personal benefit or who gives away his stock is not subject to the provisions of the Corporate Securities Act, and may sell or give away his stock without the necessity of obtaining a permit from the commissioner of corporations.

[14-16] Appellants also contend that the court's failure to give certain requested instructions was prejudicial to the respective appellants. One such instance is the refusal to instruct generally that a security issued contrary to the terms of the permit may be rendered valid by the subsequent ratification of the commissioner of corporations. There is no merit to the contention. Even were such a proposition tenable it would not apply to the facts of the instant case. People v. Ferguson, 134 Cal.App. 41, 24 P.2d 965, cited by appellants, affords them no support in the matter. Appellants' requested instruction that "after a corporate security has been legally issued, whether the same be pursuant to a permit in a state or states requiring a permit * * *, or without a permit if no permit be required * * *, the same becomes personal property, and may be transferred by the owner thereof without the obtaining of a subsequent permit * * *", constitutes a mere repetition in other language of the proposition that the owner of stock may sell or give it away for his own personal benefit without the necessity of ob-

taining a permit. The jury was amply instructed upon this proposition, as already noted. It is obvious that when a corporate security has been legally issued the same becomes personal property, and any further instruction to that effect would be superfluous. Appellants' requested instruction to the effect that a conspiracy could be terminated was properly refused. As applied to the evidence submitted to the jury, the instruction in the form requested could have served no purpose except that of confusing and misleading the jurors. The evidence presented did not warrant any such instruction as that requested.

[17, 18] Appellants requested an instruction upon the situation as presented in Russell v. Ruffcorn, supra, discussed above. Such an instruction as that requested could only be applied where the facts showed that stock in escrow was the personal property of an individual. The ownership of the stock here in question was a fact to be determined by the jury, and the jury does not appear to have decided the question in appellants' favor. Under the circumstances, failure to give the requested instruction could not be held prejudicial error, even assuming that the proposed instruction correctly stated the principle of law involved.

[19] Appellants' request that the jury be instructed that it was necessary to find the existence of a conspiracy both to violate the Corporate Securities Act and to commit grand theft in order to find appellant Marvin guilty of the charge of conspiracy, contained in the first count against him, was properly refused. The proposed instruction went on to state that if the jury found that Marvin had conspired only to violate the Corporate Securities Act or to commit grand theft, Marvin should be found not guilty of the charge. Appellants' contention with regard to the refusal of their requested instruction is fully answered in People v. Yant, supra, 26 Cal. App.2d at page 729 et seq., 80 P.2d 506.

[20, 21] Appellants complain of the refusal of the court to give a requested instruction to the effect that in regard to the charge of conspiracy certain conversations of and acts of alleged co-conspirators, including letters and instruments written by such co-conspirators were allowed to be introduced into evidence and that the introduction of such conversations or acts must not be considered by the jury in determining whether a conspiracy in fact existed; that before considering such conversations or acts of co-conspirators, the jury must find that the existence of a conspiracy has been proven beyond a reasonable doubt. The substance of this request was covered by an instruction given at the request of defendants, as follows: "You are instructed that acts and declarations of an alleged co-conspirator made during the period of a conspiracy and in furtherance thereof, are admissible against other co-conspirators only if other evidence warrants the finding beyond a reasonable doubt that a conspiracy actually existed. The acts and declarations of an alleged co-conspirator, however, are not binding upon any other alleged co-conspirator unless and until, independent of such declarations and acts a conspiracy has been shown beyond a reasonable doubt to exist and in no case may such declarations be received as proof of the conspiracy." The instruction quoted, together with others given, amply covered the matter contained in the requested instruction annd there is no basis for appellants' complaint with respect to the refusal of the court to give the particular instruction requested. Indeed, the instructions given went further than the rule requires, for proof beyond a reasonable doubt, before evidence of the acts and declarations of a co-conspirator may be considered, is not required.

[22] Other requested instructions, refusal of which by the court is cited as error, were either covered in substance by instructions given or failed to state correctly the proposition of law involved.

[23] Appellants' assignment of misconduct on the part of the trial judge is without merit. Such assignment is based largely on remarks of the trial judge made in an apparent attempt to point out that certain testimony being elicited on behalf of the defendants and certain documents sought to be introduced in evidence in their behalf were not necessary. The court does not appear to have overstepped the bounds of its discretion in the remarks made. The record merely reveals an effort on the part of the court to lessen, if possible, the amount of purely cumulative matter, where the same appeared to the court unnecessary to the defense. In one instance, on request by defendants' counsel, the court ordered its remarks stricken. In that instance the court had referred to a certain payment as a dividend. The implications appellants seek to attach to many of the court's re-

marks are not readily apparent from a reading of the record and would require a strained construction to be placed on the remarks in question. In any event, it cannot be said that the defendants were prejudiced by the court's action in this regard.

[24] As to misconduct on the part of the prosecutor, if some of the conduct and remarks of the prosecutor might be viewed as overzealous, in no instance could it be said to have resulted in prejudice. When the prosecuting attorney spoke of Marvin and Yant as "dear old pals" and remarked that it would be more appropriate to refer to them as "dear old cell mates", his reference to cell mates was stricken upon objection.

For the foregoing reasons the judgments and orders are affirmed.

YORK, P. J., and WHITE, J., concurred.



BECHTEL v. AXELROD et al.* (AXELROD, Intervener).

Civ. 11853.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

Hearing Granted Jan. 27, 1942.

1. Appeal and error ⇐907(3)

Where appeal was on the judgment roll alone, the District Court of Appeal was required to assume that the evidence fully supported the findings.

2. Parties ⇐40(2)

In order to entitle one to intervene on ground that he has an "interest in the matter in litigation", the interest must be of such a direct and immediate character that the person will either gain or lose by the direct legal operation and effect of the judgment, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in the Matter in Litigation".

3. Appeal and error ⇐907(3)

Where trial court found that defendant's wife who intervened in action against defendant and sought declaration that community property was not subject to defendant's obligation, offered no evidence to prove that she and the defendant owned any community property, and found that she had no interest in the proceeding, and reviewing court was bound to assume that evidence supported findings because appeal was on judgment roll, whether the community property was liable for separate debts of the husband was a "moot question" which reviewing court would not determine. Code Civ.Proc. § 387.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

4. Husband and wife ⇐268(5)

Community property of husband and wife would be liable for the husband's private indebtedness, such as a deficiency on note after foreclosure of trust deed.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by H. H. Bechtel against Albert A. Axelrod and others for deficiency judgment on promissory note after foreclosure of trust deed, wherein Lucille Axelrod intervened. From an adverse judgment, intervener appeals.

Affirmed.

Eugene H. O'Donnell, Julien R. Bauer, and Albert A. Axelrod, all of San Francisco, for appellant.

C. H. White and Keyes & Erskine, all of San Francisco (Leslie L. Roos, of San Francisco, of counsel), for respondent.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, amici curiæ for California Bankers Ass'n.

NOURSE, Presiding Judge.

Plaintiff sued to recover a deficiency judgment upon a promissory note after the foreclosure of a deed of trust. The defendant Axelrod had executed the note as an accommodation maker for the benefit of defendant Rosenthal. The wife of the maker intervened seeking a declaration that their community property could not be subjected to payment of the obligation since it had

* Subsequent opinion 125 P.2d 836.

been incurred by her husband solely as an accommodation maker and without her knowledge and consent. The trial court found that no evidence was offered as to whether the intervener and her husband own or owned any community property, and that no evidence was offered as to whether the plaintiff intended or threatened to execute upon any community property to satisfy the judgment. For these reasons the trial court found that the intervener had no interest in the proceedings.

[1, 2] The appeal is taken by the intervener upon the judgment roll. Under these circumstances we must assume that the evidence fully supports the findings. If the parties do not own any community property the question whether community property is subject to the payment of the debts of the husband is purely academic. Under section 387 of the Code of Civil Procedure an intervener must have "an interest in the matter in litigation, or in the success of either of the parties, or an interest against both". The interest in the matter in litigation, says the Supreme Court in La Mesa, etc., Irr. Dist. v. Halley, 195 Cal. 739, 741, 235 P. 999, 1000, "must be of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Elliott v. Superior Court, 168 Cal. [727], 734, 145 P. 101. The interest must be direct and not consequential, and must be such an interest as is proper to be determined in the proceeding in which the intervention is sought."

[3] The finding of the trial court that the intervener had no interest in the proceedings follows the finding that she offered no evidence to prove an interest and conforms to the complaint in intervention which fails to plead an interest. The question then whether community property is liable for the separate debts of the husband becomes merely an abstract question of law and the appellant has failed to show any error in the proceedings justifying a reversal of the judgment. 2 Cal.Jur., p. 125.

[4] If this view should be deemed to be too technical there is another reason why the judgment should be affirmed—the complaint fails to state a cause for intervention because the community property is liable for such private debts of the husband. This was the ruling in Grolemund v. Cafferata et al., 17 Cal.2d 679, 688, 111 P.2d 641, 645, in a decision entered after the briefs in this case were filed. In that case the question presented was whether community property was liable for satisfaction of a judgment against the husband alone for his individual tort. In holding that it was liable the court said: "A complete reading of all our code sections on community property clearly demonstrates that our community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property (with the single exception of the wife's earnings, which are exempted from certain types of debt, Civ.Code, sec. 168)", and again (17 Cal.2d at page 689, 111 P.2d at page 646), "Since it is our opinion that the enactment of section 161a of the Civil Code, defining the interests of the spouses in community property, has not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control, all community property, whether acquired prior to or subsequent to July 29, 1927 (the effective date of this statute), is liable for satisfaction of the husband's debts."

Whether the question is moot for failure to prove a triable issue, or whether it has been properly raised is immaterial, since under either view the intervener cannot prevail.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

48 Cal.App.2d 150

BALIAN et al. v. BALIAN'S MARKET et al.

Civ. 12701.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1941.

1. Appeal and error ⇐854(5)

On appeal a nonsuit will be sustained if it can be justified on any ground, whether or not such ground is stated in motion or in the ruling.

2. Trusts ⇐30½(2)

An alleged oral agreement between a father and his sons, only one of whom was of age when agreement was made, that earnings of family should be placed in a common fund and title to property acquired by family should be taken in the father's name and the property distributed to his children in equal shares upon the father's death, was too indefinite to justify impressing a "trust" upon property standing in names of father and one son, especially where agreement contained no provisions as to manner in which father was to handle property acquired nor restrictions upon his disposing of it during his lifetime.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

3. Trusts ⇐21(2)

An "express trust" must be reasonably certain in its material terms, and this requisite of certainty includes the subject matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and manner in which the trust is to be performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust".

4. Trusts ⇐1

A trust res or subject matter is an indispensable condition to the creation of a "trust".

5. Trusts ⇐1

In order for a trust to exist, there must be an estate to vest in trustee, and trust property must be clearly and definitely pointed out.

6. Trial ⇐142

A nonsuit should only be granted when, accepting the full force of the evidence adduced, with every reasonable inference favorable to plaintiff which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes plaintiff from recovering a judgment under such circumstances.

7. Trial ⇐165

Rules which are to be applied to motions for nonsuit do not require courts to put themselves in incongruous positions in order to hold a case in court, and courts will not give a strained construction to language or conduct, or distort the orderly laws of sequences or logic of a situation to force an unnatural result.

8. Trusts ⇐44(1)

In suit to impress a trust upon real and personal property standing in names of plaintiffs' father and brother based upon an alleged oral agreement between the father and plaintiffs, evidence was without sufficient substantiality as matter of law to make out a prima facie case either as to terms of alleged trust or existence of a res upon which trust could operate.

9. Appeal and error ⇐110

An order denying a new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Suit by Habib Balian and others against Balian's Market and others to impress a trust upon real and personal property. From a judgment of nonsuit and orders dissolving restraining orders, plaintiffs appeal.

Appeals from orders dismissed and judgment affirmed.

Frank J. McCarthy, Elizabeth R. Hensel, and Lee D. Mathews, all of Los Angeles, for appellants.

Elbert E. Hensley, of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is an action by three brothers, Habib, Jacob and Kameel, to impress a trust upon certain real and personal property standing in the names of their father,

Alexander, and another brother, Samuel, based upon an alleged oral agreement made in 1912 between the father and the plaintiffs Habib and Jacob. The claim is made in face of the fact that in August, 1935, the father, the plaintiff brothers Jacob and Habib and another brother, the defendant Joseph, had executed separate declarations of trust showing for whom they held title to certain properties, which properties embraced all the properties here involved.

In a declaration of trust executed by the father and mother, as trustors, of which the father was the trustee, he declared he held the properties in trust for himself, his wife and his nine children. This particular declaration of trust embraced all the properties here involved except the following:

(A) 36⅔ shares of stock (out of 85 shares of stock issued and outstanding) in Balian's Market, which were held as follows:

12⅓ shares by the Jacob Balian Trust;
12⅓ shares by the Habib Balian Trust; and
12⅓ shares by the Joseph Balian Trust.

(B) Four shares of stock (out of 12 shares issued and outstanding) in the Balian Ice Cream Company, Inc., were held by the Joseph Balian Trust, and two shares, which at the time were issued in blank, were held for plaintiff Habib.

At the time of the alleged oral agreement in 1912 there was no property which could be subject to the operation of the purported trust agreement, save the sum of $160 cash, the property of the father, which was shortly thereafter used for current expenses of the father's family. Over proper objection the trial court received testimony, not only as to the terms of the alleged oral agreement made in 1912, but that the plaintiffs had, in accordance with the terms of that agreement, turned over to their father in large part their earnings and the properties which they acquired throughout the years.

The terms of the agreement of 1912, as testified to by the plaintiffs, are as follows: That it was agreed between the father and the plaintiffs Habib and Jacob, who participated in the conversation, that all earnings of all the members of the Balian family should be placed in a common fund; that the title to all property acquired by the members of the family, individually or collectively, should be taken in the name of the father, or, if not thus taken, that it should nevertheless be held by the member acquiring it for the benefit of the family as a whole; that upon the death of the father the property was to be distributed to his children in equal shares; that any member of the family might elect, at any time, not to be bound by the terms of the agreement, in which event he was to receive his share of the property acquired up to that time; that the members of the family should have the right to declare the agreement inoperative as to any member of the family, and, if this were done, that the share in the common property of such member should be distributed and paid over to him.

Upon the trial, and as a part of the cross-examination of the plaintiffs, there were introduced three written declarations of trust, one being that of the father, another that of the plaintiff Jacob, and the third that of the defendant brother, Samuel. It appears that in addition to these three declarations of trust six other written declarations were executed by the other members of the family, and that these likewise were made at about the same time in August, 1935. However, none of these six declarations was offered in evidence, but there was testimony sufficiently identifying them as having been made. It is likewise clear from the evidence that all nine written declarations were drafted in the law offices of one Hamilton, whose name and address is printed on the margin of each sheet of the three written declarations of trust which were offered in evidence.

The plaintiffs testified that the object in executing the written declarations of trust, all nine of which were recorded, was to prevent creditors of any member of the family from reaching properties the subject of the declarations, but that through an oral understanding which the plaintiffs had with their father at, prior and subsequent to the execution by him of his declaration he stated that, as between the members of the family, the various declarations should not be effective, and that all the members of the family were to be bound by the terms of the 1912 agreement. No authority on his part to bind any of the other members of the family was shown.

We shall not stop to summarize the testimony of the three plaintiffs, but instead

shall content ourselves with setting forth what we consider to be particularly significant and necessary items of the testimony for our decision.

Plaintiff Jacob testified that in the 1912 conversation the father told him, in the presence of Habib, that he had given the latter the $160 cash which he had because he, being the oldest child, was to be the head of the family from that time onwards; that this original capital was thereafter expended for the current expenses of the family; that he (Jacob) established a grocery business in 1923 in his own name, on a lot owned by him at Inglewood, California; that when Balian's Market was incorporated in 1935 he received 12½ shares of its capital stock, issued in the name of Jacob Balian Trust, which represented 1/12 of all the issued and outstanding stock.

Plaintiff Habib testified that he entered into the carpet cleaning business in New York in 1920 under the name of "Balian's Carpet Cleaning Company"; that the verified certificate of ownership listed him as the sole owner; that he established a like business in California under the same name, and that the verified certificate listed him as the sole owner; that in making out his income tax returns as to these businesses he stated he was the sole owner; that in 1928 he established the Balian Ice Cream Company, filing a certificate of doing business in that name, in which it was stated that he was the sole owner; that at a time when his brother Abraham made claim to an interest in that business he had a conversation with his father in which the latter told him the business belonged solely to him (Habib) and that he should not give his brother Abraham any share in it; that later, when the father sued Habib to recover the ice cream business which then stood in Habib's name, he was induced to give his father a bill of sale and thereupon the action was dismissed; that at the time of the dismissal he executed a release showing he had no interest whatever in any property of his father. He further testified to a conversation with his father wherein he related to him that when a controversy arose some time prior with reference to the ice cream business he (the father) had told him when he originally started the business was to belong to him (Habib) and that it was not to be a family possession.

Plaintiff Kameel testified in a deposition, in a case where a creditor sought to reach his assets, that he had no property whatsoever; and by his answer in that case, made under oath, he averred that Balian's Market belonged solely to his father, and that neither he nor any of the other children owned any interest therein.

[1] After a trial lasting approximately two weeks the court granted the motion of defendants for a nonsuit. The granting of this motion and the entry of judgment thereon are the only matters which are here assigned as error. As the motion is not set out in the record we are not informed of its grounds. In that connection it should be stated that on appeal a nonsuit will be sustained if it can be justified on any ground, whether or not such ground is stated in the motion or in the ruling. Anchester v. Keck, 214 Cal. 207, 4 P.2d 934; Hanrahan-Wilcox Corp. v. Jenison Machinery Co., 23 Cal.App.2d 642, 73 P. 2d 1241. Accordingly, under these authorities, it is immaterial that we do not know the grounds urged in the motion for nonsuit.

The main contention of the appellants is that there was sufficient evidence to establish an oral trust in their favor based upon the evidence which they submitted of the alleged conversation in 1912; and hence, even though the evidence was disbelieved by the trial judge, he was not on a motion for nonsuit entitled to weigh the evidence but should have overruled the motion and required proof from the defendants. In response to this contention of the plaintiffs the defendants argue that on a motion for nonsuit the court is not required to accept as true testimony which is inherently improbable; and, further, that there was no relevant, substantial evidence that would have justified the trial court in holding a trust had been established. Moreover, they contend that the plaintiffs are estopped from making any claim under the alleged oral trust because of their conduct and because the written declarations of trust merged all agreements made prior thereto. In the view we take of the case it will not be necessary to discuss in detail the respective contentions of the parties. It will suffice to say there are several reasons, in our opinion, why the ruling of the trial court was correct.

First, it is to be observed that when the alleged mutual promises were exchanged in 1912 between the father and his sons Habib and Jacob it was contemplated that all the children of Alexander should be bound by the trust agreement. At the time the only child who was of age and so competent to enter into a contract was Habib, who was twenty-one. The other six children ranged from nineteen years of age down to Samuel, who was three years old. Joseph had not yet been born. The oral trust agreement contained no provisions as to the manner in which the father was to handle any property acquired, nor any restrictions upon his disposing of all or any part of the property acquired during his lifetime. The agreement merely provided that upon his death the property remaining should all be distributed to the children then surviving, without reference to the heirs of any child that might have died and without regard to any rights which the mother might have therein if she survived her husband. Moreover, there was no property or res upon which the alleged trust could operate.

[2, 3] We think the terms of the trust agreement are altogether too uncertain and tenuous to have warranted the trial court impressing a trust on any of the property. The agreement of trust falls far short of measuring up to the rule laid down in Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, 952. There it is said that an express trust must be "reasonably certain in its material terms; and this requisite of certainty includes *the subject-matter* or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed." (Italics ours.) A most casual reading of the terms of the oral trust which we have outlined above discloses a complete failure to meet any of the requirements of the rule laid down in the Lefrooth case.

[4-8] Moreover, "to the creation of a trust, a trust res, or subject-matter is a sine qua non. * * * 'In order for trusts to exist there must be an estate to vest in the trustee, and the property must be clearly and definitely pointed out.'" In re Lamb, 61 Cal.App. 321, 215 P. 109, 112. Here there was no property in the hands of the alleged trustee. The cash which the father had, totaling $160, had already been turned over to Habib. It never became a part of any trust estate but instead was consumed in living expenses. Accordingly we think that for want of a trust res, and because of the indefiniteness of the terms of the alleged trust agreement, the agreement was not enforceable and the motion for nonsuit was rightly sustained. In reaching such conclusion we are not unmindful of the rule that a nonsuit should only be granted when, "accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances." Mastrangelo v. West Side, etc., School District, 2 Cal.2d 540, 544, 42 P.2d 634, 636; Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1. It must be remembered, however, that the rules which are to be applied to motions for nonsuit "do not require courts to put themselves in incongruous positions in order to hold a case in court. Courts will not give a strained or unnatural construction to language or conduct, or distort the orderly laws of sequences or the logic of a given situation to force an unnatural result". Anchester v. Keck, 214 Cal. 207, 214, 4 P.2d 934, 937. Considering the case in the light of the foregoing rules it appears as a matter of law that the evidence is without sufficient substantiality (Gish v. Los Angeles Railway Co., 13 Cal.2d 570, 90 P.2d 792) to make out a prima facie case either as to the terms of the alleged trust or the existence of a res upon which such trust could operate.

[9] The appeal purports to be from the judgment and from the order dissolving restraining orders and from the order denying the motion for new trial. The record does not disclose any orders of the character mentioned. At all events, an order denying a new trial is not appealable. Whether an order dissolving a restraining order is appealable or not (see Palm Springs, etc., Co. v. Kieberk Co., 37 Cal.App.2d 642, 100 P.2d 346) we need not here determine, as there is nothing in the record to indicate that such an order was made.

Accordingly, the appeals from the orders dissolving restraining orders and the order denying a new trial are dismissed and the judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.



48 Cal.App.2d 79

MAHANAY v. LYNDE.

Civ. 13261.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1941.

1. Evidence ⇐179(3)

In action by purchaser for specific performance of an oral agreement for purchase of realty, where there was conflict as to wording of receipt given purchaser for a check which he had given to bind the bargain, and vendor's mother obtained possession of receipt and refused to give it back to purchaser, trial court properly admitted purchaser's oral testimony as to wording of receipt offered for purpose of showing that receipt was sufficient to satisfy statute of frauds.

2. Frauds, statute of ⇐158(4)

Evidence supported finding that wording of receipt given by vendor to purchaser upon payment by purchaser pursuant to oral agreement for purchase and sale of realty was sufficient to satisfy statute of frauds.

3. Specific performance ⇐30

A contract for purchase of realty which contained a clause governing deferred payments providing that "Balance to be paid at $20 per month" was not so uncertain that it could not be specifically enforced.

4. Specific performance ⇐121(3)

Evidence supported finding that contract for purchase of realty, by terms of which vendor was forced to give purchaser possession upon payment of one-tenth of the purchase price, was just and reasonable as to vendor.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by W. T. Mahanay against Fred E. Lynde for specific performance of a contract of purchase and sale of real property. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

John Clarke Hessin, of Hollywood, for appellant.

Moses C. Davis, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Action for specific performance of a contract of purchase and sale of real property.

The plaintiff went to the home of the defendant, and there, after a conversation between the plaintiff and his wife, and the defendant and his mother, the parties came to an oral agreement of purchase and sale of a small parcel of real property. The purchase price was to be $1,000; $100 down, and monthly payments of $20 a month on the principal.

In order to bind the bargain the plaintiff gave to the defendant his check for $20, and the defendant gave to the plaintiff his receipt therefor.

[1, 2] There is a conflict in the testimony as to the wording of the receipt, because, some days later, when the parties met at a bank, the defendant told the plaintiff that he did not want to go through with the deal, and the defendant's mother got possession of the receipt and refused to give it back to the plaintiff. The trial court properly admitted the plaintiff's oral testimony as to the wording of the receipt. At the trial defendant contended that the receipt is in language to be found in a writing which the defendant's mother testified was the one she took from the possession of the plaintiff. She said that she delivered it to her attorney, who later on sent it to the plaintiff's attorney. The language of this claimed receipt is materially different from that testified to by the plaintiff as being on the one which was first given to him. The trial court adopted the wording of the receipt as testified to by the plaintiff, and found that the writing was sufficient to satisfy the statute of frauds. We think there is substantial evidence in the record to support this finding.

The trial court adjudged specific performance in that the plaintiff was to pay

to the defendant $100, and that then the plaintiff was to have possession of the premises, and that, thereafter, the plaintiff was to pay to the defendant $20 per month until the purchase price of $1,000 was paid.

Appellant argues that the contract as found by the trial court cannot be thus specifically enforced because:

(a) It is uncertain, and because

(b) It is not just and reasonable as to the defendant.

[3] It is contended that it is uncertain because deferred payments are governed by the following clause: "Balance to be paid at $20.00 per month."

Appellant relies upon the case of Klein v. Markarian, 175 Cal. 37, 165 P. 3, in support of his contention that this provision in the contract is uncertain. In that case the provision for future payments which was under attack read as follows: "In quarterly yearly payments, with interest at 6 per cent. annually."

The opinion of our Supreme Court indicates that such a clause could not be held to mean annual payments, each covering a quarter of the balance due under the contract.

In the present case, however, we have no difficulty in determining that the expression "balance to be paid at $20.00 per month" means that the purchaser is to pay $20 a month each month until the balance due on the principal is fully paid, and that, therefore, there is no uncertainty in the contract as found by the trial court.

[4] Appellant fianlly contends that the contract is not "just and reasonable", as to him, because by its terms he has been forced to give possession of his property to the plaintiff upon payment of ⅒th of the purchase price, and he has "no writing signed by any one evidencing an obligation to pay the balance, nor any security for such balance beyond the inadequate security of a vendor's lien". Quotation from Klein v. Markarian, supra, 175 Cal. at page 41, 165 P. at page 4.

There is nothing in this last point of appellant because there is substantial evidence to sustain the finding of the trial court that the contract is just and reasonable. There is no question of a vendor's lien involved here because by the terms of the judgment title is withheld until the full purchase price is paid.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 203

SANKER et al. v. HUMBORG.

Civ. 2928.

District Court of Appeal, Fourth District, California.

Dec. 1, 1941.

1. Appeal and error ⇐1008(1)

Whether a pedestrian failing to look after looking to both right and left when he entered traveled portion of street, near center of which he was struck by automobile while in marked pedestrian crosswalk, was guilty of contributory negligence, barring recovery of damages for his resulting death, was fact question for trial judge. Vehicle Code, § 560(a), St.1935, p. 188.

2. Automobiles ⇐245(72)

Where a pedestrian, about to cross public street, looks before placing himself in position where he may be in peril, fails to see approaching vehicle or misjudges its distance from him or its speed, and proceeds on his way without again looking, his negligence is generally a question of fact, not of law.

3. Automobiles ⇐245(72)

Where a pedestrian crossing street does not look before placing himself in position of possible peril or looks from position where he cannot see approaching vehicle and takes no precaution for his own safety, his negligence is generally a question of law, not of fact.

4. Appeal and error ⇐1008(1)

In action for death of pedestrian, struck by automobile driven by defendant, trial court's finding that decedent, who looked from position where he could see before placing himself in perilous position, was not

guilty of contributory negligence, cannot be disturbed on appeal.

5. Appeal and error ⇐110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

Appeal from Superior Court, Orange County; Harry C. Westover, Judge.

Action by Effie C. Sanker and others against Charles Humborg for the wrongful death of plaintiff's husband. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Albert Launer and Elmer Guy, both of Fullerton, for appellant.

William L. Waters, of Fullerton, for respondents.

MARKS, Justice.

This is an appeal from a judgment for damages suffered by plaintiff, Effie C. Sanker, widow of Rudolph H. Sanker, as a result of the death of Mr. Sanker caused by his being struck by an automobile driven by defendant.

[1] The sole point urged for a reversal of the judgment is that Mr. Sanker, as a matter of law, was guilty of negligence that proximately contributed to his injury and death and that the findings to the contrary are not supported by the evidence.

Commonwealth and Malden avenues are public streets of the city of Fullerton. Commonwealth avenue has a width of seventy-two feet between curbs and runs east and west. Malden avenue has a width of forty feet between curbs and intersects Commonwealth avenue at right angles. There were marked pedestrian crosswalks ten feet wide across Commonwealth avenue opposite both sidewalks on Malden avenue.

On April 11, 1940, shortly after five o'clock in the afternoon, Mr. Sanker was proceeding south in the east crosswalk of Commonwealth avenue and when a few feet north of the center line he was struck by defendant's automobile which was traveling west on that street. There is evidence that Mr. Sanker looked to his right and to his left at the time he entered the traveled portion of commonwealth avenue. No one saw him look again.

Under these circumstances we cannot hold that Mr. Sanker was guilty of contributory negligence as a matter of law. That question was one of fact for the trial judge as Mr. Sanker took some precaution for his safety before proceeding into a position which proved to have been one of danger. Further, he was in a marked pedestrian crosswalk and entitled to the protection the law gives him while lawfully there. Sec. 560(a), Veh. Code, St. 1935, p. 188.

[2-4] It is now well established in California that where a pedestrian, about to cross a public street, looks before he places himself in a position where he may be in peril, and either fails to see an approaching vehicle or misjudges its distance from him or its speed, and proceeds on his way without again looking, the question of his negligence generally is one of fact and not of law; that where he does not look at all or when he looks from a position where he cannot see and takes no precaution for his own safety the question of his negligence generally is one of law and not of fact. Among the many cases supporting this rule we cite the following: Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; White v. Davis, 103 Cal.App. 531, 284 P. 1086; Rapp v. Southern Service Co., 116 Cal.App. 699, 4 P.2d 195; Shaw v. Robertson, 8 Cal.App. 2d 520, 48 P.2d 128; Ikenberg v. Carlock, 14 Cal.App.2d 693, 58 P.2d 672; Hall v. Kaufman, 37 Cal.App.2d 264, 99 P.2d 339. As Mr. Sanker looked from a position from which he could see before placing himself in a position where he might have been in peril, the question of his negligence was one of fact and we cannot disturb the finding of the trial judge to the effect that he was not guilty of contributory negligence.

[5] Defendant has attempted to appeal from the order denying his motion for new trial. Such an order is not appealable. Sec. 963, Code Civ. Proc.

The attempted appeal from the order denying the motion for new trial is dismissed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

48 Cal.App.2d 205

SANKER v. HUMBORG.

Civ. 2932.

District Court of Appeal, Fourth District, California.

Dec. 1, 1941.

1. Exemptions ⇐148

In execution proceedings against judgment debtor claiming exemption of wages earned by him as necessary to provide his family with necessaries of life, defendant's testimony on direct examination as to amounts spent by him for food and other necessaries was not sufficiently shaken by his admissions on cross-examination that he kept no exact book account of his expenditures and that such amounts were based on best estimates he could make to require rejection of such direct testimony by trial court as trier of facts. Code Civ.Proc. § 690.11.

2. Exemptions ⇐36

The word "necessaries", money required for which is exempt from execution, is relative term, and scope of its legal signification has been restricted or enlarged according to circumstances and conditions of parties concerned. Code Civ.Proc. § 690.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessaries".

3. Exemptions ⇐36

What is a "necessary of life", money required for which is exempt from execution, depends largely on circumstances of each case and position of family involved. Code Civ.Proc. § 690.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary of Life".

4. Exemptions ⇐36

The determination of what is or is not a "necessary", money required for which is exempt from execution, must be committed to considerable extent to sound discretion of trier of facts. Code Civ.Proc. § 690.11.

5. Exemptions ⇐36

In execution proceedings, trial judge's holding that defendant's expenditures of $5 per month for miscellaneous items and recreation, same sum per month for his children's music lessons, and $4.50 per month for his wife and children's insurance, were for "necessaries of life", so as to render money required therefor exempt from execution, *held* not abuse of discretion. Code Civ. Proc. § 690.11.

6. Exemptions ⇐48(1)

In execution proceedings, where defendant testified that monthly deductions from his earnings for unemployment reserve, social security, etc., amounted to sum exceeding difference betweeen his monthly salary and amount of his family's necessary expenses as found by trial judge, plaintiff was not entitled to application of amount of such difference on her judgment against defendant. Code Civ.Proc. § 690.11.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Proceedings by Effie C. Sanker against Charles Humborg for executions on a judgment against defendant. From an order releasing money from the liens of executions, plaintiff appeals.

Affirmed.

William L. Waters, of Fullerton, for appellant.

Albert Launer, of Fullerton, for respondent.

MARKS, Justice.

This is an appeal from an order releasing money from liens of executions.

Plaintiff recovered judgment against defendant for damages suffered by her as a result of the death of her husband which was caused by his being run down by an automobile driven by defendant.

Defendant was an employee of the Union Oil Company of California, working for wages of $7.50 per day, sometimes for nineteen and sometimes twenty days a month. He was married and was supporting his wife and their two minor children. The family lived in Fullerton, California. Two executions were served on his employer and a total of $148.66 was withheld under them. The wages were earned within approximately one-half month before each levy.

Defendant claims the money to be exempt from execution under the second paragraph of section 690.11 of the Code of Civil Procedure for the reason that all of it was necessary to provide the family with the necessaries of life. After a hearing the trial court found that all of the

money was necessary for that purpose and ordered it released.

[1] Plaintiff makes two attacks on the order. She first urges that the evidence of defendant as to the various amounts necessary to pay the items of living expense was conjectural and speculative and therefore not sufficient to support the finding based on it. She next urges that some of the items of expenditure allowed by the trial court were not for necessaries of life.

Defendant's testimony on direct examination as to the various items of necessary expenditures may be illustrated by the following quotation:

"Q. And what other items make up your general living expenses? How much do you spend for food? A. Well, I have got it down here. There is food, milk and cottage cheese, that is buttermilk and cottage cheese and milk, $10.00 a month. * * *

"Q. What do you pay for groceries per month? A. My groceries and meat run $50.00 a month.

"Q. You are speaking for the family? A. For the family, the four of us."

On cross-examination he admitted that he kept no exact book account of his various expenditures and that the various amounts testified to by him were based on the best estimates he was able to make of those expenditures.

The trial court accepted this evidence, given on his direct examination, as true and it was not sufficiently shaken on cross-examination to require its rejection by the trier of fact.

[2] Plaintiff bases her second argument on the common law definition of necessaries as stated in Sumner v. Mohn, 47 Cal.App. 142, 190 P. 368.

This common law definition has been considerably extended in California. In Evans v. Noonan, 20 Cal.App. 288, 128 P. 794, 795, it is said: "The word 'necessaries,' as it has been applied by some of the cases in which its legal import has been interpreted, is a relative term and, as so applied, has been restricted or enlarged in the scope of its legal signification according to the circumstances and conditions of the parties. Some of the cases have held that it is not confined in its application merely to what is essential barely to support life, but that it includes many of the conveniences of refined society, such as ornaments of dress, which are usually worn by persons of rank and position."

To illustrate the application given to this rule, and the extension of the common law rule in California, we cite the following cases in which a variety of services and items have been held to be necessaries under the facts of those cases, some of which would not have been classified as necessaries under the common law: Proper medical attention, Simoneau v. Pacific Electric R. Co., 159 Cal. 494, 115 P. 320; domestic services, Wisnom v. McCarthy, 48 Cal.App. 697, 192 P. 337; service of a nurse, Davis v. Fyfe, 107 Cal.App. 281, 290 P. 468; a fur coat costing $372.50, Bay District Claim Service v. Jones, 136 Cal.App.Supp., 789, 24 P.2d 977; dental services, Smith v. Bentson, 127 Cal.App. Supp., 789, 15 P.2d 910; services of a nurse girl, Heaton v. Justice's Court, 19 Cal.App.2d 118, 64 P.2d 1004; legal services rendered an incompetent wife in restoring her to competency, Stone v. Conkle, 31 Cal.App.2d 348, 88 P.2d 197.

[3-5] Plaintiff particularly urges that three items of expense allowed by the trial court cannot be classified as expenditures for necessaries. They are: $5 per month for miscellaneous expenses and recreation; $5 per month for music lessons for the children, and $4.50 per month for insurance for the wife and children.

Under the rule prevailing here, what is a necessary of life must depend largely on the circumstances of each case and the position of the family involved. What is or what is not a necessary, must, to a considerable extent, be committed to the sound discretion of the trier of fact. Under the facts of this case and the law as it exists in California we can see no abuse of discretion in the decision rendered by the trial judge in holding that the various items of expense involved here were for necessaries of life.

[6] Plaintiff has added the various items of expense testified to by defendant and approved by the trial judge as the necessary expenses of the family and finds they total $143.06, which would leave a few dollars of the salary in excess of that amount and which she contends were not necessary for the support of the

family and which should have been applied on the judgment.

Defendant testified as follows:

"Q. Mr. Humborg, what about is monthly taken out of your earnings for unemployment reserve social security and so on? * * * A. Well, I would say about eight dollars."

This item brings the total necessary expenses above the income and disposes of this final argument.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.



48 Cal.App.2d 117

MORTON v. FOSS et al.

Civ. 11866.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

Hearing Denied Jan. 27, 1942.

1. Specific performance ⇐31

Evidence supported finding that alleged contract for sale of realty was never entered into by parties as minds of parties never met, so as to support judgment denying purchaser specific performance of the alleged contract, where original unsigned instrument called for 20 days for examination of title, vendor changed instrument so as to permit only five days for the examination of title, purchaser refused to accept the change, and broker without authority from vendor again changed instrument to provide for 20 days.

2. Specific performance ⇐31

Where original unsigned contract for sale of realty called for 20 days for examination of title, and vendor changed the instrument so as to permit only five days before affixing her signature to instrument, and thereafter broker without authority from vendor again changed the instrument to provide for 20 days before purchaser signed it, proof that purchaser did in fact deposit agreed purchase price within the five day period would not establish a binding "contract", in absence of acceptance of vendor's offer by signing of instrument upon the terms offered by vendor.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

3. Appeal and error ⇐197(1)
Trial ⇐36

In action for specific performance of contract for sale of realty against vendor and others who claimed interests in the realty deraigned through vendor after time of recording of alleged contract, even if vendor's answer admitted due execution of agreement, trial court did not err in admitting testimony tending to show lack of due execution, where question of due execution was put in issue by answers of defendants other than vendor, and, as to vendor, the trial proceeded as though the issue had also been made by answer of vendor, and there was no objection made to introduction of any of such testimony as to any of defendants.

4. Appeal and error ⇐882(17)

Where certain issues of fact are tried in the lower court without objection and as if they were correct, findings responsive thereto will be considered as if upon real issues and, if supported by the evidence, will stand.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by A. W. Morton against Marie J. Foss and others for specific performance of an alleged contract for the sale of realty. From an adverse judgment, the plaintiff appeals.

Affirmed.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellant.

Walter E. Dorn and Bessie Larson, both of San Francisco, for respondents Marie J. Foss and Bessie Dwyer.

H. Robert Bolander, Jr., and J. Richard Townsend, both of San Francisco, for respondent William E. Whissell.

SPENCE, Justice.

In this action for specific performance of an alleged contract for the sale of real property, defendants had judgment and plaintiff appeals.

The defendant Marie J. Foss was the owner of the real property in question and the remaining defendants were joined only for the reason that they claimed interests in the real property deraigned through defendant Marie J. Foss after the time of the recording of the alleged contract between defendant Marie J. Foss and plaintiff. We will hereinafter use the word "defendant" in referring to defendant Marie J. Foss.

Defendant claimed in the trial court and now claims on this appeal that no contract was ever entered into by the parties as the minds of the parties never met; that the alleged contract was procured through fraud; and that the consideration of $4,000 specified in the alleged contract was inadequate. The trial court found in favor of defendant on all of these issues. On this appeal, plaintiff's main contention is that the evidence was insufficient to support said findings. In view of our conclusion that the trial court's findings to the effect that no contract was ever entered into by the parties find ample support in the evidence, we deem it unnecessary to discuss the claims that the evidence was insufficient to support other findings.

The findings of the trial court on the issue under discussion were as follows:

"That it is true that on the 18th day of September, 1939, plaintiff herein caused to be submitted for approval by E. S. Preston an agreement to purchase certain real property situate in the City and County of San Francisco, State of California, belonging to the defendant, Marie J. Foss. That it is true that E. S. Preston, as a real estate broker was appointed and constituted the agent for the seller, Marie J. Foss, on or about the 12th day of June, 1939, and acted for said Marie J. Foss as such agent. That it is true that on or about the 18th day of September, 1939, and at the time said E. S. Preston presented for signature the proposed agreement to purchase said real property by A. W. Morton, said E. S. Preston acted as the agent and real estate broker for both Marie J. Foss and A. W. Morton. That it is also true that at the time said agreement was submitted for approval said agreement contained the words 'twenty days' from the date of confirmation of the sale to allow the purchaser to examine the title; that on the 20th day of September, 1939, said Marie J. Foss caused said words 'twenty days' to be stricken out and the words '5ds' inserted and initialed 'M. J. F.' and with said change said defendant Marie J. Foss approved said contract of purchase.

"That it is also true that after said agreement of sale was approved by the defendant Marie J. Foss, without the consent and without the approval and without the authority of said Marie J. Foss the words and figures '5 ds' were changed to read 'O.K. 20 days', and as so changed said contract or agreement was signed by the plaintiff, A. W. Morton.

"It is also true that said defendant, Marie J. Foss, upon learning of said changed agreement, refused to approve or initial or confirm the change in said agreement from '5 ds' to 'O. K. 20 days', and repudiated said agreement and refused to be further bound by its terms. It is also true that said Marie J. Foss informed E. S. Preston, the broker who presented said agreement for approval on behalf of plaintiff, that she would not be bound by the terms of the agreement changed without her knowledge or consent."

"That it is not true that said Marie J. Foss entered into a contract with said plaintiff herein. * * *"

The trial court therefore concluded: "That the plaintiff A. W. Morton never at any time had any binding or enforceable contract with the defendant Marie J. Foss".

It appears from the evidence that the real property originally consisted of a lot upon which was located a frame building used as an apartment house and that said building had been partially destroyed by fire. It was deemed a health and fire menace and the authorities had instituted proceedings against defendant. Several continuances had been had and defendant was finally informed that the authorities were insisting upon immediate action. A proposed deal for the exchange of the property for certain real property in Los Angeles had not materialized. Plaintiff learned that the property was for sale and, thereafter, he placed a deposit of $250 with a title company and caused E. S. Preston, a real estate broker, to submit an offer to defendant of $4,000. Said broker drew up a "Uniform Agreement of Sale" on the form adopted by the San Francisco Real Estate Board and had a Miss Shaffer, whom he described as an "associate broker" submit the instrument to defendant. At that time, the instrument had not been signed by plaintiff. Defendant decided to

accept the price offered but insisted upon having the instrument changed to permit only five days rather than twenty days for the examination of the title. It was so changed and initialled by defendant at the time that defendant affixed her signature to the instrument. Miss Shaffer communicated with Mr. Preston advising him of the change made and he in turn communicated with plaintiff. Mr. Preston testified, "I asked him if that would be all right, and he said no, it would not". Mr. Preston then communicated with Miss Shaffer and told her of his conversation with plaintiff. Miss Shaffer said "she would see what she could do". Miss Shaffer called defendant but defendant refused to consent to an alteration to provide for twenty days instead of five days. Nevertheless Miss Shaffer, without any authority to do so, scratched out the original change to five days and inserted the words "O. K. 20 days". The instrument was then signed by plaintiff. With respect to the last-mentioned change Miss Shaffer testified in part as follows:

"Q. Did you tell her you had altered that document after she had signed it? A. I told her I was going to alter it.

"Q. And what did she say? A. She said not to do it."

After the instrument had been signed by plaintiff, defendant was asked to initial the unauthorized change which had been made therein but she refused to do it and announced that she refused to go through with the proposed transaction. Plaintiff thereupon acknowledged before a notary public his signature upon the instrument and cause the instrument to be recorded. Thereafter he tendered the balance of the $4,000 and brought this action for specific performance.

[1] It seems entirely clear from what has been said that the minds of the parties never met. Plaintiff's so-called offer, evidenced by the original unsigned instrument calling for twenty days for the examination of title, was never accepted by defendant. Defendant's counter-offer, evidenced by the instrument signed by defendant as changed to provide for but five days instead of twenty days, was never accepted by plaintiff. Plaintiff's second offer, evidenced by the instrument signed by plaintiff as again changed to provide for twenty days, was never accepted by defendant. The parties simply never arrived at an agreement and, under the circumstances before us, it is immaterial that the signatures of the parties were affixed to the twice changed instrument. The changes are conceded and are shown by the uncontradicted evidence.

Much is said in the briefs regarding the question of agency. We are of the opinion that the evidence was ample to show that the brokers were acting for both parties. But in any event, there is not a particle of evidence to show that any person had authority from defendant to change the terms of the written instrument as they existed at the time that the instrument was executed by defendant. All of the evidence in the record is to the contrary.

[2] Plaintiff states that regardless of the unauthorized change in the written instrument, he did in fact deposit the agreed purchase price with the title company within the five-day period provided in the instrument. He apparently contends that this act resulted in a binding contract regardless of the effect of the unauthorized change in the written instrument. We cannot agree with plaintiff on this contention. Defendant's execution of the written instrument constituted a written offer to enter into a binding written agreement upon the terms set forth in said instrument as they read at the time that defendant executed said instrument. That instrument required the "Sale to be confirmed within two (2) days from date hereof" and the instrument further provided that time was of the essence. Plaintiff did not confirm the sale within two days and never at any time confirmed the sale upon the terms offered by defendant. It is entirely obvious from the substance and form of the written instrument that it was intended for use as a bilateral agreement between seller and buyer and that no unilateral agreement could have been contemplated by the parties. In the absence of any acceptance of defendant's offer by plaintiff by the signing of the instrument within the two-day period and upon the terms offered by defendant, plaintiff may not rely upon his subsequent willingness to comply with the terms previously offered by defendant or upon his act of depositing the money with the title company, as the basis for an agreement binding upon the defendant.

Plaintiff further contends that "the court erred in admitting evidence contrary to the express admissions of the answer of defendant Foss". This contention is based

upon the claim that due execution of the agreement was admitted by the answer of defendant Foss and we may assume for the purpose of this discussion that this claim is well founded. It may be noted that this claim relates only to the answer of defendant Foss and there can be no doubt that the answers of the other defendants denied the due execution of said instrument. At the opening of the trial, counsel for plaintiff made an opening statement and was immediately followed by counsel for defendant Foss who made his opening statement at that time. In the last-mentioned opening statement, the charge was clearly made that the instrument "was changed without Mrs. Foss' consent from five days to twenty days". The trial then proceeded as though all parties had denied the due execution of said instrument and a great deal of testimony was introduced on this issue without any objection. Toward the close of the trial, counsel for plaintiff suggested to the court "that it will probably be necessary to secure some further evidence, because we are taken entirely by surprise. * * * We had no idea that there would be any question about this twenty days raised. * * *" Whereupon the court said: "I think counsel in the opening statement of the case brought that to our attention." The trial then proceeded to its conclusion without any continuance being asked to produce testimony other than the large amount of testimony already in the record on this issue. Our review of the record discloses that all persons concerned with said transaction testified on this issue and that said testimony relating to said issue was not in conflict in any of its material aspects.

[3, 4] We find no error in the admission of said testimony. The question of the due execution of the instrument was clearly put in issue by the answers of the defendants, other than defendant Foss. As to the defendant Foss, the trial proceeded as though the issue had also been made by the answer of said defendant. There was no objection made by plaintiff to the introduction of any of said testimony as to any of the defendants and said testimony amply sustains the findings. As was said in Moran v. Ratzkowski, 120 Cal.App. 703, at page 705, 8 P.2d 198: "* * * even though the answer insufficiently put in issue the making of the new agreements, the appellants could not now be heard to complain because it is a familiar rule of law that, where certain issues of fact are tried in the lower court without objection and as if they were correct, findings responsive thereto will be considered as if upon real issues, and, if supported by the evidence, will stand. [Citing cases.]" See also, Northwestern M. F. Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 40, 200 P. 934; Lawrence v. Ducommun, 14 Cal. App.2d 396, 399, 58 P.2d 407.

Plaintiff further contends that the trial court erred in failing to rule on plaintiff's motions to strike and demurrers. Our review of the record, however, convinces us that the error, if any, could not have been prejudicial to plaintiff.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.



48 Cal.App.2d 101

In re DARGIE'S ESTATE.

Appeal of MARTIN.

Civ. 11798.

District Court of Appeal, First District, Division 2, California.

Nov. 28, 1941.

Hearing Denied Jan. 27, 1942.

1. Courts ⇐202(5)

A probate court decree, reciting the taking of a prior appeal to District Court of Appeal, the rendition of judgment on the appeal, the filing and entry of a certified copy of the opinion in the trial court's record, and that pursuant to the opinion and judgment of District Court of Appeal probate court made its findings of fact and conclusions of law in conformity with the opinion and judgment of District Court of Appeal, showed that probate court attempted to carry out mandate of District Court of Appeal.

2. Wills ⇐392

The construction by District Court of Appeal, of provision in will giving "full half of estate" to certain person, that such por-

tion of the estate could be conveyed only after charges specified were deducted, was not inconsistent with subsequent construction of will by probate court that corpus of estate could be looked to for the payment of debts and expenses of administration, but was an implied finding that estate might be looked to for that purpose.

3. Appeal and error ⇐1207(1)

Where reviewing court adopts a written opinion determining issues on appeal and directing that judgment be modified or reversed accordingly, opinion becomes a part of decision and instructions, vesting trial court with a sound discretion to determine what reviewing court decided thereby.

4. Appeal and error ⇐1207(1)

Where reviewing court adopts a written opinion determining issues on appeal and modifies or reverses judgment, specifically directing lower court with respect to particular issues, trial court has no discretion to interpret opinion of appellate court but must specifically carry out instructions thereof, and any material variance from explicit directions of reviewing court is void.

5. Executors and administrators ⇐315(9)

An order of the probate court for partial distribution of estate under a will to cash legatees, made under a decree of partial distribution which had become final, was valid.

6. Courts ⇐202(5)

A party who, in his pleadings before probate court, had taken position that it was proper to pay cash legatees from sale of assets, and who, though he later opposed confirmation of the sale on other grounds, never departed from that position until after judgment of District Court of Appeal affirming the order confirming the sale had become final, could not thereafter change his position to detriment of beneficiaries of cash legacies.

7. Taxation ⇐887

The right to inheritance tax vests in state at time of death.

8. Ambassadors and consuls ⇐1

Under a treaty providing that consular officers, after presenting their commissions, should receive, free of cost, "the exequatur required for the exercise of their functions" and that on presentation of the document "they shall be admitted to the enjoyment of rights, privileges and immunities granted to them by the Treaty", it was intended that no consular officer should exercise his functions until exequatur was issued to him, and that on its issuance or presentation to him he would be admitted to enjoyment of rights, privileges, and immunities granted by the treaty. Treaty between United States and Spain, 33 Stats.U.S. p. 2111, arts. 13–15.

9. Treaties ⇐7

The language of a treaty must prevail over general custom established under international law.

10. Ambassadors and consuls ⇐1

A consul, being in a foreign country, derives his authority, in effect, from both governments, in that he receives his commission from the country which he represents and receives his exequatur from country to which he is sent, and it is solely by virtue of the authority vested in him by country to which he is sent that he is able to exercise his official functions within its territorial limits.

11. Treaties ⇐7

Clear language in a treaty is required to indicate that the high contracting parties intended to depart from a general custom established by international law.

12. Ambassadors and consuls ⇐1

A provision of a treaty that each party pledges itself to admit the Consuls-General of the other in all its ports, places, and cities, did not necessarily require United States to admit consular officers of other party and issue its exequatur to them, or that they should be entitled to exercise consular authority before issuance of exequatur. Treaty between United States and Spain, 33 Stats.U.S. p. 2111, art. 13.

Appeal from Superior Court, Alameda County; Warren B. Tryon, Judge.

Proceeding in the matter of the estate of Herminia Peralta Dargie, deceased, wherein Antonio Rodriguez Martin and others filed a petition to determine who were entitled to a distribution of the estate. From an order denying a motion to vacate and set aside a decree determining interests in the estate, from a decree of partial distribution, and from an order directing and instructing administrator with the will

annexed to pay the inheritance tax on her distributive share of the property of the estate, Antonio Rodriguez Martin appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

W. H. Metson and P. H. McCarthy, Jr., both of San Francisco, for appellant.

James W. Hickey, of Sacramento, Raymond G. LaNoue, of Los Angeles, and Hugo P. Correll, of San Francisco, for respondent State of California (Controller).

Morgan J. Doyle and J. Joseph Sullivan, both of San Francisco, for respondent Peralta P. Wilson.

Robinson, Price & Macdonald, of Oakland, for respondent Franklin Investment Co.

DOOLING, Justice, pro tem.

Appeals are presented on a single bill of exceptions from an order of the probate court denying a motion of appellant to vacate and set aside a decree made and entered on June 1, 1937, determining interests in the above entitled estate; from a decree of partial distribution; and from an order directing and instructing the administrator with the will annexed to pay the inheritance tax on appellant's distributive share of the property in the estate.

[1] There have been three previous appeals in the matter of this estate which will be found reported in 216 Cal. 667, 15 P.2d 849; 19 Cal.App.2d 215, 64 P.2d 1131; and 33 Cal.App.2d 148, 91 P.2d 126. In the decision in 19 Cal.App.2d 215, 64 P.2d 1131, 1135, to which reference is made for a statement of the provisions of the will of Mrs. Dargie, this court made the following order: "The decree appealed from is reversed, and the trial court is directed to reframe its findings and conclusions in accordance with the foregoing views and enter a judgment and decree accordingly." Upon the going down of the remittitur on that appeal the probate court made and entered its decree or order of June 1, 1937, determining interest. This decree recites the taking of the appeal, the rendition of the judgment on the appeal, the filing and entry of a certified copy of the opinion in the records of the trial court and then proceeds:

"This court, pursuant to said opinion and said judgment of said District Court of Appeal, having made its findings of fact and conclusions of law in conformity with said opinion and judgment of said District Court of Appeal.

"(1) It is therefore hereby ordered, adjudged and decreed etc."

From this recital it appears that the probate court attempted and purported to carry out the mandate of this court in its opinion in 19 Cal.App.2d 215, 64 P.2d 1131.

Specifically that decree contained, among others, the following provisions:

"(2) It is further ordered, adjudged and decreed that the legacy of $50,000.00 to decedent's sister, Josefa Peralta Wilson, provided for in paragraph XXIV of said will, at the rate of $1,000.00 a month is payable from dividends within the ordinary meaning of the term 'dividends' derived and to be derived after the date of the death of the said decedent from the assets of her estate, and said monthly payments of $1,000.00 each are respectively due and payable from the time of the receipt by the executors or special administrators of said estate of such dividends from the said estate sufficient in amount to pay them.

"(3) It is further ordered, adjudged and decreed that all the legacies provided for in paragraphs III to XXVII, inclusive, of decedent's will other than the aforesaid legacy of $50,000.00 to Josefa Peralta Wilson are or will become due and payable from accumulation of dividends within the ordinary meaning of the term, 'dividends'; when the executors or special administrators have received from dividends from the assets of said estate the sum of $239,000.00 such legacies other than said sum of $50,000.00 may be paid out of said dividends one or more at a time as soon as possible therefrom, and all such legacies are to be paid to the persons or parties to whom they are made and as set forth in subdivision (1-a) of this decree, or to their successors in interest respectively.

* * *

"(6) It is further ordered, adjudged and decreed that it is proper and necessarily permissible for the representatives of the estate of said decedent to utilize at any time and from time to time during the pendency of the administration of said estate any funds belonging to said estate from whatever source for the payment of expenses of administration, debts of decedent, property and income tax on said estate and Federal Estate taxes, but upon

and after the accrual of the right of any cash legatees to any distribution said representatives may be required from the corpus of the estate to reimburse the dividend fund, specified as aforesaid by the testatrix as the source of payment of such cash legacies, to the extent that such dividend fund may have been utilized by such representatives in the payment of such estate obligations, but the payment of each of such cash legacies shall in each instance be dependent upon the status of the estate with reference to the payment or provision for payment of debts of the decedent and expenses of administration, and no testamentary disposition shall be payable so long as there remains unpaid or unprovided for any debt, debts of the decedent, or expense or expenses of administration, unless at the same time provision is made for the payment thereof, and reserving to said cash legatees all the rights, if any provided for by Sections 1000 to 1003, both inclusive, of the Probate Code of California. No legacy, bequest or device or inheritable or distributive share of said estate shall be paid or delivered without deduction therefrom and payment of any and all inheritance and other taxes that may be chargeable upon or a lien against them."

[2] A reading of the opinion in 19 Cal.App.2d 215, 64 P.2d 1131, will show that paragraphs (2) and (3) above quoted were made pursuant to the order and direction of this court. It is appellant's position that paragraph (6) above quoted is in conflict with the mandate of this court and therefore void upon its face. A careful reading of our opinion in 19 Cal.App.2d 215, 64 P.2d 1131, satisfies us that this position is not well taken. In that opinion this court did not consider or decide the question whether if debts and expenses of administration were paid from accumulated dividends, the dividend fund might later be restored from other assets of the estate. We did say in that opinion at page 221 of 19 Cal.App.2d at page 1134 of 64 P.2d: "In an endeavor to re-enforce their contentions, the respondents place a strained interpretation on words contained in paragraph 30(2d). They emphasize the words 'the full half of my estate.' They contend that expression refers to the amount of the estate as it stood at the time of the death of the testatrix. The contention offends the intelligence of the testatrix. (1) She knew she was in debt $120,000. (2) She knew the administration of her estate would create a large expense. (3) She knew her last illness and burial would create other large expenses. (4) And she also knew that she had provided cash legacies in the sum of $239,000. She provided expressly how the fourth item was to be paid. She expressly provided that the third item was to be paid. And, although no express language was inserted as to how items 1 and 2 were to be paid there was no language to the effect they would not be paid; but it is presumed she knew they would be paid together with all taxes. It is patent that the full half of her estate could be conveyed only after such charges were deducted."

This language is not inconsistent with the construction that the corpus of the estate may be looked to for the payment of debts and expenses of administration. Indeed it contains the implied finding that it may be looked to for that purpose. The opinion likewise contains no direction express or implied that if accumulated dividends should be used for that purpose the dividend fund could not be replenished to a like amount from other sources.

[3, 4] In English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, at page 201, 52 P.2d 267, at page 269, the court said: "The directions of a court of review for the modification or reversal of a judgment, when the cause is not remanded for a new trial, may ordinarily be divided into two general classes. The appellate tribunal adopts a written opinion determining the issues on appeal and directs that the judgment be modified or reversed accordingly, in which event the opinion becomes a part of the decision and instructions, vesting the trial court with a sound discretion to determine what the reviewing court decided thereby. In the other class of instructions, the appellate court may adopt a written opinion determining the issues on appeal and modify or reverse the judgment, specifically directing the lower court with respect to particular issues. In the last-mentioned class of cases the trial court has no discretion to interpret the opinion of the appellate court, but on the contrary, it is bound to specifically carry out the instructions of the reviewing court."

The directions of this court in 19 Cal. App.2d 215, 64 P.2d 1131, fall into the first class. Appellant took no steps by appeal or otherwise to set aside the decree

of June 1, 1937, until long after it had become final and immune from direct attack.

[5] The order for partial distribution was made to the cash legatees from the dividend fund after reimbursement from the corpus of the estate. It followed paragraph (6) of the decree of June 1, 1937, above quoted and was authorized thereby. That decree having become final the decree of partial distribution made pursuant to its terms was valid.

[6] There is another reason why these decrees must be held immune to attack by appellant. The bulk of the stock in the estate from which dividends might be derived to pay the cash legacies was sold and the sale upheld in 33 Cal.App.2d 148, 91 P. 2d 126. Appellant in the probate court filed a pleading in the matter of that sale, verified by himself, in which he alleged: "That a sale of assets of said estate is necessary in order to pay the cash legacies, debts, expenses of administration and inheritance taxes due by said estate, and there are no assets of said estate sufficient in value or amount to pay the same, except the said shares of stock of said corporations owned by said estate, and therefore a sale of the said shares is necessary for such purposes."

Having taken the position in the probate court that it was proper to pay the cash legacies from the sale of assets and, although he later opposed confirmation of the sale on other grounds, never having departed from that position until the judgment of this court in 33 Cal.App.2d 148, 91 P.2d 126, affirming the order confirming the sale had become final, he may not now change his position. The only shares from which sufficient dividends to pay the cash legacies might be expected were the subject of this sale. Unless the cash legacies are paid from the corpus of the estate they can now for the most part never be paid. It is reasonable to assume that the beneficiaries of these legacies would themselves have opposed the sale if they had then been advised of appellant's present position. Appellant cannot at this late date change position to their detriment. In re Estate of Davis, 38 Cal.App.2d 579, 584, 101 P.2d 761, 102 P.2d 545; Donegan v. City of Los Angeles, 109 Cal. App. 673, 293 P. 912.

On the appeal from the order directing the administrator with the will annexed to pay the inheritance tax assessed against appellant it is appellant's position that at the time of the testatrix' death he was an Honorary Vice-Consul of Spain and as such exempt from the tax by virtue of a treaty between Spain and the United States of America. 33 Stat. U.S., Part 2, 2105.

The pertinent portions of that treaty provide:

"Article XIII. Each of the High Contracting Parties pledges itself to admit the Consuls-General, Consuls, Vice-Consuls and Consular Agents of the other in all its ports, places and cities, except where it may not be convenient to recognize such functionaries.

"This reservation, however, shall not be applied by one of the High Contracting Parties to the other unless in like manner applied to all other Powers.

"Article XIV. Consular officers shall receive, after presenting their commissions, and according to the formalities established in the respective countries, the exequatur required for the exercise of their functions, which shall be furnished to them free of cost; and on presentation of this document, they shall be admitted to the enjoyment of the rights, privileges and immunities granted to them by this Treaty. * * *

"Article XV. All consular officers, citizens or subjects of the country which has appointed them * * * shall * * * be exempt from all National, State, Provincial and Municipal taxes except on real estate situated in, or capital invested in the country to which they are commissioned. * * *"

[7] Appellant was appointed honorary vice-consul on October 19, 1929. The testatrix died on December 8, 1929. Appellant's exequatur was issued to him by the Department of State on December 18, 1929. Since the right to the inheritance tax vests in the state at the time of death (In re Estate of Woodard, 153 Cal. 39, 94 P. 242), it follows that appellant's right to claim an exemption from the tax is dependent upon whether the provisions of article XV of the treaty with Spain became effective as to him on the date of his appointment or on the date of the issuance to him of the exequatur.

[8] A proper construction of the language of the treaty seems to us to compel the conclusion that the date of issuance of the exequatur is the controlling date.

Looking to the language of article XIV it first provides that consular officers after

presenting their commissions shall receive free of cost "the exequatur *required* for the exercise of their functions" and it then proceeds: "on presentation of this document, they shall be admitted to the enjoyment of the rights, privileges and immunities granted to them by this Treaty".

The clear meaning of this language seems to us to show the intentional understanding of the high contracting parties to be that no consular officer should exercise his functions until the exequatur had been issued to him but that upon its issuance or presentation to him he would thereby be admitted to the enjoyment of the rights, privileges and immunities granted by the treaty.

Appellant argues for another construction. It is his contention that under the language of the treaty the exequatur is merely an evidence of consular authority, not the source of it. The difference between the two constructions depends entirely on the sense in which the word "presentation" is to be construed. The appellant would have us construe it to mean that on presentation of the exequatur *by* the consular officer to any person or official that person or official shall be bound to admit him to the enjoyment of the rights, privileges and immunities granted by the treaty. This construction appears to us to be a strained one. We think the natural meaning of the words used, particularly in view of the context, is that on presentation of the exequatur *to* him by the State Department the consular officer is thereby admitted to the enjoyment of such rights, duties and privileges.

[9] While the language of the treaty must prevail over general custom established under international law, the construction which we place upon the language of article XIV comports with such general custom.

[10] "A consul being in a foreign country derives his authority, in effect, from both governments. He receives his commission from the country which he represents and receives his exequatur from the country to which he is sent. It is, in truth, solely by virtue of the authority vested in him by the country to which he is sent that he is able to exercise his official functions within its territorial limits." 16 Amer. Juris., pp. 962, 963.

[11] This being the general custom it should take clear language in the treaty to indicate that the high contracting parties intended to depart from it. There is not such clear language in article XIV. Giving the language used its natural effect it indicates an intention to follow established custom rather than to depart from it.

[12] Appellant emphasizes the language of article XIII, "each of the High Contracting Parties pledges itself to *admit* the Consuls-General * * * of the other in all its ports, places and cities", and argues that by virtue of that language the issuance of the exequatur as a source of consular authority is dispensed with. This does not necessarily follow. The United States of America bound itself to admit consular officers of Spain and to issue its exequatur to them. It did not contract that they should be entitled to exercise consular authority before the issuance of the exequatur.

A simple illustration will emphasize the distinction. If A sells and transfers property to B, B thereby at once becomes the owner. If A contracts to sell property to B, B does not thereby become the owner although B has the legal right and A has the correlative legal duty under the contract to transfer the property to B and thereby make B the owner. So here, as we construe the language of the treaty, the United States of America was bound by its terms to issue the exequatur to a regularly commissioned consular officer of Spain, but until its issuance despite this duty the person to whom the commission was issued was not admitted to the status of a consular officer.

The decree and orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

48 Cal.App.2d 72

ROSS v. ROSS.

Civ. 12653.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1941.

1. Divorce ⇐229

A motion by husband in wife's divorce action to vacate an order making an allowance to wife for counsel fees and costs on ground that husband's failure to appear and oppose order to show cause was result of accident, surprise and excusable neglect was addressed to trial court's sound discretion. Code Civ.Proc. § 473.

2. Divorce ⇐286

Trial court's order granting or denying application of wife for allowance of counsel fees and costs to enable her to prosecute divorce action will not be reversed on appeal unless abuse of discretion appears. Code Civ.Proc. § 473.

3. Divorce ⇐286

Though in some cases, trial court's discretion is better exercised when it tends to bring about a decision on the merits, the rule that a motion to vacate an order for counsel fees and costs allowed to wife to enable her to prosecute divorce action is addressed to trial court's sound discretion has never been relaxed, and unless record clearly shows an abuse of trial court's discretion, its order granting or denying the motion will be affirmed. Code Civ.Proc. § 473.

4. Divorce ⇐229

Where copies of summons and complaint in wife's divorce action and order to show cause respecting temporary alimony and supporting affidavit were bound together and served on husband, who, without inspecting papers, left them with his attorneys, and the attorneys and one legal secretary all failed to read the papers or to ascertain what papers were served, denial of husband's motion to vacate default order fixing counsel fees and costs allowed wife to prosecute the action, on the ground of "accident, surprise and excusable neglect", was not abuse of discretion. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Accident, Surprise and Excusable Neglect".

5. Divorce ⇐286

The question whether neglect is excusable so as to authorize vacation of default order directing defendant to pay plaintiff's counsel fees and costs in divorce action is primarily a question for trial court's discretion. Code Civ.Proc. § 473.

6. Divorce ⇐229

The trial court, in passing on question of excusability of defendant's neglect in not appearing in answer to show cause order as to alimony, counsel fees and costs in divorce suit, could properly consider, in addition to failure of defendant and his counsel to examine papers served on defendant, the fact that in a former action of same kind defendant had been served with, and his attorneys had handled, a set of papers which to their knowledge included an order to show cause, and that this might cause them to expect a similar order in the subsequent action, and that no showing was made of stress or urgency or of other matters. Code Civ.Proc. § 473.

7. Divorce ⇐286

The fact that an order granting husband's motion to vacate order directing payment of counsel fees and costs to enable wife to prosecute her divorce action could have been sustained on record did not necessarily require that denial of the motion should be reversed. Code Civ.Proc. § 473.

8. Divorce ⇐66

Where husband's motion for change of place of trial in wife's divorce action was supported by uncontradicted affidavit that husband resided in county mentioned, the transfer should have been made unless excused on some of grounds suggested by wife. Code Civ.Proc. § 395.

9. Divorce ⇐66

In statute providing for change of venue, the proviso that in action for divorce court may, prior to determination of motion for change of venue, determine motion for allowance of counsel fees and costs and make all necessary and proper orders "in connection therewith", authorizes only such orders as are in connection with consideration and determination of motions so heard. Code Civ.Proc. § 396b.

See Words and Phrases, Permanent Edition, for all other definitions of "In Connection Therewith".

10. Divorce ⇐66

An order refusing to act finally on defendant's motion for change of venue in divorce action until he complied with order for payment of counsel fees and costs was not within proviso of change of venue statute providing that in divorce actions court may, prior to determination of motion for change of venue, determine motion for allowance of counsel fees and costs, and make all necessary and proper orders "in connection therewith." Code Civ.Proc. § 396b.

11. Divorce ⇐262

An order refusing to act on husband's motion for change of venue to county of his residence until he complied with prior order directing him to pay counsel fees and costs, rendered on wife's motion for order to show cause, was proper, where no excuse for husband's failure to comply with order was made on hearing of motion, entitling trial court to assume that noncompliance was wilful and without excuse. Code Civ.Proc. § 395.

12. Contempt ⇐80

A party to action is not entitled to court's aid while standing in attitude of contempt of courts' legal orders and processes.

13. Divorce ⇐262

The rule against extending the rule that a party is not entitled to court's aid while standing in attitude of contempt to courts' legal orders and processes so far as to preclude a defendant from making his defense does not apply to denial of a husband's motion for change of venue to county of his residence because of husband's unexcused and wilful failure to comply with order to pay costs and counsel fees to enable wife to prosecute her divorce action, since, on complying with order, husband may have change of venue, and if he is unable to comply and order stands unchanged, trial may proceed where action was commenced. Code Civ.Proc. §§ 395, 396b.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action for divorce by Agnes Sicotta Ross against Richard R. Ross. From an order denying defendant's motion to vacate an order granting attorney's fees and court costs to plaintiff, and from an order overruling a demurrer to the complaint and denying a motion for change of venue, defendant appeals.

Appeal from order overruling demurrer dismissed, and other orders appealed from affirmed.

Betts & Garrison and John A. Loomis, all of Los Angeles, for appellant.

Vernon Cruickshank, of Los Angeles, for respondent.

SHAW, Justice pro tem.

This is an action for divorce, and at the time plaintiff filed her complaint she also filed an affidavit setting forth her claim of necessity for temporary alimony and for an allowance of counsel fees and costs to enable her to prosecute the action. On this affidavit she obtained an order directing defendant to show cause on August 8, 1939, why such alimony, counsel fees and costs should not be allowed to her. At the time so fixed, defendant did not appear, and an order was made directing him to pay certain sums for plaintiff's counsel fees and costs in the action, but no order for alimony was made. Subsequently, defendant made a motion to vacate the order for counsel fees and costs. It was denied, and the order of denial is the subject of one of the appeals now before us.

The ground of defendant's motion to vacate was that his failure to appear at the hearing of plaintiff's motion was the result of accident, surprise and excusable neglect on the part of defendant and his attorneys. The motion was heard on affidavits, from which the following facts may be gleaned: A previous divorce action by this plaintiff against the defendant, in which the plaintiff had caused summons, complaint and an order to show cause in re alimony, counsel fees and costs to be served on defendant, and defendant had made a motion for change of venue, and in which the same attorneys acted for defendant as in the present case, had been dismissed a few days before this action was begun. In the present action copies of the summons and complaint of plaintiff's affidavit and of the order to show cause above mentioned were bound together in one cover, and in that form were delivered to defendant in Stanislaus county by way of service of the several papers upon him. Defendant states that he "never at any time inspected said papers or examined them closely and that he was therefore not aware of the inclusion in said group of papers of an order to show cause". He at once took them to the office of his attorney at Modesto and there left them. This attorney "did not inspect said papers in

the presence of said defendant, nor discuss the matter with him at all", and "was not himself aware of the inclusion in said papers of an order to show cause, * * * or the necessity of said defendant appearing before the above entitled Court on August 8, 1939", but prepared "papers on motion for change of venue" and sent them to a firm of attorneys in Los Angeles, with the entire group of papers he received from defendant and a letter informing those attorneys that "copy of the summons and the complaint" was enclosed. On reaching Los Angeles this letter was opened by the secretary of the Los Angeles attorneys, who read the letter but not the enclosed papers. She handed the letter and papers to one of the firm, stating that they contained "complaint and motion for change of venue". This attorney read the letter but did not discover the order to show cause, and he handed the file to another attorney in the firm and told him the case involved a motion for change of venue exactly like the one in the previous case and asked him to attend to it. Apparently the second attorney also did not read the papers, for he "did not learn that an order to show cause had been ordered and was heard on August 8, 1939, until August 10, 1939, when he was informed by attorney for plaintiff". Nothing appears to indicate that any person who had these papers in hand lacked ample opportunity to examine and read them.

[1-3] On this showing the trial court denied defendant's motion to vacate. An application of this sort for relief under section 473, Code of Civil Procedure, is addressed to the sound discretion of the trial court, and its order, whether granting or denying the application, will not be reversed on appeal unless an abuse of discretion appears. We find no abuse of discretion here. "While it has been said in some cases that this discretion is better exercised when it tends to bring about a decision of the cause upon its merits, the rule itself has never been relaxed. This observation has been in the nature of advice to the superior court, and not for the purpose of compelling it to decide in that mode. Unless the record clearly shows that the court has abused its discretion, its order, whether it be to grant or deny the application will be affirmed." Ingrim v. Epperson, 1902, 137 Cal. 370, 372, 70 P. 165, 166; see, also, Alferitz v. Cahen, 1904, 145 Cal. 397, 399, 78 P. 878; Lang v. Lilley & Thurston Co., 1912, 164 Cal. 294, 128 P. 1026; Morton v. Shannon, 1915, 26 Cal.App. 689, 690, 147 P. 1179.

[4-7] Defendant has cited here some of the cases declaring that the discretion is better exercised in favor of a decision on the merits, but none of them, and especially none of those in which an order denying relief was reversed, presents facts such as we have here. Here it appears that the defendant himself, three attorneys to whom the care of his interests in this action was committed and one legal secretary unanimously failed to read all the papers served on him or even to ascertain what papers were served, although they all had those papers in their hands with ample opportunity, as far as appears, for examination. Such a failure to examine the papers served on defendant undoubtedly constituted a neglect of duty. Farrar v. Steenbergh, 1916, 173 Cal. 94, 98, 159 P. 707; Edwards v. Hellings, 1894, 103 Cal. 204, 206, 37 P. 218; Garner v. Erlanger, 1890, 86 Cal. 60, 63, 24 P. 805; W. J. Wallace & Co. v. Growers Sec. Bk., 1936, 13 Cal.App.2d 743, 747, 57 P.2d 998; Penryn Land Co. v. Akahori, 1918, 37 Cal.App. 14, 16, 173 P. 612; Gillingham v. Lawrence, 1909, 11 Cal. App. 231, 233, 104 P. 584. Under some circumstances such neglect might be excusable, but the question whether an excuse appears is primarily one for the trial court's discretion. In passing upon that question here the trial court might properly consider, in addition to the failure to examine, the facts that in a former action of the same kind the defendant had a short time before been served with, and the attorneys had handled, a set of papers which to their knowledge included an order to show cause as well as summons and complaint,—a fact which might very well cause them to expect another order to show cause in this action, —and that no showing was made of circumstances of stress or urgency upon defendant or his counsel, of deceptive appearance or of other matters such as have sometimes been regarded as excusing careful attention to the subject in hand. It may be that an order granting defendant relief could have been sustained on the record before us, but it does not follow that an order denying it must be reversed; there are cases in which an order either way will be sustained on the ground that no abuse of discretion appears. Lynn v. Knob Hill Improvement Co., 1917, 177 Cal. 56, 62, 169 P. 1009; Dwyer v. Davis, 1932, 120 Cal.

App. 435, 438, 8 P.2d 168; Anglo California Trust Co. v. Kelly, 1928, 95 Cal.App. 390, 392, 272 P. 1080.

[8] Defendant made a motion for change of the place of trial to Stanislaus county, supporting it by his affidavit that he resided in that county. This affidavit was not contradicted, but on the hearing of the motion, held after the order for counsel fees and costs had been made, it appeared that this order had not been complied with, and thereupon the court made an order denying the motion "without prejudice to renew said motion after defendant has complied with the order of this court for payment of attorney fees and costs to plaintiff". Section 396b, Code of Civil Procedure, is applicable here and directs that "upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court". The counter showing for retention of the case which is authorized by that section "if an answer be filed" could not be made here, for there was no answer. On defendant's uncontradicted showing the proper court was the superior court of Stanislaus county (Code Civ.Proc., sec. 395), and the transfer should have been made (People v. Pinches, 1931, 214 Cal. 177, 179, 4 P.2d 771), unless excused on some of the grounds suggested by plaintiff.

[9, 10] Section 396b, Code of Civil Procedure, contains also a proviso that in an action for divorce the court may, prior to the determination of such a motion for change of venue, "consider and determine motions for allowance of * * * counsel fees and costs, and make all necessary and proper orders in connection therewith". While this provision authorizes the hearing of the described motions at the time stated, the orders authorized by it are such only as are "in connection therewith", that is, in connection with the consideration and determination of the motions so heard. The motion for counsel fees and costs was completely determined by the order directing defendant to make payments therefor, and no further consideration could be given it. The order now in question has no connection with the order for counsel fees and costs, except perhaps that it was made as a means of enforcing that order. But if it be so regarded, orders of that sort are not within this proviso of section 396b.

[11, 12] The order now under consideration is in effect an order refusing to act finally on defendant's motion for change of venue until he has complied with the order for payment of counsel fees and costs. No excuse for defendant's failure to comply was made on the hearing of the motion, and the trial court was therefore entitled to assume that his noncompliance was wilful and without excuse. Upon these facts we agree with plaintiff's contention that the trial court's action was proper under the rule which is stated in MacPherson v. MacPherson, 1939, 13 Cal.2d 271, 277, 89 P.2d 382, 385, as follows: "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state."

[13] Defendant claims that under the terms of section 396b, Code of Civil Procedure, he is entitled to a change of venue as a matter of right where, as here, the fact of his non-residence is undisputed. But the rule above quoted has been applied as a reason for denying to a disobedient litigant other rights which are, under ordinary circumstances, as absolute and unconditional as the right to a change of venue. Thus, under the rule, such a party has been denied the right to prosecute an appeal, his appeal being dismissed because of his contumacy (MacPherson v. MacPherson, supra; Knoob v. Knoob, 1923, 192 Cal. 95, 218 P. 568); the entry of a final decree of divorce has been denied to such a party (Weeks v. Superior Court, 1921, 187 Cal. 620, 203 P. 93); it has been held that the court need not hear his application for modification of an interlocutory decree of divorce (Schubert v. Superior Court, 1930, 109 Cal.App. 633, 293 P. 814); it has been held that the appellate court will not issue to such a party its writ to prohibit or set aside action claimed to be in excess of jurisdiction (Funfar v. Superior Court, 1930, 107 Cal.App. 488, 290 P. 626); and it has been held proper for the trial court to refuse to hear a motion to vacate an interlocutory decree of divorce claimed to be void. Soderberg v. Soderberg, 1923, 63 Cal. App. 492, 219 P. 82. In Monterey Coal Co. v. Superior Court, 1909, 11 Cal.App. 207, 104 P. 585, the rule was applied also to a motion for change of venue, and it was held that the trial court might properly refuse to hear the motion while proceedings were

pending against the moving party on a charge of contempt of court. This case was cited with approval in Weeks v. Superior Court, supra. The order appealed from here is similar in effect to that approved in Monterey Coal Co. v. Superior Court, supra, and the same rule should be applied to uphold it. There are cases holding that the doctrine under consideration cannot be extended so far as to preclude a defendant from making his defense, but the order here does not have that effect. On complying with the order he may have his change of venue, and if he is unable to comply, no doubt on a proper showing to that effect he can be purged of his contempt and allowed to renew his motion; but even if the order stands unchanged, the trial of the case may proceed where it was filed and he may make his defense as if he had made no motion for change of venue.

The appeal from the order overruling defendant's demurrer is dismissed. The other orders appealed from are affirmed.

YORK, P. J., and WHITE, J., concurred.

19 Cal.2d 147

OWEN v. COHEN.

L. A. 17917.

Supreme Court of California.

Dec. 5, 1941.

1. Partnership ⇐61

Where oral partnership agreement fixed no term for the duration thereof but provided that all obligations incurred by the partnership should be paid out of the profits of the partnership business, a "partnership at will", dissoluble at the election of a member thereof, was not created, since it must be presumed that parties intended the partnership should continue until such obligations were liquidated in the manner contemplated. Civ.Code, § 2425(1) (b).

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership at Will".

2. Appeal and error ⇐1071(3)

Where findings of trial court, other than those which did not conform to the evidence, amply justified court's decision, the findings not conforming to the evidence could be disregarded.

3. Partnership ⇐315

Minor differences and grievances which involve no permanent mischief will not authorize a court to decree the dissolution of a partnership, but equity may order the dissolution where there are disagreements of such a nature that all confidence between the parties has been destroyed, or where one of the parties by his misbehavior materially hinders a proper conduct of the partnership business. Civ.Code, § 2426.

4. Partnership ⇐328(3)

In action for dissolution of partnership entered into under oral agreement for the purpose of operating a bowling-alley business, court was warranted in finding that due to bitter, antagonistic feeling between the parties, existent conditions rendered the parties incapable of carrying on the business to their mutual advantage, so that a judicial dissolution of the partnership was warranted. Civ.Code, § 2426(1) (c, d, f).

5. Contracts ⇐235

A party to a contract may absolutely limit his right to receive a sum of money from a specified source.

6. Partnership ⇐333

Where judicial dissolution of partnership was justified by one partner's persistence in the commission of acts provocative of dissolution, decree properly provided for payment out of proceeds of sale of partnership assets of money advanced to partnership by the other partner under agreement that it should be repaid out of profits derived from business, since partner, whose acts made dissolution necessary, was in no position to insist on continued operation of the partnership. Civ.Code, § 2426(1) (c, d, f).

7. Partnership ⇐340

Equity court did not abuse its discretion in providing as a part of decree dissolving partnership that, in bidding at receiver's sale of partnership assets, either partner might use, in lieu of cash, credit to the extent of any sums which would accrue to him out of the proceeds.

8. Partnership ⇐346

In action for dissolution of partnership and sale of partnership assets, equity court did not abuse its discretion in providing for recovery by plaintiff of his costs out of proceeds of the sale of partnership assets and for a personal judgment against defendant for the payment of such costs to the extent that they are not satisfied out of distribution of such proceeds according to priority specified by the court. Code Civ.Proc. § 1032 (c).

9. Appeal and error ⇐984(2)
Costs ⇐13

In a proceeding in equity, the assessment of costs is a matter the disposition of which rests in the discretion of the trial court, and the action of such tribunal will not be disturbed unless an abuse of discretion is shown. Code Civ.Proc. § 1032(c).

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action in equity by Ross Owen against Israel Cohen for the dissolution of a partnership and for the sale of the partnership assets in connection with the settlement of its affairs. From a decree in favor of plaintiff, defendant appeals.

Decree affirmed.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

LeRoy B. Lorenz, of Los Angeles, for respondent.

CURTIS, Justice.

This is an action in equity brought for the dissolution of a partnership and for the sale of the partnership assets in connection with the settlement of its affairs.

On or about January 2, 1940, plaintiff and defendant entered into an oral agreement whereby they contracted to become partners in the operation of a bowling-alley business in Burbank, California. The parties did not expressly fix any definite period of time for the duration of this undertaking. For the purpose of securing necessary equipment, plaintiff advanced the sum of $6,986.63 to the partnership, with the understanding that the amount so contributed was to be considered a loan to the partnership and was to be repaid to the plaintiff out of the prospective profits of the business as soon as it could reasonably do so. Defendant owned an undivided one-half interest in a bowling-alley establishment in Burbank and the partnership purchased the other one-half interest for the sum of $2,500, of which amount $1,250 was paid in cash and the balance of $1,250 was evidenced by the partners' promissory note. As part of this transaction plaintiff assumed payment of the sum of $4,650 owing on a trust deed on the property, title to which he took in his own name. The partnership also purchased alleys and other requisite furnishings, and as part payment therefor the two partners executed promissory notes in the total sum of $4,596, secured by a chattel mortgage on said equipment.

Plaintiff and defendant opened their partnership bowling-alley on March 15, 1940. From the day of its beginning until the institution of the present action on June 28, 1940—a period of approximately three and one-half months—the business was operated at a profit. During this time the partners paid off a part of the capital indebtedness and each took a salary of $50 per week. However, shortly after the business was begun differences arose between the partners with regard to the management of the partnership affairs and their respective rights and duties under their agreement. This continuing lack of harmonious relationship between the partners had its effect on the monthly gross receipts, which, though still substantial, were steadily declining, and at the date of the filing of this action much of the partnership indebtedness, including the aforementioned loan made by plaintiff, remained unpaid. On July 5, 1940, in response to plaintiff's complaint and upon order to show cause, the court appointed a receiver to take charge of the partnership business, which ever since has been under his control and management.

As the result of the trial of this action the court found that the partners "did not agree upon any definite term for the continuance of said partnership, nor upon any particular undertaking to be accomplished; that the said partnership was a partnership at will". From this finding the court concluded that plaintiff was entitled to a dissolution under section 2425, subdivision (1) (b), of the Civil Code. The court further found that the parties disagreed "on practically all matters essential to the operation of the partnership business and upon matters of policy in connection therewith"; that the defendant had "committed breaches of the partnership agreement" and had "so conducted himself in affairs relating to the business" that it was "not reasonably practicable to carry on the partnership business with him". From this finding it was concluded that the partnership was dissoluble by court decree in accordance with the provisions of section 2426 of the Civil Code.

Pursuant to these findings of fact and conclusions of law, the trial court rendered a decree adjudging the partnership dissolved and ordering the assets sold by the receiver. It was further decreed that the proceeds of such sale and of the receiver's operation of the business on hand upon the consummation of such sale be applied, after allowance for the receiver's fees and expenses, to payment of the partnership debts, including the amount of $6,986.63 loaned by plaintiff to the business; that one-half of the remainder of the proceeds be paid to plaintiff, together with the additional sum of $100.17 for his costs; and that defendant be given what was left. It was also provided that in bidding at the sale of the partnership assets, either party might use, in lieu of cash, credit to the extent of any sums which would accrue to him out of the proceeds; and that if the money derived from such sale proved to be insufficient to pay plaintiff's costs, a personal judgment to the extent of the deficiency was to be rendered against defendant. It is from this decree that the defendant has appealed.

[1, 2] The principal question presented for consideration is whether or not the evidence warrants a decree of dissolution of

the partnership. Defendant's objection to the finding that the partnership was one at will is fully justified by the uncontradicted evidence that the partners at the inception of their undertaking agreed that all obligations incurred by the partnership, including the money advanced by plaintiff, were to be paid out of the profits of the business. While the term of the partnership was not expressly fixed, it must be presumed from this agreement that the parties intended the relation should continue until the obligations were liquidated in the manner mutually contemplated. These circumstances negative the existence of a partnership at will, dissoluble at the election of a member thereof (Mervyn Investment Company v. Biber, 184 Cal. 637, 194 P. 1037), and demonstrate conclusively that the assailed finding is without support in the record. However, our determination of this issue does not necessitate a reversal of the decree, for other facts found by the court relating to defendant's breach of the partnership agreement amply justify the decision rendered. In such event the law is settled beyond question that the finding which does not conform to the evidence becomes immaterial and may be disregarded.

It is not necessary to enter into a detailed statement of the quarrel between the partners. Whether the disharmony was the result of a difference in disposition or to other causes, the effect is the same. Most of the acts of which complaint is made are individually trivial, but from the aggregate the court found, and the record so indicates, that the breach between the partners was due in large measure to defendant's persistent endeavors to become the dominating figure of the enterprise and to humiliate plaintiff before the employees and customers of the bowling-alley. In this connection plaintiff testified that defendant declined to do any substantial amount of the work required for the successful operation of the business; that defendant informed him that he (defendant) "had not worked yet in 47 years and did not intend to start now"; and that he (plaintiff) "should do whatever manual work he could do on the premises, but that he (defendant) would act as manager and wear the dignity". The record also discloses that during the preparation and before the opening of the bowling-alley establishment, defendant told a mutual acquaintance that plaintiff would not be there very long. Corroborative of this evidence is plaintiff's testimony that a few weeks prior to the filing of this action, when he had concluded that he and defendant could not reconcile their differences, he asked defendant to make an offer either to buy out his (plaintiff's) interest in the business or to sell to him (plaintiff); that defendant replied, in effect, that when he was ready to sell to plaintiff, he would set the price himself and it would cost plaintiff plenty to get rid of him. In addition, there is considerable evidence demonstrating that the partners disagreed on matters of policy relating to the operation of the business. One cause of dispute in this connection was defendant's desire to open a gambling room on the second floor of the bowling-alley property and plaintiff's opposition to such move. Another was defendant's dissatisfaction with the agreed salary of $50 per week fixed for each partner to take from the business and his desire to withdraw additional amounts therefrom. This constant dissension over money affairs culminated in defendant's appropriation of small sums from the partnership's funds to his own use without plaintiff's knowledge, approval or consent. In justification of his conduct defendant claimed that on each occasion he set aside a like amount for plaintiff. This extenuating circumstance, however, does not serve to eliminate from the record the fact that monetary matters were a continual source of argument between the partners.

[3, 4] Defendant urges that the evidence shows only petty discord between the partners, and he advances, as applicable here, the general rule that trifling and minor differences and grievances which involve no permanent mischief will not authorize a court to decree a dissolution of a partnership. 20 R.C.L. 958, par. 182. However, as indicated by the same section in Ruling Case Law and previous sections, courts of equity may order the dissolution of a partnership where there are quarrels and disagreements of such a nature and to such extent that all confidence and cooperation between the parties has been destroyed or where one of the parties by his misbehavior materially hinders a proper conduct of the partnership business. It is not only large affairs which produce trouble. The continuance of overbearing and vexatious petty treatment of one partner by another frequently is more serious in its disruptive character than would be larger differences which would be discussed and

settled. For the purpose of demonstrating his own preeminence in the business one partner cannot constantly minimize and deprecate the importance of the other without undermining the basic status upon which a successful partnership rests. In our opinion the court in the instant case was warranted in finding from the evidence that there was very bitter, antagonistic feeling between the parties; that under the arrangement made by the parties for the handling of the partnership business, the duties of these parties required cooperation, coordination and harmony; and that under the existent conditions the parties were incapable of carrying on the business to their mutual advantage. As the court concluded, plaintiff has made out a cause for judicial dissolution of the partnership under section 2426 of the Civil Code:

"(1) On application by or for a partner the court shall decree a dissolution whenever: * * *

"(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

"(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him, * * *

"(f) Other circumstances render a dissolution equitable."

[5, 6] Defendant next questions the propriety of that portion of the decree which provides for the payment of plaintiff's loan to the business, to-wit, the sum of $6,986.63, from the proceeds realized upon the sale of the partnership assets. It is his contention that since the partners agreed that the amount so contributed was to be repaid from the profits of the business, which the evidence established to be a profitable enterprise, the court's order directing the discharge of this partnership obligation in a manner violative of the express understanding of the parties is unjustifiable. Mervyn Investment Company v. Biber, supra. That a party to a contract may absolutely limit his right to receive a sum of money from a specified source is indisputable. Lynch v. Keystone Consolidated Mining Company, 163 Cal. 690, 126 P. 968; Martin v. Martin, 5 Cal.App.2d 591, 43 P.2d 314. But defendant's argument based upon this settled precept is of no avail here, for his above-described conduct, creative of a condition of disharmony in derogation of the best interests of the partnership, constituted ground for the court's decree of dissolution and its order directing the sale of the assets for the purpose of forwarding the settlement of the partnership affairs. Defendant, whose persistence in the commission of acts provocative of dissension and disagreement between the partners made it impossible for them to carry on the partnership business, is in no position now to insist on its continued operation. These circumstances not only render the assailed provision of the decree invulnerable to defendant's objection, but also establish its complete accord with established principles of equity jurisprudence.

[7] Defendant also attacks the provision in the decree permitting the plaintiff, in bidding at the receiver's sale of the partnership assets, to use, "in lieu of cash, credit to the extent of any sums which will accrue to him out of the proceeds". He contends that such stipulation is erroneous on its face because it recognizes that the amount of money which "will accrue" to plaintiff cannot be ascertained until after the sale and yet it authorizes plaintiff to use in connection with his bid credit measured by such an indefinite quantity. This factor of uncertainty, he claims, will operate to plaintiff's advantage by stifling competitive bidding and therefore will react unfavorably on the outcome of the sale. Defendant's argument is not only unsound in view of the precise wording employed by the court in reference to the conduct of the sale, but it likewise fails to present in its entirety that portion of the decree of which the clause in question is but a part. Exactly the same provision concerning the use of credit was made for the benefit of defendant, so that in this respect the parties were placed on an equal footing. Moreover, the extension of credit has no bearing upon the bidding as such, for plaintiff and defendant, as other bidders at the sale, still must state their offers for the purchase of the partnership assets in terms definite as to amount; therefore, the competitive spirit customarily present on such occasions will in nowise be disturbed. It is manifest from the court's language that the single circumstance which will give operative force to the applicable credit provision is the prevalence of plaintiff or defendant over other participants in the bidding. In such event the receiver, as part of the mechanics

of computing the division of the proceeds, must, if so requested, take into account the sums of money which "will accrue" to the party bidding in the property and credit such amount against the cash figure constituting the pevailing bid. To pay money to the receiver merely to have it returned would be an idle ceremony, as the court recognized in its decree. In the case of an ordinary sale under execution the practice of the sheriff's taking the creditor's receipt instead of cash was approved in Mitchell v. Alpha Hardware & Supply Company, 7 Cal.App.2d 52, at page 61, 45 P.2d 442, at page 446, wherein it was said: "Thus, * * * if the sheriff accepts the receipt, and the judgment is satisfied, in substance and effect it amounts to the same thing as though actual cash had been passed to and fro, from purchaser to sheriff, and sheriff to purchaser."

The fact that at an execution sale the amount owing to the judgment creditor is known *before* the sale, while in the present situation the credit to which plaintiff or defendant will be entitled cannot be ascertained until *after* the receiver's sale is immaterial, for in neither case does certainty as to such allowance affect the conduct of the bidding. In each instance the credit is definitely fixed at the time of its consideration, which is *after* the consummation of the sale. Nor is it of consequence that it is obligatory upon the receiver here, in the event that either plaintiff or defendant prevails in the bidding at the sale of the partnership assets, to approve such party's tender of credit owing him, in lieu of cash, whereas the acceptance of a like offer from a successful judgment creditor at an execution sale is wholly volitional on the part of the sheriff. The procedure prescribed by the court here, after a consideration of all the facts presented in this equity proceeding, was a matter purely within its discretion, and no abuse thereof appears from the record. In accord with this analysis, it is our opinion that the questioned portion of the decree is proper in every respect.

[8, 9] Defendant finally contends that the court erred in its allowance of costs to plaintiff. Provision was made in the decree for plaintiff's recovery of his costs out of the proceeds of the sale of the partnership assets and also for a personal judgment against defendant for the payment of this item to the extent that it is not satisfied upon distribution of the proceeds according to the priority specified by the court. Defendant's objection is untenable, for under section 1032, subdivision (c), of the Code of Civil Procedure the assessment of costs in a proceeding in equity is a matter whose disposition rests "in the discretion" of the trial court, and the action of such tribunal will not be disturbed where, as here, there is no showing of an abuse of discretion.

The disposition of this appeal on the merits makes it unnecessary to pass upon the incidental supersedeas proceeding instituted herein, and the order to show cause issued in connection therewith is therefore discharged.

The judgment is affirmed.

GIBSON, C. J., SHENK, J., EDMONDS, J., HOUSER, J., CARTER, J., and TRAYNOR, J., concurred.



19 Cal.2d 123

POWERS FARMS, Inc., v. CONSOLIDATED IRR. DIST.

L. A. 17901.

Supreme Court of California.

Dec. 3, 1941.

1. Eminent domain ⇐271

Damage to land caused with or without negligence by seepage of water from canals of an irrigation district, which have been constructed and are maintained to supply water for public use, gives landowner a cause of action in the nature of "eminent domain" against the district. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Eminent Domain".

2. Eminent domain ⇐277

That a cause of action against irrigation district for damages from seepage is authorized under constitutional provision against taking or damaging property without just compensation does not exclude the cause from operation of a claim statute requiring a claim to be filed within fixed period if terms of statute are broad enough to embrace such cause. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

3. Eminent domain ⇐79, 167(1)

Under constitutional provision prohibiting the taking or damaging of private property for public use without just compensation, the procedure by which the right may be enforced may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a "waiver" of the right to compel payment of damages. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

4. Eminent domain ⇐277

A complaint alleging that water escaped from irrigation district's canal by reason of operation, maintenance, changes and alterations of the bed and banks of the canal, causing destructive seepage through plaintiff's lands and that district failed to make adequate provision against damage alleged that lands were damaged as result of "dangerous or defective condition" created by district within statute requiring the filing of a claim with district for damages resulting from dangerous or defective condition of property under district's control. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous or Defective Condition".

5. Eminent domain ⇐277

The filing of claim within period fixed under irrigation district liability law was a prerequisite to the maintenance of action against irrigation district for damages from seepage, notwithstanding such action was grounded on constitutional provision prohibiting the taking or damaging of private property for public use within just compensation rather than on statute. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

6. Waters and water courses ⇐228¾

The term "and/or" within statute providing that whenever it is claimed that person or property has been injured or damaged as result of any dangerous or defective condition of property under control of irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee, a verified claim for damages shall be presented, refers to a claim for damage grounded upon any one of causes enumerated in statute, the term "and/or" being commonly defined to mean either "and" or "or". Gen.Laws 1937, Act 3886*l*, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "And/Or".

7. Eminent domain ⇐277

The statute requiring the filing of a claim for damages caused by irrigation district was not inapplicable to actions in the nature of eminent domain because the statute did not cover actions for property taken for public use, since in the case of a "taking" of property, taker is the first to know about it and there is no reason to afford him protection of claim statute. Gen.Laws 1937, Act 3886*l*, § 2.

8. Constitutional law ⇐70(1)

The question whether it would have been better for legislature under irrigation district liability law to have enacted a provision embracing all cases in eminent domain is not a matter of judicial concern. Gen. Laws 1937, Act 3886*l*, § 2.

9. Eminent domain ⇐277

The statute requiring the filing of a claim for damages caused by irrigation district was not inapplicable to actions in nature of eminent domain on ground that detailed requirements with respect to time and manner of filing claims indicated that legislature intended only cases of injury caused by negligence, where claim provision included within its scope claims for damage or injury to property resulting from "any" dangerous or defective condition brought about by district in operation of its works. Gen.Laws 1937, Act 3886*l*, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Any".

10. Limitation of actions ⇐43

Where time and extent of injury are uncertain, statutory period of limitations begins to run when fact that damage is occurring becomes apparent and discoverable even though extent of damages may still be unknown.

11. Statutes ⇐123(6)

The title of "An act relating to the liability of irrigation districts, their officers and employees" was sufficiently comprehensive to embrace the entire subject matter of its provisions, including the procedural requirement for filing of a verified claim which requirement is incident to and within general subject of liability of district, its officers and employees in that it provides a method

of procedure by which such liability may be established. Gen.Laws 1937, Act 3886*l*; Const. art. 4, § 14.

12. Statutes ⇐107(1), 109

The title of an act need not contain an index or an abstract of its provisions, the constitutional mandate being satisfied if provisions themselves are cognate and germane to subject matter designated by the title, and if title intelligently refers the reader to subject to which act applies and suggests the field of legislation which the text includes. Const. art. 4, § 14.

13. Statutes ⇐109

Where a title of a statute assumes to be an index of particular matters embraced in statute, the specific enumeration of subjects therein is exclusive. Const. art. 4, § 14.

14. Estoppel ⇐62(4)

An irrigation district sued for damages from seepage was not "estopped" to invoke statutory requirement for filing of a verified claim because district had timely notice of danger to property derived from written and oral communications concerning the damage, since written notice to or actual knowledge on part of public officer does not constitute a substantial compliance with statutory requirement for a verified claim or give rise to an estoppel to assert the defense. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

15. Municipal corporations ⇐1021

The courts may allow no exceptions to plain provisions of a statute requiring the filing of a claim as prerequisite to maintenance of an action against a public body, under guise of interpretation or construction.

16. Waters and water courses ⇐228¾

The compliance with statute requiring the filing of a claim within specified period as prerequisite to maintenance of an action against irrigation district for damages is "mandatory", and hence such requirement may not be waived. Gen.Laws 1937, Act 3886*l*, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

17. Statutes ⇐97(1)

The statute requiring the filing of a claim within designated time for damage or injury to property resulting from dangerous or defective condition of property under district's control is not unconstitutional as "special legislation" in violation of constitution prohibiting legislature from passing special laws granting to anyone special or exclusive rights, privileges, or immunities, since public agencies, generally, including irrigation districts, afford a proper subject for legislative classification. Gen.Laws 1937, Act 3886*l*, § 2; Const. art. 4, § 25, and art. 11, § 13.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; B. C. Hawkins, Judge.

Action by Powers Farms, Incorporated, against the Consolidated Irrigation District to recover damages to realty from seepage. From a judgment for plaintiff, defendant appeals.

Reversed.

For prior opinion see 110 P.2d 112.

See, also, Cal.Sup., 119 P.2d 727.

Harris, Willey & Harris, Ronald B. Harris, and Everett G. Harris, all of Fresno, for appellant.

Harry W. Horton, of El Centro, Arvin B. Shaw, Jr., of Los Angeles, P. Jack Minasian, of Oroville, Thomas Boone, of Modesto, Hankins & Hankins, of San Francisco, and C. F. Metteer, of Sacramento, for Irrigation Districts Ass'n of California, Amici Curiae for appellant.

Christopher M. Bradley and Lucius Powers, Jr., both of San Francisco (C. Ray Robinson, of Merced, and James W. Archer, of San Francisco, of counsel), for respondent.

EDMONDS, Justice.

Powers Farms, Inc., the owner of improved land planted principally to mature orchards and vineyards, recovered a judgment for damages which the trial court found that it sustained when Consolidated Irrigation District permitted water to seep from its canals. One of the special defenses to the action is that no verified claim of damages was filed as required by the Irrigation District Liability Law. Stats.1935, p. 2250; Deering's Gen.Laws, vol. 1, p. 1932, Act 3886L, § 2. The principal question for decision upon the appeal of the district from the judgment is whether this

statute is applicable to the respondent's cause of action.

[1] The Constitution of this state (art. I, § 14) prohibits the taking or damaging of private property for public use "without just compensation having first been made to, or paid into court for, the owner." It is well settled that damage to land caused, with or without negligence, by the seepage of water from canals of an irrigation district which have been constructed and are maintained to supply water for public use, gives the owner of such land a cause of action in the nature of eminent domain against the district. Hume v. Fresno Irr. Dist., 21 Cal.App.2d 348, 354, 69 P.2d 483; Massetti v. Madera Canal & Irr. Co., 20 Cal.App.2d 708, 715, 68 P.2d 260; Ketcham v. Modesto Irr. Dist., 135 Cal.App. 180, 186, 26 P.2d 876; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 200 P. 814, opinion of Supreme Court on denial of hearing, page 568 of 53 Cal.App., page 818 of 200 P.

[2, 3] But the fact that the cause of action is one of that kind does not exclude it from the operation of a claim statute, the terms of which are broad enough to embrace it. Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages. Crescent Wharf, etc., Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102, and cases cited; see, also, Sala v. City of Pasadena, 162 Cal. 714, 124 P. 539; Bigelow v. City of Los Angeles, 141 Cal. 503, 75 P. 111; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; McCann v. Sierra County, 7 Cal. 121; Yonker v. City of San Gabriel, 23 Cal.App.2d 556, 73 P.2d 623; Musto-Keenan Co. v. City of Los Angeles, 139 Cal.App. 506, 34 P.2d 506.

The Irrigation District Liability Law, supra, is entitled: "An act relating to the liability of irrigation districts, their officers and employees." Section 1 limits the liability of directors of the district for negligent acts or omissions of employees to cases where the employee was hired with or retained after knowledge that he was incompetent or inefficient.

Section 2 provides: "Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property owned or operated and under the control of any irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee of an irrigation district, a verified claim for damages shall be presented in writing and filed with such officer or employee and the secretary of said board within ninety days after such accident or injury has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident or injury or damage and the nature and extent of the injury or damages claimed. The foregoing shall be a condition precedent to the filing or maintaining of any action for said injury or damages."

Section 3 imposes a limited liability on the district by obligating it to pay certain judgments against its officers. This, according to section 4, is the only new liability created by the act.

[4] By its complaint, the respondent charged that water escaped from the district's canal by reason of the operation, maintenance, changes, and alterations of the bed and banks of the canal, causing great and destructive seepage from the canal into and through the soil and into and through the lands of plaintiff, with resultant damage to lands, crops, and permanent improvements; also, that the district failed to make adequate provision against the damage or to provide adequate measures and means to drain, divert, or prevent the water from escaping to its lands. According to these allegations, the respondent's property was damaged as the result of a dangerous or defective condition in the maintenance, operation, or alteration by the district of its canals and other works, for unless such condition existed, excessive water could not have escaped. See Kaufman v. Tomich, 208 Cal. 19, 280 P. 130; Western Assurance Co. v. Sacramento & San Joaquin Drainage Dist., 72 Cal. App. 68, 77, 237 P. 59.

[5] The appellant takes the position that the respondent's action is one for negligence and, even if based upon the constitutional provision requiring compensation to be paid for property damaged, cannot be maintained in the absence of a claim

filed in strict compliance with the Irrigation District Liability Law, supra. The respondent admits that no verified claim for damages was filed with any officer of the district, but contends that the law concerns actions sounding in tort; that it has no reference to the general liability of the district, and should be construed as applying only to suits against directors, officers, agents, and employees, based on negligence, and to the secondary liability of the district, created by section 3, to pay certain judgments against officers. However, the statute may be construed in that way only by ignoring both the reference in the title to "the liability of irrigation districts", and the inclusion in the phraseology of section 2 of the disjunctive "or", by use of the term "and/or" instead of merely the conjunction "and".

[6] The term "and/or" is commonly defined to mean either "and" or "or." Webster's New International Dictionary, Second Edition; see, also, note 118 A.L.R. p. 1367. As used in section 2 of the act, it refers to a claim for damage grounded upon any one of the following causes: (1) a dangerous or defective condition of property of the district and negligence of an officer or employee; or (2) a dangerous or defective condition of property of the district, that is, a general liability without reference to negligence; or (3) the negligence of an officer or employee.

[7, 8] The respondent argues that if the statute had been intended to apply to actions in the nature of eminent domain, it would undoubtedly have been drawn to cover all actions within the constitutional provision (art. I, § 14, supra), that is, actions for property "taken" for public use, as well as for property "damaged" for such use. This argument is not persuasive. In the case of a "taking" of property for public use, the taker is the first to know about it, and there is no reason to afford him the protection of a claim statute. On the other hand, where the claim is one of damage, the protection of the statute is essential in order that the one charged with responsibility for the loss may be put upon notice that dangerous or defective conditions are alleged to exist, and thus be given an opportunity to rectify them in time to prevent an unnecessary expansion of the injury or increase in the amount of loss. Moreover, the question whether it would have been better for the legislature to have enacted a provision embracing all cases in eminent domain is not a matter of judicial concern.

[9, 10] It is also argued that the detailed requirements of the statute with respect to the time and manner of filing claims and the contents thereof indicate that the legislature had in mind only cases of accidental injury or specific damage caused at a given time and place by negligence or carelessness. Damage such as that caused by seepage, it is said, can occur so slowly that the injury would not be discovered before the statutory period lapsed. The answer to this argument lies in the fact that the claim provision as a whole indicates no intention that it is to have a limited application, for the opening clause includes within its scope any claim for damage or injury to property resulting from "any" dangerous or defective condition brought about by the district in the operation of its works. Where the time and extent of injury are uncertain, a statutory period of limitation begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown. See Young v. County of Ventura, supra, 39 Cal.App. 2d page 737, 738, 104 P.2d 102.

The case of Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226, relied upon by the respondent, is not determinative of the present controversy. Although the language of a statute which the court was there called upon to construe is very similar to that used in the one now being considered, its title refers exclusively to the liability of "officers". The title of the Irrigation District Liability Law, supra, includes "the liability of irrigation districts". Moreover, the Jackson case concerned two statutes which the court held were complementary and had been passed to meet situations where a joint liability is sought to be enforced. Accordingly, a construction was placed upon them which would give effect to each.

[11, 12] The title of the Irrigation District Liability Law, supra, is sufficiently comprehensive to embrace the entire subject matter of its provisions, including the procedural requirement for the filing of a verified claim. This requirement is incident to and within the general subject of the liability of the district, its officers and employees, in that it provides a method of procedure by which such liability

may be established. As stated in Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 677, 154 P. 845, 847, "When the general purpose of the act is declared, the details provided for the accomplishment of that purpose will be regarded as necessary incidents." See also Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185. The title of an act need not contain either an index or an abstract of its provisions. The constitutional mandate (art. IV, § 14) is satisfied if the provisions themselves are cognate and germane to the subject matter designated by the title, if the title intelligently refers the reader to the subject to which the act applies, and suggests the field of legislation which the text includes. Heron v. Riley, 209 Cal. 507, 511, 289 P. 160; Ex parte Liddell, 93 Cal. 633, 635, 29 P. 251.

[13] The construction placed upon one of the statutes considered in the Jackson case does not violate this principle. There it was held that a title which refers only to the liability of officers of municipalities and other entities would violate the constitutional mandate if the text of the act were construed to include the liability of the entities themselves as well as of the officers. In the present case the title refers to the liability of both the district and its officers and employees. Moreover, in the Jackson case the title was one drawn in an itemized form, as distinguished from the concise form used in the one now under review. Where a title assumes to be an index of the particular matters embraced in the act, it has been held that the specific enumeration of subjects therein is exclusive. O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 323, 245 P. 164.

[14-16] The district is not estopped to invoke the requirement for the filing of a verified claim by reason of the fact that it had timely notice of the danger to plaintiff's property derived from written and oral communications with plaintiff concerning the damage. It is well settled that written notice to or actual knowledge on the part of public officers does not constitute a substantial compliance with or satisfaction of a statutory requirement for a verified claim, or give rise to an estoppel to assert the defense. The long-established rule in this state is that the courts may allow no exceptions to the plain provisions of a claim statute under the guise of interpretation or construction. Compliance with this statute is mandatory and the requirement may not be waived. Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Western Salt Co. v. City of San Diego, 181 Cal. 696, 186 P. 345; Bancroft v. City of San Diego, supra; Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Young v. County of Ventura, supra; Wicklund v. Plymouth Elementary School Dist., 37 Cal.App.2d 252, 99 P.2d 314; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29; Yonker v. City of San Gabriel, supra; Strath v. City of Santa Rosa, 19 Cal.App.2d 382, 65 P.2d 894; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516, and cases cited; White-Satra v. City of Los Angeles, 14 Cal.App.2d 688, 58 P.2d 933; Johnson v. City of Glendale, 12 Cal.App.2d 389, cases cited pages 393, 394, 55 P.2d 580; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Myers v. Hopland, etc., School Dist., 6 Cal.App.2d 590, 44 P.2d 654; Thompson v. County of Los Angeles, supra; Chapman v. City of Fullerton, 90 Cal. App. 463, 265 P. 1035.

[17] The respondent contends that the Irrigation District Liability Law, supra, is unconstitutional because it is special legislation discriminating against a particular class of claimants. Const. art. IV, § 25. However, public agencies, generally speaking, afford a proper subject for legislative classification. This is true of irrigation districts. Const. art. XI, § 13; Wores v. Imperial Irrigation Dist., 193 Cal. 609, 227 P. 181; Wood v. Imperial Irrigation Dist., 216 Cal. 748, 17 P.2d 128. "A law, to be general in its scope," said this court in Heron v. Riley, 209 Cal. 507, 518, 289 P. 160, 165, "need not include all classes of individuals in the state. It answers the constitutional requirements if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic, or constitutional distinction. Abeel v. Clark, 84 Cal. 226, 230, 24 P. 383; People v. Jordan, 172 Cal. 391, 397, 156 P. 451. If good ground for the classification exists, such classification is not void because it does not embrace within it every other class which might be included." See, also, Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

Plaintiff commenced this action against the Consolidated Irrigation District to recover damages to its land caused by seepage of water from defendant's canals. This appeal is prosecuted by defendant from a judgment rendered in favor of plaintiff.

Powers Farms, Inc., plaintiff and respondent, is a California corporation and the owner of 160 acres of improved land, planted principally to mature orchard and vineyard. The present action is brought against the appellant Consolidated Irrigation District, a public corporation, relying upon the constitutional guarantee that private property shall not be taken or damaged for public use. Constitution of California, art. I, § 14.

Respondent's property is in Fresno county and within the area served by the Consolidated Irrigation District. There are two irrigation canals which are in close proximity to this property. One is known as the Fowler Switch Canal which runs in a general southwesterly direction, passing in its course approximately one-quarter of a mile northerly of plaintiff's lands; the other is Lone Tree Canal, constructed in the winter of 1932-1933, which also runs in a southwesterly direction, entering the property near the northeast corner and extending diagonally across to the center of the westerly boundary. The complaint alleges that by reason of the operation and maintenance of said canals, water in great quantity in 1937 and 1938 escaped and percolated through the soil to plaintiff's lands, causing damage to the land and crops, and destroying many valuable trees and vines.

After trial without a jury the court found that seepage water from the Fowler Switch Canal flows through an aquifer consisting of porous material; that water escapes freely from the canal at all times when it is carrying water; that the proximate result of this seepage was to cause destructive rises of surface water on plaintiff's lands; that the defendant knew at all times during the years of 1937 and 1938 of this destructive seepage from the Fowler Switch Canal; that the lands of plaintiff, which were planted with fruit trees and grape vines, began to be damaged on or about the first day of April, 1937; that during the years 1937 and 1938 the escaping water caused the lands to become water-logged and flooded, rendering cultivation impossible and causing damage in the sum of $14,000.

Appellant contends that the court had no jurisdiction to render a judgment against the district because the statute requires the filing of a verified claim within ninety days of the time in which the damage was done as a condition precedent to the commencement of an action. It also challenges the sufficiency of evidence to support the findings that the changes made in the canal materially increased the seepage condition on respondent's land or that the seepage from the canal to the north caused the damage complained of, and declares that the action is barred by the statute of limitations.

Respondent contends that the statute in question refers only to the liability on the part of an irrigation district to pay a judgment obtained in a tort action against an officer or employee of the district. However, assuming the act is applicable, respondent urges that it is unconstitutional in that it is special legislation, that the title to the statute is fatally defective, and that the district is estopped from invoking the provisions of a statute requiring a verified claim because it was fully advised of the claim by letter on April 21, 1937. It points to evidence which supports the finding that changes in the canal caused an increased flow of seepage water and to evidence showing that this water caused the damage complained of and denies that the action is barred by the statute of limitations.

It is well settled in this state that liability of an irrigation district for damages to land as a result of seepage from its canals, flows from the constitutional provision (art. I, § 14) and a showing of negligence is not required. Tormey v. Anderson-Cottonwood Irrigation District, 53 Cal. App. 559, 200 P. 814; Massetti v. Madera Canal & Irrigation Co., 20 Cal.App.2d 708, 68 P.2d 260; Ketcham v. Modesto Irrigation District, 135 Cal.App. 180, 26 P.2d 876. These cases hold that an action by a land owner against an irrigation district to recover damages to his land as the result of seepage, is in the nature of an inverse condemnation for compensation under the constitutional provision based on the taking or damaging of private property for public use.

It appears from the complaint in this action that plaintiff's cause of action is predicated solely upon the theory that the dam-

age suffered by him is the result of the public use by the defendant of its canals and irrigation system. It is not claimed that such damage resulted from a dangerous or defective condition of the district's property or the negligence of the officials or employees of the district.

The trial court found in accordance with the allegations of the complaint:

"IV. That the Fowler Switch Canal, running in a general southwesterly direction, passes in its course approximately one-quarter of a mile northerly of plaintiff's lands, and at an elevation approximately fourteen (14) feet higher than the northerly boundary of plaintiff's lands; that the channel of the Fowler Switch Canal extends in and through an aquifer consisting of porous material, and the lands south of said Fowler Switch Canal, including the lands of this plaintiff, slope southerly and southwesterly from the Fowler Switch Canal; that water freely escapes from the canal during all times when water is carried in the canal, and, more particularly, when water flows at high stages and for extended periods of time in the canal; that as a proximate result of such flow of water in the Fowler Switch Canal under these circumstances, there was in said years a great and destructive seepage from the Fowler Switch Canal into and through the soil contiguous to the land and into and through the lands of the plaintiff, and that the defendant at all times well knew that in the years 1937 and 1938 the flow of water in the Fowler Switch Canal was causing great and destructive rises of surface water on the lands of plaintiff; that early in the year 1937 the plaintiff advised, informed, notified and warned defendant, in writing, that large quantities of seepage water were escaping from defendant's canal and on and into the lands owned by plaintiff, thereby causing damage to the lands, crops and permanent improvements thereon and would continue in the future to cause increasing damage with the flow of water in said canal;

"V. That the described lands of the plaintiff, being variously planted by plaintiff in part to field crops and in part to deciduous fruit trees and grape vines, beginning on or about the first day of April, 1937, began to be damaged, and continued to be damaged by reason of the water flowing in said canal and escaping therefrom and through the aquifer underlying the canal and underlying plaintiff's lands, during the years 1937 and 1938, and caused the lands of the plaintiff to become waterlogged and flooded and permanently damaged and rendered impossible the cultivation thereof, so that to a large extent the trees and vines on said lands were severely damaged and, in greater part, killed and destroyed, thereby causing the plaintiff to suffer damage in said years 1937 and 1938 in the sum of Fourteen Thousand Dollars ($14,000.00), in addition to and exclusive of any damage to said lands and improvements thereon occurring in prior years and, particularly, occurring in the year 1932; that the damage suffered by the plaintiff and proximately caused by the defendant was much greater in 1937 and 1938 than theretofore, and the ground was more completely saturated and new and additional areas were affected; that subsequent to the year 1932, there occurred substantial changes in the Fowler Switch Canal adjacent to the land of the plaintiff, which increased the seepage therefrom; that among other changes was the construction of a check-drop in the canal immediately north of the plaintiff's property, in the winter of 1932-1933, which increased the hydraulic pressure of that section of the canal above the check-drop; also, such change in the canal resulted in an increased seepage through the sides of the canal for a considerable distance;

"VI. That there was a greatly increased flow of water in the Fowler Switch Canal in the years 1937 and 1938 for a continuous period;

"VII. That the water from the Fowler Switch Canal was the proximate cause of the damage suffered by the plaintiff in the years 1937 and 1938."

From the foregoing, it is apparent that the damages suffered by plaintiff were the result of the operation and maintenance of defendant's irrigation system which was devoted to a public use and that the basis of plaintiff's right to recover damages as the result of the destruction of his land is section 14 of article I of our state Constitution.

Defendant's contention that plaintiff's action is barred by reason of its failure to file a claim as a condition precedent to the commencement of the action is based upon section 2 of act 3886L Deering's General Laws; statutes 1935, chap-

ter 833, page 2250, which reads as follows:

"§ 2. Whenever it is claimed that any person or property has been injured or damaged as a result of any dangerous or defective condition of any property owned or operated and under the control of any irrigation district or its officers or employees and/or the negligence or carelessness of any officer or employee of an irrigation district, a verified claim for damages shall be presented in writing and filed with such officer or employee and the secretary of said board within ninety days after such accident or injury has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident or injury or damage and the nature and extent of the injury or damages claimed. The foregoing shall be a condition precedent to the filing or maintaining of any action for said injury or damages."

It has been uniformly held that an action for damages against a public corporation resulting from the dangerous or defective condition of property owned, operated or maintained by such corporation is predicated upon negligence, and it is apparent from a reading of the above-quoted statutory provision that the filing of a claim is a condition precedent to the commencement of an action for damages based upon negligence and not an action in inverse condemnation for the taking or the damaging of property for a public use in violation of section 14 of article I of our Constitution.

This conclusion appears to be obvious when we consider the nature of the two actions. If an irrigation district should construct a canal across a farmer's land without first acquiring a right of way therefor, the farmer would have a cause of action against the irrigation district under section 14 of article I of the Constitution for the value of the land taken and for damages resulting to the remainder of his land as the result of the construction of the canal. Such damages would be those which would flow from the severance of his land as the result of the construction of the canal and any diminution in the market value of his land adjacent to the canal by reason of deterioration as the result of water-logging or raising of the water table to such a height that crops could not be produced thereon profitably. The landowner would have but one cause of action for the taking and damaging of his land. It is conceded by appellant that he would not be required to file a claim for the value of the land taken, but it is claimed that he would be required to file a claim for the consequential damage to the remainder of his land as the result of the taking as a condition precedent to the commencement of his action. Obviously, this procedure would require the splitting of his cause of action. However, when we consider the wording of the above-quoted claim statute, it is clear that it was the intention of the legislature to limit the requirement for filing claims to those cases where the action for damages is predicated upon negligence, or dangerous or defective condition of the district's property and not to actions based upon section 14 of article I of the Constitution.

The majority opinion is based upon the misconception which appears from the statement therein that "* * * the respondent's property was damaged as the result of a dangerous or defective condition in the maintenance, operation, or alteration by the district of its canals and other works * * *." When, as I have pointed out above the respondent's cause of action is not based upon any such theory. The appellant does not claim that the action is founded upon negligence or upon dangerous or defective condition of its property. It interposed various defenses, including the statute of limitations and the failure to file a claim, but its principal contention as appears from its briefs was that the evidence was insufficient to support the findings that the damage to plaintiff's land was the result of the seepage of water from its canal; in fact, the failure of plaintiff to file a claim was touched upon only incidentally on pages 59 and 60 of appellant's opening brief.

However, in appellant's closing brief a further argument is advanced on this proposition based upon the case of Young v. County of Ventura, 39 Cal.App.2d 732, 104 P.2d 102, 105, which case was decided after appellant's opening brief was filed. Obviously, that case does not support appellant's position in the case at bar, as the court expressly held in its opinion therein, that "At the time the acts complained of were performed by defendant county no property of plaintiffs was taken or damaged." The court further held in said case, that "Plaintiffs' cause of action

rests upon the provisions of act 5619, Deering's General Laws, Statutes of 1923, page 675, section 2 * * *", which statute imposes liability upon counties and other political subdivisions for damages resulting from the dangerous or defective condition of property owned or maintained by such public corporations. In other words, the two cases are entirely dissimilar. Here there was what actually amounted to a taking of plaintiff's property for a public use, as this would obviously be the result if defendant's irrigation system cannot be operated without the use of plaintiff's property as a storage basin for the water lost in seepage and percolation from its irrigation system. The result would occur without negligence on the part of defendant, and its property would not necessarily be in a dangerous or defective condition to cause this result. Let us assume that instead of the present situation, plaintiff's property were situated adjacent to lands owned by defendant and used for reservoir purposes, and defendant would raise the water in its reservoir to such height that plaintiff's land was submerged or flooded to such an extent that it was rendered unfit for productive use, could it be said that plaintiff would not be entitled to redress under section 14 of article I of the Constitution? I doubt if even the author of the majority opinion would so hold. But the situation in the case at bar is not different. Furthermore, the mere fact that there is negligent conduct on the part of the public agency in the taking or damaging of private property for public use, does not impose any additional burden upon the property owner. It was held in the case of Hume v. Fresno Irrigation District, 21 Cal.App.2d 348, 69 P.2d 483, that an action of this character can be maintained under section 14 of article I of the Constitution irrespective of the presence or absence of negligence.

While claim statutes have generally been upheld and it must be conceded that their application is usually in the public interest, I am convinced that it was not the intention of the legislature in enacting such statutes to trench upon the constitutional guarantees for the protection of life, liberty and property. In my opinion such statutes should be strictly construed in favor of the protection of such constitutional guarantees. Only one case has been called to my attention where a claim statute has been invoked to prevent a recovery for the taking or damaging of private property for public use under section 14 of article I of our Constitution. That is the case of Crescent Wharf, etc., Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028. This was a case against the city of Los Angeles for wharf property taken and physically destroyed without compensation. The cause of action was in eminent domain and the claim statute relied upon was section 376 of the Los Angeles City Charter, which provided:

"No suit shall be brought on any claim for money or damages against the city until a demand for the same has been presented." This case is not authority for the proposition that a claim is required in the case at bar, as the claim statute relied upon here restricts the requirement for the filing of a claim to cases for the recovery of damages as the result of negligence or dangerous or defective condition of public property. This is not such a case.

We hear a lot these days about substituting substance for form in order that wrongs may be redressed and justice may be meted out with simplicity, expedition and fairness. To my mind the majority opinion in this case presents a classical example of the impotency of our judicial system to accomplish a just result in a very simple case.

While I have not read all of the voluminous record in this case, I have read the briefs of counsel filed on behalf of the respective parties and amici curiae, and I am impressed with the great amount of effort consumed both in the trial of the case and in the preparation of the briefs. The case is ably briefed on its merits on both sides, and in my opinion it should be decided on its merits instead of being brushed aside by the superficial treatment of a hypertechnical point which was not even presented as a ground for reversal in appellant's opening brief.

This disposition of the case presents even a more shocking situation when we consider the admitted factual background upon which the majority opinion is based. It is alleged in the complaint, admitted by the answer and the trial court found that in April, 1937, at the first indication of damage to plaintiff's property, defendant was notified in writing and thereafter efforts were made by defendant to correct the situation and prevent further damage,

but these efforts failed. It is also admitted that negotiations were carried on between the parties during 1937 and 1938 for a settlement of the controversy, which also failed. There is no suggestion that defendant did not have every opportunity to investigate plaintiff's claim, make any change in its system it desired in order to prevent further damage and consummate a settlement with plaintiff for the damages suffered, if any. In view of the state of the record in this case, to say that plaintiff's cause of action guaranteed by our Constitution is barred as the result of its failure to file a claim within ninety days (which it is conceded would have been an idle act) is to my mind so outrageous as to stultify every concept of justice known to our law. Such a result cannot be defended on any basis of reason, logic or common sense and I cannot agree that it should be announced as the law of this state.



19 Cal.2d 140

DAVIS et al. v. EAST CONTRA COSTA IRR. DIST.

S. F. 16586.

Supreme Court of California.

Dec. 3, 1941.

1. Eminent domain ⇐277

The statute requiring the filing of claim with irrigation district for damages resulting from dangerous or defective condition of property under district's control, is applicable to an action in eminent domain. Gen. Laws 1937, Act 3886*l*, § 2.

2. Eminent domain ⇐277

A complaint which charged that plaintiffs' lands had been damaged or destroyed by waters escaping from canals and works of irrigation district and by district's failure to maintain adequate drainage facilities, sufficiently alleged damages as result of "dangerous or defective condition" created by district within statute requiring the filing of a claim with district for damages resulting from dangerous or defective condition of property under district's control, the word "dangerous" meaning attended or beset with danger, full of risk or perilous. Gen.Laws 1937, Act 3886*l*, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous" and "Dangerous or Defective Condition".

3. Eminent domain ⇐277

The statutory requirement for filing of claim with irrigation district for damages resulting from dangerous or defective condition of property under district's control was not inapplicable to action for damage from seepage on ground that complaint allegedly charged damage caused by condition of land belonging to third parties, where plaintiffs based all of their causes of action on charge that district was wholly responsible for the damage and no claim was made against other owners of land in the vicinity. Gen.Laws 1937, Act 3886*l*, § 2.

4. Eminent domain ⇐277

If irrigation district permitted water to escape, a "dangerous or defective condition" necessarily resulted within statute requiring filing of claim with irrigation district for damages resulting from dangerous or defective condition of property under district's control. Gen.Laws 1937, Act 3886*l*, § 2.

5. Eminent domain ⇐277

That irrigation district liability law did not apply to property "taken" for public use as distinguished from property "damaged" for such use did not aid plaintiffs suing for damages resulting from seepage so as to entitle them to maintain the action notwithstanding they failed to file a claim as required by statute, where complaint alleged only damage to, and not taking of, their property. Gen.Laws 1937, Act 3886*l*, § 2.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Contra Costa County; Edward I. Butler, Judge.

Action by Andrew M. Davis, Jr., and others against the East Contra Costa Irrigation District to recover for damage to land caused by seepage or overflow of water from canals of defendant district. From a judgment following an order sustaining defendant's demurrer without leave to amend, plaintiffs appeal.

Affirmed.

For prior opinion see 109 P.2d 986.

Lloyd W. Dinkelspiel, Donald W. Falconer, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

A. L. Cowell, of Stockton, and Stephen W. Downey and Downey, Brand & Seymour, all of Sacramento, for respondent.

Harry W. Horton, of El Centro, Arvin B. Shaw, Jr., of Los Angeles, P. Jack Minasian, of Oroville, Thomas Boone, of Modesto, Hankins & Hankins, of San Francisco, and C. F. Metteer, of Sacramento, for Irrigation Districts Ass'n of California, Amici Curiae for respondent.

EDMONDS, Justice.

The appellants sued to recover compensation for the damage to land owned by them which, they alleged, was caused by the seepage or overflow of water from the canals of the East Contra Costa Irrigation District. They have appealed from a judgment which followed an order sustaining the district's demurrer to their third amended complaint without leave to amend.

[1] The principal point presented by the demurrer is that the appellants failed to allege the filing of a verified claim for damages as required by section 2 of the Irrigation District Liability Law of 1935. Stats.1935, p. 2250; Deering's Gen.Laws, vol. 1, p. 1932, Act 3886L. As this statute is applicable to an action in eminent domain (Powers Farms, Inc., v. Consolidated Irrigation District, Cal.Sup., 119 P.2d 717), the sole question for decision is whether either of the four counts of the appellants' complaint states a cause of action for injury or damage "as a result of any dangerous or defective condition of any property owned or operated and under the control" of the respondent district. § 2, supra.

[2] The gravamen of the appellants' charge is that their orchard and agricultural acreage has been severely damaged or destroyed by waters escaping through seepage, overflow, or other means from the canals and works of the respondent district, and by its failure to maintain adequate drainage facilities. Although the complaint does not allege in express terms that the condition created by the district was "dangerous or defective", the facts stated show that it was such, and the use of the words of the statute would add nothing except the statement of a conclusion. The word "dangerous", as ordinarily defined, means "attended or beset with danger; full of risk; perilous" (Webster's New International Dictionary, second edition). Manifestly the condition created by the district's activities over a long period of years in transporting great quantities of water for irrigation and in permitting it to escape, seep, or overflow from canals and ditches in such volume as to raise the water level underlying the appellants' lands to an extent which has rendered them useless for agricultural or horticultural purposes, is a condition "dangerous" to their property. The same is true of the district's failure to maintain drainage facilities adequate to remedy the situation.

[3] The appellants allege in a second cause of action that damage has resulted from the district's transportation and distribution of artificial water by seepage and overflow through canals and ditches to lands within the district, "including lands now owned by defendant district in the vicinity of plaintiffs' said lands." These allegations, the appellants contend, merely charge damage caused by the condition of lands belonging to and under the control of third parties, not by the condition of property of the district. But this argument is not supported by their pleading because they base all of their causes of action upon the charge that the district is wholly responsible for the damage. No claim is made against other owners of land in the vicinity.

[4, 5] In the last analysis the appellants' causes of action charge no more than that the district permitted its water to escape and flood and damage their land. If the district permitted the water to escape, a dangerous condition necessarily resulted. Under such circumstances the Irrigation District Liability Law, supra, is applicable and a claim must be filed as the basis for a cause of action. The fact that this statute does not apply to property "taken" for public use, as distinguished from property "damaged" for such use does not aid the appellants as their complaint alleges only damage to, not a taking of, their property.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The majority opinion in this case is predicated upon the rule announced in the ma-

jority opinion in the case of Powers Farms, Inc., v. Consolidated Irrigation District, Cal.Sup., 119 P.2d 717, this day decided. I filed a dissenting opinion in the Powers Farms case which covers the same legal propositions involved in the above-entitled cause, and for the reasons stated and upon the authorities cited in my dissenting opinion in the Powers Farms case, in my opinion the judgment against the plaintiff in this case should be reversed.



19 Cal.2d 143

FIFTH STREET BUILDING v. McCOLGAN, Franchise Tax Commissioner.

L. A. 17737.

Supreme Court of California.

Dec. 5, 1941.

Rehearing Denied Dec. 31, 1941.

1. Bankruptcy ⇐314(6)

Under statute making trustees in bankruptcy, carrying on business of bankrupt, subject to all state and local taxes that would be applicable to the business, trustee was liable for franchise taxes that would have been due from bankrupt corporation, without necessity of specific provision to that effect in the taxing statute. St.1929, p. 19, as amended by St.1935, pp. 959, 995, 1245; 28 U.S.C.A. § 124a.

2. Bankruptcy ⇐314(6)

Appointment of a trustee in bankruptcy does not relieve a business of state and local taxes to which it is normally subject, under statute manifesting intent that business in receivership or conducted under court order shall be subject to the same tax liability as owner would have been if in possession and operating the enterprise. 28 U.S.C.A. § 124a.

3. Bankruptcy ⇐314(6)

A trustee in bankruptcy cannot escape applicability of a state tax enforceable against the bankrupt, and the trusteeship cannot militate against effective enforcement of the tax. 28 U.S.C.A. § 124a.

4. Bankruptcy ⇐3

In exercise of its plenary authority over administration of a bankrupt's estate, Congress may provide that a trustee be regarded as of such a nature as to come within range of state tax laws. 28 U.S.C.A. § 124a.

In Bank.

Appeal from the Superior Court of Los Angeles County, Benjamin J. Scheinman, Judge.

Action by the Fifth Street Building against Charles J. McColgan, as Franchise Tax Commissioner, to recover franchise tax paid. From a judgment for plaintiff, defendant appeals.

Reversed, with instructions.

Earl Warren, Atty. Gen., and H. H. Linney and Valentine Brookes, Deputy Attys. Gen., for appellant.

Flint & Mackay and Clark J. Milliron, all of Los Angeles, for respondent.

TRAYNOR, Justice.

On December 30, 1934, Walkers' Inc., a domestic corporation doing business in California, filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California. It was adjudicated a bankrupt, and a trustee in bankruptcy was appointed who carried on the business from December 31, 1934, until about July 26, 1938. On March 9, 1937, the trustee filed a franchise tax return under the Bank and Corporation Franchise Tax Act (Cal.Stats.1929, p. 19 as amended by Cal.Stats.1935, pp. 959, 995, 1245), and paid a franchise tax of $4,764.17 for the taxable year 1937. In 1938 Walkers' Inc., was discharged from bankruptcy. The trustee filed a claim, which was denied, for the refund of the 1937 franchise tax. By an order of the federal court plaintiff, Fifth Street Building, became the assignee of the claim for refund and brought suit for the recovery of the tax paid by the trustee. Both the plaintiff and defendant filed motions for judgment on the pleadings, and judgment was entered in favor of the plaintiff for the refund of the tax in question. From that judgment defendant has taken this appeal.

Plaintiff contends that the trustee in bankruptcy was not subject to the Bank and Corporation Franchise Tax Act, which imposes a tax on corporations doing business in the state for the privilege of exercising their corporate franchises therein. In plaintiff's view the corporation's franchise did not pass to the trustee but he carried on the business as an individual, im-

mune from the taxes applicable solely to corporations.

[1] This contention would revive an issue, once highly controversial, laid at rest by an act of Congress of June 18, 1934, 28 U.S.C.A. § 124a. See United States v. Whitridge, 231 U.S. 144, 34 S.Ct. 24, 58 L.Ed. 159; Michigan v. Michigan Trust Co., 286 U.S. 334, 52 S.Ct. 512, 76 L.Ed. 1136; Reinecke v. Gardner, 279 U.S. 239, 48 S.Ct. 472, 72 L.Ed. 866; Bright v. State of Arkansas, 8 Cir., 249 F. 950; Kansas City v. Johnson, 8 Cir., 70 F.2d 360; In re Continental Candy Co., D.C., 291 F. 773; In re Century Mills Inc., D.C., 12 F. 2d 292. The act of Congress provides: "Any receiver, liquidator, referee, trustee, or other officers or agent appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

[2] This language envisages precisely such situations as the present one. The trustee, appointed after June 18, 1934, by a United States Court, conducted the business theretofore carried on by Walkers' Inc., then subject to the franchise tax as it would have continued to be had it not gone into bankruptcy. The act of Congress makes it clear that the appointment of a trustee in bankruptcy by a federal court does not relieve a business of the state and local taxes to which it is normally subject. "What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise." Palmer v. Webster & Atlas Nat. Bank of Boston, 312 U.S. 156, 61 S.Ct. 542, 545, 85 L.Ed. 642; see, also, Philadelphia Co. et al. v. Dipple, 312 U.S. 168, 61 S.Ct. 538, 85 L.Ed. 651; Boteler v. Ingels, 308 U.S. 57, 60 S.Ct. 29, 84 L.Ed. 78; Thompson v. Louisiana, 8 Cir., 98 F. 2d 108; In re Vicksburg Bridge & Terminal Co., D.C., 24 F.Supp. 123; International Shoe Co. v. Picard & Geismar, D. C., 30 F.Supp. 570; In re Kentucky Fuel Gas Corp., D.C., 37 F.Supp. 625; The Southern Cross, 2 Cir., 120 F.2d 466.

[3] In was settled in Boteler v. Ingels, supra, not only that a trustee in bankruptcy comes within the meaning of the act of Congress and cannot therefore escape the applicability of a state tax, but that the trusteeship can in no way militate against the effective enforcement of the tax. In that case a trustee in bankruptcy operated automobiles on the California highways without obtaining the licenses required by California laws or paying the state automobile license tax. The court upheld a penalty of 100 per cent, stating [308 U.S. 57, 60 S.Ct. 32, 84 L.Ed. 78]: "* * * Congress has here with vigor and clarity declared that a trustee and other court appointees who operate businesses must do so subject to State taxes 'the same as if such business (es) were conducted by an individual or corporation.' If businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. * * * petitioner's contention would exempt a trustee operating a business in bankruptcy from this double tax liability which other delinquents must bear. A State would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment."

[4] There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax as if he were a corporation in order to insure that an intervening bankruptcy will not interrupt the application of the tax. Thompson v. Louisiana, supra. The act of Congress already provides that state taxes are as applicable to such a business as if it were conducted by a corporation, and thus gives to the trustee the status of a corporation for the purpose of the tax. That status is determined by Congress in the exercise of its plenary authority over the administration of a bankrupt's estate. Thompson v. Louisiana, supra; In re Landquist, 7 Cir., 70 F.2d 929. Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the act of 1934, that a trustee be regarded as of such a nature as to come within the range of state tax laws.

Plaintiff's complaint therefore does not state a cause of action and since amendment could be of no avail the judgment is reversed with instructions to enter judgment on the pleadings for the defendant.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

19 Cal.2d 156

JONES v. CLARK et al.

L. A. 17315.

Supreme Court of California.

Dec. 9, 1941.

1. Appeal and error ⇐1010(1)

The Supreme Court would not interfere with trial court's findings which were supported by substantial evidence.

2. Specific performance ⇐121(7)

Evidence sustained judgment enforcing written contract to devise property and decreeing that plaintiff was the equitable owner thereof and entitled to its conveyance, on ground that testatrix had entered into the contract under which she agreed to devise her realty and furnishings to plaintiff on a specified condition, that plaintiff complied with condition, and that the contract was fair and equitable and the consideration passing from one to the other of equal value.

3. Appeal and error ⇐1009(3)

In action to enforce written contract to devise property, fact that a codicil executed by testatrix contained self-serving declaration that plaintiff had not helped testatrix nor been good to her could not foreclose inquiry concerning whether plaintiff actually had performed what was required of her under the agreement, and at best created a mere conflict in the evidence for the exclusive determination of the trial court.

4. Specific performance ⇐86

A court of equity will decree specific performance of an agreement to dispose of property by will upon recognized principles by which it is governed in the exercise of this branch of its jurisdiction.

5. Specific performance ⇐86

Plaintiff could maintain action to enforce a written contract to devise property, upon death of testatrix who failed to devise the property to plaintiff, as against contention that plaintiff had an adequate remedy at law.

6. Specific performance ⇐49(2)

The promise of testatrix to devise property to plaintiff if the plaintiff would move from New Hampshire, and reside with testatrix in California, was not invalid for lack of "consideration" and was enforceable by plaintiff who in reliance on the promise sold her property and left her home state to be near the testatrix as requested.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

7. Specific performance ⇐6

The doctrine of "mutuality of remedies" applies only to executory contracts and not to executed contracts. Civ.Code, § 3386.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Remedies".

8. Specific performance ⇐6

Any lack of mutuality of remedy which existed at inception of contract under which testatrix agreed to devise her property to plaintiff, if the plaintiff would leave her home state to be near the testatrix in California, was cured upon substantial performance of the contract by plaintiff who in reliance on the promise sold property in her home state and moved to California. Civ. Code, § 3386.

9. Witnesses ⇐133

An action against executor to compel specific performance of contract under which decedent agreed to devise her property to plaintiff was not prosecuted on a "claim against an estate" within statute prohibiting a party to action against an executor on claim against estate of a deceased person from becoming a witness as to any matter or fact occurring before death of the deceased person so as to preclude plaintiff from testifying to facts which occurred prior to decedent's death. Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim Against An Estate".

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Helen Boulton Jones against William J. Clark, executor, etc., and others to enforce a contract to devise property to the plaintiff. From an adverse judgment, defendants appeal.

Affirmed.

H. S. Farrell, of Alhambra, for appellants.

R. D. Wickham, of Alhambra, for respondent.

CURTIS, Justice.

The defendants prosecute this appeal from a judgment enforcing a written contract to devise property and decreeing that plaintiff is the equitable owner thereof and entitled to its conveyance, the defendants holding it in trust for her use and benefit. The principal issue on the appeal has to do with the asserted insufficiency of the evidence to support such judgment.

It appears that in August, 1935, the plaintiff, a married niece of the testatrix, was living in Acworth, New Hampshire, where she and her husband owned several parcels of real property. At about this time the testatrix, a childless widow, left her home in Alhambra in this state to visit with her sister and nieces in Detroit, Michigan, and other places. During the course of her sojourn she visited with the plaintiff in New Hampshire, where she remained about a month. While there the testatrix apparently became fond of the plaintiff, who testified that on an occasion when they were conversing the testatrix stated, "If I would come to California to live and be near her and sell my property in New Hampshire, that she would leave me her property here in California. She said she was lonely since her daughter's death * * * that none of her relatives were out here, that no one was here, and that she wished I would be near her, so that she could see me."

Later, and after her return to this state, the testatrix, according to plaintiff's testimony, repeated this offer by letter on several occasions, wanting to know "how soon I could straighten out my affairs and come out there". Plaintiff ultimately replied, accepting the offer, indicating that she would come to this state as early as necessary adjustments would permit. Plaintiff testified that these several letters were either lost or destroyed in the moving process, she having attached no particular importance to their continued existence.

In March, 1936, plaintiff and her husband did move to southern California, where they continued to live except for a return visit to New Hampshire to sell their property, the sale being upon the advice and at the request of the testatrix. Plaintiff lived for a while in Hollywood, and later, at the request of the testatrix, in Alhambra, in the immediate vicinity of the home of the testatrix. She lived at the latter place until her aunt's death in August, 1938, spending much time with her aunt until a few weeks prior to the latter's death, when some disagreement occurred between them.

Apparently the testatrix was satisfied with the arrangement resulting from plaintiff's removal to this state, for after plaintiff had disposed of the New Hampshire property, thus making more certain her permanent residence here, the testatrix on March 9, 1937, executed a will, leaving to plaintiff her home in Alhambra and the furnishings thereof, the property here in dispute. Provision was also made for other relatives. On January 14, 1938, a codicil was executed by the terms of which a sewing machine left under the will to another was bequeathed to plaintiff. On July 13, 1938, however, a few weeks before her death at the age of 87 years, and apparently after the above mentioned disagreement between plaintiff and testatrix, the latter executed a second codicil to her will, in which she declared, "I desire to revoke my devise and bequest to my niece, Nellie Boulton Jones [plaintiff and respondent herein], for the reason that since she has lived in Alhambra she has not helped me, nor been good to me and has disturbed me greatly by her actions toward me." This document also made money bequests to two other persons.

The will and codicils were offered for probate. Before their admission, plaintiff here filed a contest to the second codicil on the ground that the testatrix was of unsound mind at the time of its execution. The court found her to be sane and all three documents were accordingly admitted to probate. Thereupon plaintiff commenced this action to enforce the written contract and agreement alleged to have been made in 1935 between her and the testatrix. As already indicated, the court below found in favor of the plaintiff, decreeing that she was the equitable owner of the home and furnishings of the testatrix and entitled to the conveyance thereof from the defendant executor and other heirs who held them in trust for her use and benefit.

As to the conversation with the testatrix in 1935 and as to the receipt of the subsequent but lost letters from the testatrix soliciting plaintiff to sell her

New Hampshire property and come to this state to live in exchange for the testatrix's promise to devise and bequeath her property, plaintiff's testimony was corroborated by that of her husband. In addition, there was substantial corroboration furnished by other and disinterested witnesses. The housekeeper for the testatrix testified that the latter "told me she was going to have Mrs. Jones come out here and she was going to give her property to her; * * * she told me that several times. She wanted her to come out here and be here. * * * Her place where she was living. She said she was going to give this place to Nellie; and her furnishings. * * *" This same witness testified that she had written letters for the testatrix importuning the plaintiff to come to California to live on the strength of her promise to leave the property to plaintiff. Another housekeeper for the testatrix testified that the latter had related to her that she had gone to visit her relatives in the east "with the purpose of seeing which would come out here and which would treat her the best, you know, the friendliest towards her. * * * Well, she said that she had her come out here for that purpose, to come here to be near her for companionship. She said at different times that she was leaving everything to Mrs. Jones." Other corroborative evidence appears in the record.

[1-3] Upon this evidence the court below found that the testatrix had entered into a written contract with the plaintiff whereby the former agreed to devise and bequeath her real property and furnishings to the plaintiff if the latter would sell her New Hampshire property and come here to live near the testatrix and furnish her with companionship; that plaintiff had performed all things required of her by the contract; and that the contract was fair and equitable and the consideration passing from one to the other of equal value. There being substantial evidence to support these findings an appellate court will not interfere therewith. Jones v. Rutherford, 8 Cal.2d, 603, 607, 67 P.2d 92; Simonton v. L. A. Bank, 205 Cal. 252, 259, 270 P. 672. The self-serving declaration in the second codicil that plaintiff while living in Alhambra "has not helped me, nor been good to me", cannot foreclose an inquiry as to whether plaintiff actually had performed what was required of her under the agreement. At best, it creates a mere conflict in the evidence, a matter for the exclusive determination of the trial court. From the plaintiff's evidence, as well as from the fact of execution of the will leaving the property in dispute to the plaintiff, and also from the fact of execution of the first codicil a few months before testatrix's death augmenting the bequest to plaintiff, the trial court might properly conclude, as it apparently did, that plaintiff had fully performed her part of the contract.

The case of Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026, sufficiently answers appellants' challenge to indicate a case where our appellate courts have sustained a "verbal agreement to make a will * * * or where a written agreement to make a will depending on a lost document has ever been upheld". In the cited case, as here, the contract relied on was the result of an exchange of letters. There, plaintiffs' letter of acceptance of the testator's offer had been lost or destroyed but its contents were established by parol, this court declaring, supra, page 374 of 1 Cal.2d, page 1028 of 34 P.2d, "The testimony is uncontradicted and ample to support the trial court's finding that this letter was sent * * * and received * * *." In Wolf v. Donohue, 206 Cal. 213, 216-219, 273 P. 547, the contract was also based on an exchange of subsequently lost or destroyed letters. It was held that secondary evidence of their contents was admissible and that the trial court properly found for the plaintiff on such evidence.

[4, 5] Nor is there merit in the contention that plaintiff had an adequate remedy at law. As said in Wolf v. Donohue, supra, page 220 of 206 Cal., page 550 of 273 P., "It is well settled in this state by numerous decisions that a court of equity will decree specific performance of such an agreement [to dispose of property by will] upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction."

[6-8] Contrary to the appellants' further contention, it must be held that the parol evidence disclosed the terms of the contract to be adequately certain and definite. Likewise, there was ample consideration for the promise of the testatrix. In reliance upon that promise plaintiff sold

her property and left her home state to be near the testatrix as requested. Any asserted lack of mutuality of remedy existent at the inception of the contract obviously was cured by plaintiff's substantial performance of the contract long prior to this effort to enforce it. The doctrine of mutuality of remedies applies only to executory contracts and not to executed contracts. This exception to the mutuality rule is well established and finds expression in section 3386 of the Civil Code.

[9] Appellants further contend that the court erred in permitting plaintiff to testify at the trial of said action as to facts occurring prior to the death of testatrix. This contention is based upon the provisions of subdivision 3, section 1880, Code of Civil Procedure, which prohibit a party to an action against an executor or administrator upon a claim or demand against the estate of a deceased person from becoming a witness as to any matter or fact occurring before the death of such deceased person. The restrictions upon a party becoming a witness contained in this section of the code do not apply to an action like the present one. Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026; Steinberger v. Young, 175 Cal. 81, 165 P. 432; Furman v. Craine, 18 Cal.App. 41, 121 P. 1007. Appellants rely upon the case of Ruble v. Richardson, 188 Cal. 150, 204 P. 572. That was an action on a claim against the estate of the deceased brought against the executor of the will of the deceased and came clearly within the inhibition against a party to an action testifying as provided in the code provision above stated. The present action is one to compel specific performance of a contract entered into by the deceased with plaintiff and, as held in Furman v. Craine, supra, 18 Cal.App. at page 49, 121 P. at page 1010, "was not prosecuted upon a claim against an estate, and hence the admission of the testimony did not contravene the provisions of this section. [Section 1880, Code of Civil Procedure]".

Other contentions of appellants are equally without merit and do not require specific mention.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. HANSEN et al.

Civ. 13095.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1941.

1. Eminent domain ⇐148

"Just compensation" for taking of private property for public use includes, not only actual cash value or market value of property taken, but also actual cash value of use of such property from date of taking possession thereof up to date of judgment if possession is taken by condemnor prior to judgment. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Just Compensation".

2. Eminent domain ⇐247(1)

In condemnation proceeding for land for construction and maintenance of dam and reservoir for control and conservation of storm waters, landowners were entitled to interest on amount awarded from the date on which possession was taken to date of payment of award, notwithstanding that landowners did not show value of use of land between time of taking of possession and time of trial. Const. art. 1, § 14.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Actions by the Los Angeles County Flood Control District against Homer A. Hansen and others to condemn lands for the purpose of constructing and maintaining a dam and reservoir for the control and conservation of storm waters. The actions were consolidated for trial. From the judgment, the defendants appeal.

Affirmed as modified.

Latham & Watkins, Hill, Morgan & Bledsoe, and Stanley S. Burrill, all of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, and Roy W. Dowds, Asst. Co. Counsel, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Four actions, which were consolidated for trial, were commenced by Los Angeles County Flood Control District on August

8, 1938, and subsequent dates to acquire by condemnation proceedings lands for the purpose of constructing and maintaining a dam and reservoir for the control and conservation of storm waters. Defendants were the owners of the fee or leasehold interest in the property sought to be condemned. Shortly after the actions were filed plaintiff took possession of the properties under court orders made by the court pursuant to the provisions of section 14, article 1, of the Constitution of California. The actions were brought to trial and judgments rendered in favor of the defendants for various sums. It is contended on this appeal that the trial court erred in refusing to allow interest on the awards from the date on which possession was taken by plaintiff to the date of the trial.

From the bill of exceptions it appears that it was stipulated by the parties that "the only issues to be submitted to the jury were (1) the market value, as of November 13, 1939, being the date of the trial of said cause of action, of the parcels of land, the fee of which was being condemned * * * (2) the severance damage, if any, caused by the taking of said parcels * * * (3) the market value as of November 13, 1939, * * * of the rock and gravel leases * * * (4) the severance damages, if any, to the remainder of said leases * * *". From the bill of exceptions it also appears that "all of the issues presented by the trial of the above entitled consolidated causes were tried by the court except the issues hereinbefore recited which were tried by the jury". After the verdict had been returned fixing the values in accordance with the issues submitted to them under the stipulation of the parties and before final submission of the cause, the defendants presented a motion to the trial court asking that, as just compensation for the taking of immediate possession of the properties, there be included in the judgment interest at the legal rate from August 17, 1938, this being the date upon which plaintiff commenced the construction of the dam. It is claimed that although possession was taken of some of the parcels at later dates, all of the parcels became of no value to defendants when the construction was started on the dam. This motion was denied.

The interlocutory judgment was filed on February 15, 1940. In the following December the Supreme Court returned its decision in Metropolitan Water District v. Adams, 16 Cal.2d 676, 107 P.2d 618, 620. The decision in the Metropolitan Water District case, in which the issues were substantially the same as the issues in the present action, is determinative of the question now before the court and makes necessary a modification of the judgment.

[1] In the Metropolitan Water District case immediate possession was taken of the land sought to be condemned. The jury found the value of the property sought to be condemned as of the date of trial. The trial court instructed the jury that, in addition to fixing the value of the land it could allow interest at the rate of 7 per cent per annum from the date of the taking of possession of the land to the date of the entry of the judgment and the jury thereupon, in accordance with this instruction, added interest for the amounts found as to value. The Supreme Court affirmed the judgment based upon the jury's verdict and, after referring to the constitutional provision to prevent taking or damaging of private property for public use without just compensation, observed: "There can be no question, we think, that just compensation for the taking of respondents' property includes not only the actual cash value, or market value of said property, but also the actual cash value of the use of said property from the date of the taking possession thereof up to the date of judgment, if possession is taken by the condemner prior to judgment. The damage for the taking of said property in the present case, in pursuance of section 1249 of the Code of Civil Procedure, was fixed as of the date of trial, at its then actual value. Had plaintiff not taken possession of said property prior to the trial of said action, respondents' damage would still have been fixed at the actual value of said property at the date of trial—the same as if no prior possession had been taken by appellant. There should be some means or method of procedure, if we are to comply with the constitutional requirement that just compensation be paid to the owner for the taking of his property, whereby compensation for its use prior to the judgment is paid to him. * * * Legal interest is frequently accepted as the basis for fixing the measure of damages." The court quoted from the decisions in several

federal cases in which similar rulings had been made.

[2] Plaintiff argues that in the Metropolitan Water District Case "the court further erroneously followed the Federal cases, which are not in point, due to the difference in the Federal law and the state law relative to eminent domain". It is claimed that the difference between the federal law and the California law lies in the fact that a jury trial may be waived in California and the further fact that under the federal law title vests when possession is taken of the land. Defendants do not concede that there is any substantial difference between the federal law and the California law. If in fact a distinction may be made between the federal law and the California law, it is a distinction without a substantial difference, for the same fundamental principles are applicable. From the date on which plaintiff took possession of defendants' property defendants were deprived of the use of the property. If they are to be compensated justly they should not be compelled to wait to the date of trial, at some uncertain time in the future, for the receipt of the sum to be awarded as the value of the property on the trial date without compensation for the period in which they had neither the property nor the sum awarded as its value.

Plaintiffs further argue that the burden of proof was upon defendants to present evidence of the value of the use of the property between the dates of the taking of immediate possession and of trial and they assert that no evidence on this point was presented to the jury. Defendants point out, however, that an examination of the record in the Metropolitan Water District case discloses that "there was absolutely no testimony in the Metropolitan Water District case, as to said 'value of the use' during the period the plaintiff in that case had immediate possession prior to the date of trial". The decision in that case disposes of the issue of the burden of proof.

The trial court is directed to add to the judgment heretofore returned a finding and order that the defendants are entitled to interest at the rate of 7 per cent per annum upon the respective amounts found by the jury as the market value of the respective parcels of land or of defendants' interest therein sought to be condemned and the respective amounts found by the jury as severance damage, from the dates on which possession was taken of the respective parcels to the date of the payment of the awards.

As so modified the judgment is affirmed. Appellants to recover costs on appeal.

MOORE, P. J., concurred.

McCOMB, J., deemed himself disqualified and took no part in the consideration or decision of this case.



48 Cal.App.2d 404

PHILLIPS v. PHILLIPS.

Civ. 6420.

District Court of Appeal, Third District, California.

Dec. 9, 1941.

1. Constitutional law ⇐314
Divorce ⇐303(3)

Where wife moved to dismiss husband's motion to modify final divorce decree granting wife custody of daughter on ground that husband was in contempt in that he was in arrears in payment of monthly award for child, and it appeared that trial court's intent, in stating that matter would be continued for one week was to hear all witnesses immediately and then withhold ruling on contempt for a week, and wife called six witnesses on day of hearing, wife was not deprived of "due process of law" on ground that, relying upon court's statement, she made no effort to have all witnesses present, especially where wife made no showing as to names of witnesses whose testimony she asserted she was unlawfully deprived of, and the substance of evidence which she would produce. Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

2. Divorce ⇐298(6)

The section of Probate Code providing that as between parents claiming the guardianship adversely to each other, neither is

entitled to priority, but other things being equal, if child is of tender years, it should be given to mother, has reference to appointment of a guardian, and is not applicable in divorce action. Probate Code, § 1408.

3. Divorce ⇐298(6)

The provision of Civil Code that as between parents adversely claiming the custody of minor child, neither parent is entitled to it as of right, but other things being equal, if child is of tender years, it should be given to mother, and if it is of an age to require education and preparation for labor and business, then to the father, does not give mother absolute right to custody of a child of tender years, but rather leaves a large measure of discretion with trial court. Civ.Code, § 138(2).

4. Divorce ⇐303(3)

Evidence supported order modifying final divorce decree which granted custody of six-year old daughter of parties to wife by giving husband custody of daughter. Civ. Code, § 138(2).

Appeal from Superior Court, Amador County; Anthony Caminetti, Judge.

Action by Berthold A. Phillips against Wanona Phillips for divorce, wherein a final decree of divorce granted the custody of minor child of the parties to the defendant. Thereafter, the plaintiff procured an order to show cause why the decree should not be modified to the extent that he be granted custody of the minor child. From an order giving plaintiff the custody of the minor child, the defendant appeals.

Affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Anthony N. Pierovich, of Jackson, for respondent.

TUTTLE, Justice.

Appellant appeals from an order giving her former husband, respondent, the custody of the six-year-old daughter of the parties.

A final decree of divorce granted the custody of said minor to appellant. Thereafter, charging that appellant was not a fit and proper person to have the custody of the child, respondent procured an order to show cause why said decree should not be modified to the extent that he be granted her custody. The matter was set for hearing on June 19, 1939, when both sides appeared, ready for the trial of the issues involved. At that time respondent was in arrears in the payment of a monthly award of $30 for the support of the minor. The amount had been due nine days.

During the cross-examination of respondent it developed that, as stated above, he was in default in one payment of the allowance. Thereupon, appellant moved the court to dismiss or continue the hearing until "he" (respondent) "has purged himself of contempt". Later, during the hearing, the court stated:

"You may call any other witnesses. Then we will continue the matter for one week and give him an opportunity to purge himself of contempt of court before I pass upon the motion."

The hearing continued. Toward the end thereof, the following proceedings took place:

"The Court: The motion submitted to increase the allowance for the support of the child will be denied. The interlocutory decree will be modified at this time giving the custody of the child to the father until the further order of the court; if circumstances change down there, and the home provided by the father is not satisfactory, you may make a motion.

"Mr. Snyder: If the court please, I want it definitely understood I by no means waive my right under the original motion, with this testimony at this time; I also at this time, if the court please—withdraw that—I don't want the court to understand my proceeding at the court's request I waived my right on my motion to dismiss the particular motion on the grounds that this man was in contempt; I made it in time and I want it to be understood.

"The Court: I will reopen the case—put him on the stand to testify."

Respondent then testified that he had handed to counsel for appellant a check for the payment which was overdue.

[1] Appellant contends that she was deprived of a right guaranteed by article I, section 13, of the Constitution of California, which provides that: "No person shall * * be deprived of life, liberty, or property without due process of law." Counsel for appellant states that the court said the matter would be continued for one week to give respondent an opportunity to purge

himself of contempt, and that relying upon said statement, he made no effort to have all the witnesses present in the afternoon of the day of hearing. The point is without merit. Prior to making the announcement last mentioned, the court said: "You may call any other witnesses." The intent of the court, clearly indicated, was to hear all the witnesses on that day, and then withhold the ruling for a week, within which time respondent might have an opportunity to pay the installment of allowance which was overdue. It was the duty of appellant then and there to produce all witnesses upon whose testimony she would rely. Furthermore, appellant made no showing as to the names of the witnesses whose testimony she asserts she was unlawfully deprived of, and the substance of the evidence which she would produce. No showing of prejudice is therefore made, assuming that the contention of appellant had any merit. The record contains some one hundred twenty-five pages of testimony. Six witnesses were called by appellant. It would seem as though she had her day in court on an issue of this character, and that she was not deprived of any constitutional right during said hearing.

[2] Appellant also contends that the trial court was bound to award her the custody of said minor, under the provisions of section 1408 of the Probate Code, which read as follows:

"As between parents claiming the guardianship adversely to each other, neither is entitled to priority; but other things being equal, if the child is of tender years, it should be given to the mother;"

That section has reference to the appointment of a guardian, and is not applicable here. Section 138, subdivision (2), of the Civil Code, is very similar, however, and it reads as follows:

"As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

[3, 4] This section does not give the mother the absolute right to the custody of a child of tender years. The qualifying clause, "but other things being equal", still leaves a large measure of discretion with the trial court. If the court finds that other things are not equal, as it evidently did here, and there is any substantial evidence to support such a finding, our inquiry is at an end. The evidence is abundantly sufficient to warrant the court in exercising its discretion as it did. It showed the appellant to be employed as a waitress and bartender in an establishment known as Russell's Cafe in the town of Ione, California, and that while engaged in such employment, she drank considerably, played cards with the male patrons, and on occasion was observed to be under the influence of intoxicating liquor. The minor child of the parties hereto was in these surroundings many times and as late as eleven and twelve o'clock at night. The child had been abandoned to the care and control of appellant's mother, who, with her husband, operated a roadhouse, the only accommodations of which were a kitchen, bedrooms, and a bar. In this atmosphere, the child's surroundings, of necessity, confined her to the bar a great part of the time, where intoxicating liquor was sold. Appellant's mother did on occasions act as bartender and drink with the patrons in the presence of the minor child of the parties hereto. Respondent herein, the father of the minor child, was shown to be regularly employed and in a position to properly care for the child. His plans were to live with his sister in Ione, which is situated close to his place of employment. His sister's home provided reasonable accommodations for respondent and his minor child.

The order is affirmed.

THOMPSON, Acting P. J., concurred.

MURPHY v. RETIREMENT BOARD OF SAN FRANCISCO CITY EMPLOYEES' RETIREMENT SYSTEM et al.*

Civ. 11522.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1941.

Rehearing Granted Jan. 2, 1942.

1. Municipal corporations ⇐187

In proceeding before city employees' retirement board for allowance of pension to petitioner as widow of city police officer, who died of heart occlusion, the fact that evidence was conflicting as to when such occlusion occurred did not bind board to conclude that it was result of decedent's fall while climbing stairs of police station two years before his death.

2. Mandamus ⇐172

In mandamus proceeding to review administrative board's order based on conflicting evidence, superior court is limited to inquiry whether board acted arbitrarily, capriciously or fraudulently or whether proceedings before it were conducted without due regard for petitioner's rights in some other respect.

3. Mandamus ⇐172

Where city police officer's widow, appealing from judgment denying writ of mandate to review city employees retirement board's order denying her a pension on conflicting evidence, does not contend that trial court departed from ruling limiting it to inquiry whether board acted arbitrarily, capriciously or fraudulently or conducted proceedings without due regard for petitioner's rights in some other respect, appellant's contention that court should have required board to disregard some of expert evidence taken and put more weight on evidence favorable to petitioner may not be sustained.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Judge.

Proceeding by Ida Murphy for a writ of mandate requiring the Retirement Board of the San Francisco City Employees' Retirement System and others to grant petitioner a pension as the widow of a former member of the police department of such city. From a judgment denying the writ, petitioner appeals.

Affirmed.

James C. Purcell and William E. Ferriter, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Reynald J. Bianchi, Deputy City Atty., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

The petitioner sued for a writ of mandate requiring respondents to grant her a pension as the widow of a former member of the municipal police department. Trial was had upon the record of the proceedings of the respondent board which resulted in a denial of a pension upon the ground that the death of the police officer did not result from an injury received while in the performance of his duties.

The trial court found that, on February 10, 1936, the police officer, while climbing the stairs of the central police station, fell and was unconscious for about five minutes; that, on March 23, 1938, he died of a heart occlusion, or heart thrombosis; that the evidence before the respondent board did not show that the exertion of walking up the stairs of the police station caused the disease resulting in death; that the expert evidence affirmatively showed that, at the time of the fall, the symptoms of the disease were not present, but that there was some conflict in that evidence; and that the evidence as a whole showed that the disease which caused the death of the officer had no connection with any injury suffered by him while performing his duties as a member of the police department.

[1, 2] In appealing from the judgment adverse to her the petitioner rests her case upon the theory that, since the evidence was in conflict as to when the heart occlusion took place, the respondent board was bound to conclude that it was the result of the fall two years prior to the death. She relies upon Buckley v. Roche, 214 Cal. 241, 4 P.2d 929; Peters v. Sacramento City E. R. System, 27 Cal.App.2d 10, 80 P.2d 179, and Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, 110 P.2d 714. The cases are really not authority for the proposition advanced by the appellant. They held that where the evidence is all one way (or where it is stipulated to as in the Buckley case) the administra-

* Subsequent opinion 121 P.2d 101.

tive board cannot justify a finding based wholly upon conjectures contrary to such evidence. Here the evidence is in conflict—it was so found by the trial court, and appellant concedes this to be so. When that situation arises and the board is required to decide what of the evidence should be believed and what should be rejected the question before the trial court is limited to the inquiry whether the administrative board has acted arbitrarily, capriciously or fraudulently, or whether, in some other respect, the proceedings were conducted without due regard for the rights of the petitioner. McColgan v. Board of Police Com'rs, 130 Cal.App. 66, 68, 19 P.2d 815; Mogan v. Board of Police Com'rs, 100 Cal. App. 270, 276, 279 P. 1080; Hogan v. Retirement Board, etc., 13 Cal.App.2d 676, 57 P.2d 520.

[3] The authority of these cases clearly defines the scope of the inquiry by the trial court in mandamus proceedings, and the appellant does not contend that the trial court departed from this rule in any particular. Her contention that the court should have required the respondents to disregard some of the expert evidence taken and should have put more weight upon that evidence favorable to her may not be sustained.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



48 Cal.App.2d 332

FARMER v. MATSUTANI et al.

Civ. 11780.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1941.

1. Appeal and error ⇐1011(1)

Where a substantial conflict in the evidence has been resolved in favor of one party by the trial court, and there is substantial evidence to support the finding, an appellate court will not interfere with that determination.

2. Appeal and error ⇐1010(1)

Where testimony was in substantial conflict in action by motorist for damage to automobile and for personal injuries sustained when he lost control of his automobile in attempting to avoid colliding with a truck, which made a left turn ahead of motorist into driveway, and motorist testified that the reason that he had previously stated that truck was emerging from driveway rather than entering driveway was that he had been dazed by a blow on the head, judgment for motorist would not be reversed on appeal on ground that it was inherently improbable or obviously false.

3. Appeal and error ⇐1011(1)

Where there is a conflict between the testimony of a witness and statements previously made by him, there is a fact question for the trier of the facts, and it is not within the province of an appellate court to interfere.

4. Automobiles ⇐244(12)

In action by motorist for damages when he lost control of automobile in attempting to avoid striking a truck which made a left turn ahead of him into driveway, testimony of motorist that truck driver turned the truck to the left across the highway and stopped on the paved portion, leaving only about two feet clearance to the rear and six feet clearance to the front in violation of statute, was substantial evidence to support finding of negligence of truck driver. Vehicle Code, § 583, St.1935, p. 190.

5. Automobiles ⇐244(44)

In action by motorist for damages when he lost control of automobile in attempting to avoid striking a truck which made a left turn ahead of him into driveway, testimony of motorist that when truck stopped diagonally across the highway, he attempted to avoid collision by applying his brakes and steering his automobile to the rear of the truck, was sufficient to support finding that motorist was not guilty of contributory negligence.

6. Appeal and error ⇐1046(5)

The alleged fact that trial judge, sitting without a jury, by his remarks indicated that he was under an erroneous impression that before a vehicle can lawfully turn across a highway in front of an approaching automobile, there must be a clearance of 400 feet between the two vehicles, did not require reversal of judgment for plaintiff where plaintiff's counsel advised the court that a sec-

tion of the Vehicle Code covered the point, and the judge then took the case under submission, and there was no showing of any prejudice to defendants, or that judgment was based on court's alleged misconception of the law on the subject.

7. Appeal and error ⇐1046(5)

A trial judge's remarks, which are not part of the findings, and which in themselves are not prejudicial, do not constitute a basis for reversal of judgment.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by George L. Farmer against G. Matsutani and another to recover for property damage and personal injuries. From a judgment in favor of the plaintiff, and from an order denying defendants' motion for new trial, they appeal.

Appeal from order dismissed, and judgment affirmed.

Tinning & DeLap and J. Vance Porlier, all of Martinez, for appellants.

Ralph E. West, of Vallejo, for respondents.

NOURSE, Presiding Justice.

This action for damages to property and for personal injuries was tried before the court sitting without a jury. Defendants appeal from a judgment entered in favor of plaintiff in the sum of $747.63 plus costs, and from an order denying their motion for a new trial.

The accident occurred on the Pacheco-Concord road, a paved two-lane county highway running east and west, about seven-tenths of a mile east of the town of Pacheco. At this place in the road the shoulder on the south side of the highway has a surface of loose gravel and there is a private driveway on the north side leading to defendant Matsutani's ranch. On September 24, 1940, at about 7:10 a. m., defendant Toriyama was driving a truck belonging to his employer, defendant Matsutani, in an easterly direction along the highway at a speed of approximately five miles per hour. Plaintiff was following the truck in his automobile at a speed of about forty-five miles per hour and sighted the vehicle when it was approximately one hundred and fifty yards ahead of him. Plaintiff testified that defendant gave a stop signal with his arm, continued for thirty-five feet and then came to a stop; plaintiff stated that at this time he was one hundred and twenty feet to the rear of the truck and was maintaining his speed in order to pass the vehicle. Defendant testified that he made no stop at that point, that he did not give a stop signal and that if he had given such a signal with his arm the truck body would have obscured it from plaintiff's view.

Plaintiff testified that the truck remained stopped for a second and then without any warning signal turned left across the highway towards defendant Matsutani's driveway. Defendant driver, on the other hand, stated that he raised the mechanical arm signal for a left turn about one hundred and fifty feet from the driveway, that he slowed down about one hundred feet before reaching his employer's private road and that when he started to make the left turn plaintiff was about one hundred and fifty feet to the rear; the truck driver testified that at no time did he stop his vehicle diagonally across the driveway. Plaintiff's story was that as he observed the truck turning towards the left he steered his automobile to the right side of the road with the intention of clearing the rear end of the vehicle. Plaintiff testified that the truck traveled about five feet in an easterly direction, about thirteen feet in a northerly direction and then came to a stop in the middle of the highway, leaving only a couple of feet clearance behind it. As a result plaintiff applied his brakes, leaving a seven-foot skid-mark on the highway, and turned his car to the right in order to avoid colliding with the truck. The automobile skidded on the loose gravel, went out of control, struck a power pole on the shoulder of the highway seventy-two feet east of the point at which it left the pavement and then made a half circle thirty-two feet across the highway. The car came to a stop on the north shoulder of the road facing in a westerly direction with the private driveway to plaintiff's right and the truck in front of him.

Plaintiff was removed to a hospital in an ambulance, and after receiving medical treatment he was sent home; he continued to receive treatment until October 10, 1940. Plaintiff was interviewed by a highway patrol officer at 5:30 p. m. on the day of the accident, at which time he claims that he was still in a dazed condition as a result of having hit his head against the steering post of the automobile. He told the officer

that the truck had emerged from a private driveway on the south side of the highway. On September 30, 1940, plaintiff took an oath to a criminal complaint accusing defendant Toriyama of driving a truck onto the highway from a driveway without yielding the right of way and also accusing him of unlawfully stopping the vehicle without leaving the statutory clearance. During the course of the trial of the instant action plaintiff testified that he had been mistaken as to the details surrounding the accident when he related the former stories concerning its occurrence, but that he subsequently passed the scene of the accident and noticed that the driveway was on the north side of the highway rather than on the south side; it was then that he recalled how the incident occurred and evolved the story which he related in court. The cause was ordered submitted for decision; the court found defendants guilty of negligence and awarded a judgment in favor of plaintiff. Defendants' motion for a new trial was denied and both defendants appeal.

[1-3] Appellants argue that respondent's testimony, in direct conflict with his previous stories of the accident, was so improbable and obviously false that the conflict which was resolved in his favor should not be binding on the appellate court. Without considering the previous stories told by respondent the facts heretofore stated disclose that the testimony of the witnesses in the trial court concerning the circumstances surrounding the accident was in substantial conflict. It is well settled that where such a substantial conflict in the evidence has been resolved in favor of one party by the trial court and where there is substantial evidence to support the finding the appellate court will not interfere with that determination. Arundel v. Turk, 16 Cal.App.2d 293, 296, 60 P.2d 486; 2 Cal.Jur. 918 et seq. and cases cited therein. Respondent explained that when his car finally came to a stop he was headed in a different direction and that he had been dazed by a blow on the head, which explanation apparently satisfied the trial court as to the reason for his previous stories of the accident. We cannot say that this testimony was inherently improbable or obviously false and therefore the determination of the trial court is conclusive. Hersh v. Garau, 218 Cal. 460, 465, 23 P.2d 1022; Stefani v. Southern Pacific Company, 119 Cal.App. 69, 73, 5 P.2d 946. In such a case the conflict between the testimony of the witness and the statements previously made by him presents a question of fact for the trier of facts, and it is not within the province of the appellate court to interfere. Williams v. General Insurance Company, 8 Cal.2d 1, 4 and 5, 63 P.2d 289.

[4, 5] Appellants also contend that the evidence showed that the truck driver was not negligent and that respondent was guilty of contributory negligence either because of his excessive speed or because he was following too closely behind the vehicle ahead. Respondent testified the truck driver turned the vehicle left across the highway and stopped on the paved portion, leaving only about two feet clearance to the rear and six feet clearance to the front in violation of section 583 of the Vehicle Code, St.1935, p. 190. This testimony constitutes substantial evidence to support the findings of negligence on the part of appellants, and therefore such findings will not be disturbed on appeal. Estate of Moore, 162 Cal. 324, 326, 122 P. 844; National Ice & Cold Storage Co. of California v. Pacific Fruit Express Company, 11 Cal.2d 283, 288, 79 P.2d 380; 2 Cal.Jur. 918. Respondent's testimony indicated that when the truck stopped diagonally across the highway he attempted to avoid a collision by applying his brakes and steering his automobile to the rear of the truck. It is apparent that respondent was in a situation of peril and that the trier of the facts may well have found that his actions under such circumstances were reasonable. (Squier v. Davis Standard Bread Company, 181 Cal. 533, 535, 185 P. 391; Hill v. Peres, 136 Cal.App. 144, 147 and 148, 28 P.2d 944); and that he was not guilty of contributory negligence.

[6, 7] Appellants finally urge that certain remarks made by the trial judge indicate that the court was under the erroneous impression that before a vehicle can lawfully turn across a highway in front of an approaching automobile there must be a clearance of four hundred feet between the two vehicles. The record shows that counsel for respondent advised the court that section 544 (a) of the Vehicle Code covered that point and that the judge then took the case under submission. There is no showing of any prejudice to appellant or that the judgment was based on the court's misconception of the law on the subject. Remarks made by the trial judge which are not part of the findings, and which in themselves are not prejudicial, do

not constitute a basis for reversal of the judgment. Gilmore v. Paris Inn, 10 Cal. App.2d 353, 355, 51 P.2d 1103.

The special appeal from the order denying the motion for a new trial is dismissed.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.



48 Cal.App.2d 340

WOEBBE v. SPERRY et al.

Civ. 11803.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1941.

Hearing Denied Feb. 5, 1942.

1. Appeal and error ⇐215(1)

The trial court's failure to give instruction on applicability of statute to intersectional automobile collision presented nothing for review where such an instruction was not prepared, asked, or refused. Vehicle Code, § 540(b), St.1935, p. 184.

2. Evidence ⇐254

Where plaintiff's attorney did not lay foundation for proof of an admission by defendant to police officer immediately following accident in which defendant's automobile was involved, nor ask what reply was made by defendant, permitting police officer called as plaintiff's witness to testify only concerning what the defendant told the officer without going into discussions was not error, as against contention that the witness should have been permitted to state the entire conversation between the parties.

3. Appeal and error ⇐1069(1)

Where juror had occasion daily, during trial, to pass and repass intersection where automobile accident involved in the trial occurred, but on presentation of motion for new trial juror made affidavit to effect that he did not stop at intersection and make any observations or measurements and there was no evidence that the juror received directly or indirectly any evidence outside the courtroom, the juror's action did not require reversal on ground of "misconduct".

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

4. Appeal and error ⇐1060(1)

In action for injuries sustained by automobile guest in intersectional collision between automobile in which guest was riding and defendant's automobile, remark made by counsel for defendant in opening statement, to the effect that host and his wife had met their death in another automobile collision, was not prejudicial.

5. Appeal and error ⇐1060(1)

Any misconduct of defendant's counsel in referring to a police scandal, while he was discussing testimony given by a police officer, was not prejudicial where objection was made to the reference and the court required the counsel to go on to something else, and stated that the scandal had nothing to do with the case.

6. Appeal and error ⇐207

Where trial court was not asked to admonish the jury to disregard statements made by defendant's counsel, alleged misconduct resulting from such statements could not be urged on appeal.

Appeal from Superior Court, City and County of San Francisco County; I. M. Golden, Judge.

Action by Helen Woebbe against John A. Sperry, Jr., and others, for injuries sustained in an automobile collision. From an adverse judgment, plaintiff appeals.

Affirmed.

Phillip Barnett and Samuel Vartan, both of San Francisco, for appellant.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

At about eleven o'clock p. m. on the night of November 18, 1939, the plaintiff was riding in an automobile as the guest of, and being driven by, Mr. Paulsen. The automobile was driven south on Van Ness avenue and then turned easterly into Pine street. The defendant John A. Sperry, Jr., was driving north on Van Ness avenue along the eastern side of said avenue. Mr.

Paulsen was driving a Dodge sedan, Mr. Sperry was driving a Ford sedan. At a point in the intersection, more or less controverted by the witnesses, the Ford car hit the Dodge car on its right-hand rear door. The plaintiff was injured. She sued to recover damages for the injuries sustained. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the defendants. A judgment was entered on the verdict and from that judgment the plaintiff has appealed and has brought up typewritten transcripts. The record discloses that in the trial court numerous exhibits were offered. It also discloses that a map drawn to scale was used throughout by both parties. It also discloses that photographs were introduced in evidence and that those photographs were used by both parties during the trial. Except as hereinafter mentioned no exhibit, map or photograph has been certified to this court. While the trial was progressing both parties prepared instructions and requested the trial court, at the proper time, to give them. By stipulation the instructions so prepared by the parties were given by the court. Every instruction tendered was given.

Examining the opening statements it will be seen at once that the plaintiff contended Mr. Paulsen drove south on Van Ness avenue; that, as he approached the intersection, he put out his hand indicating a left turn; and that he passed the center of the intersection and turned to go east on Pine street. The plaintiff also testified to similar facts. On the other hand, from the opening statement of defendants, it will also be seen that they contended Mr. Paulsen drove north to about ten feet north of the northerly property line of Pine street, made a left turn, "cut the corner", and drove easterly on Pine street. They also contended that as he did so he gave no signal of his intention to make said turn, and made the turn after the defendant John A. Sperry, Jr., had entered the intersection and had crossed the middle line of Pine street. The defendants called three eyewitnesses to sustain their theory. From the beginning of the trial the defendants contended there were no "markers" in either Pine or Van Ness at said intersection indicating how or where a turn could be made.

[1] After the jury had retired to deliberate on its verdict it returned into court and the foreman stated there was considerable confusion in regard to making a left-hand turn at an intersection. A somewhat extended colloquy ensued which was participated in by the court, counsel, and one or more of the jurors. The court again read section 540, subdivision (b), of the Vehicle Code, St.1935, p. 184. It also read section 551. During the colloquy counsel for the plaintiff asked the jury be instructed that there were "markers" in the intersection. In another place he asked that the jury be instructed that there is a marked cross-walk at the intersection. The trial court replied that the jurors had heard the evidence and that the facts presented in the record were for the determination of the jurors. At this time the plaintiff contends that at the intersection of Pine and Van Ness avenue traffic is not governed by the sections of the Vehicle Code but falls within the exception, "unless otherwise directed by markers, buttons or signs" (sec. 540 [b]), and that the case is governed by the provisions of the traffic ordinance of San Francisco, and that the trial court should have so instructed the jury. We find no merit in the contention. At no time was an instruction to that effect prepared, asked, or refused. Under these circumstances the record does not present a question for review by an appellate court. McFate v. Zuckerman, 130 Cal.App. 172, 179, 19 P. 2d 532.

[2] After the accident the defendant Sperry remained at the scene for a short time. While he was there Edward F. Penaat, a police officer attached to the accident prevention bureau, arrived. The plaintiff called him as a witness. Among other things he testified that he had a conversation with defendant Sperry. Counsel for the plaintiff propounded to him a question: "Now, Officer Penaat, would you state to his Honor and the ladies and gentlemen of the jury just what that conversation was?" After some discussion the trial court said, "Well, you can tell us what the defendant told you, without going into discussions". Counsel for the plaintiff contended that he was entitled to have the witness state the entire conversation. The trial court sustained the objection and said, "Statements made by the defendant are admissible against him on the theory that they are contrary to his interests. Statements made by the witness are not admissible at all unless they are necessary to explain the statements of

the defendant." At no time did the plaintiff's attorney lay the foundation for proof of an admission by the defendant Sperry and ask what reply was made by him. We find no error in the ruling.

[3] One of the jurors, J. P. Doyle, had occasion daily to pass and repass the intersection where the accident happened when he was going from his place of business to his home, or when he was going from his home to his place of business. During the trial he continued to travel the same path. The plaintiff assigns the fact as misconduct. She made the same point in her motion for a new trial. On the presentation of that motion Mr. Doyle made an affidavit to the effect he did not during the trial stop at the intersection and make any observations or measurements. There was no evidence whatever that Mr. Doyle received, directly or indirectly, any evidence outside of the courtroom. The plaintiff's contention may not be sustained. Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 379, 398, 104 P. 986.

[4-6] The last point made by the plaintiff is that counsel for defendants improperly stated to the jury that Mr. and Mrs. Paulsen met their death in another automobile collision. The statement was made by Mr. Hoge as a part of his opening statement. Mr. Barnett objected. After some discussion by counsel the trial court remarked, "Well, what is the difference how they came to their death, it had nothing to do with this case". The statement made by Mr. Hoge was not prejudicial error. Another instance of alleged misconduct was based on the fact that when Mr. Hoge was arguing the case and discussing the testimony given by Officer Penaat, among other things he referred to a police scandal. The proceedings were:

"Mr. Hoge: As you know, and we all know, one of the worst police scandals that we have had—

"Mr. Barnett: Now, your Honor, I object to that—

"The Court: Go on to something else, Counsel. The police scandals have nothing to do with the case."

Conceding, without deciding, that the incident might have been error, it is patent that such misconduct was not prejudicial. Furthermore, as to either of these assignments, the trial court was not asked to admonish the jury to disregard the statements. Under such circumstances the alleged misconduct may not be urged. 24 Cal.Jur. 746, sec. 29.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 360

PEOPLE v. ZOLOTOFF.

Cr. 2206.

District Court of Appeal, First District, Division 1, California.

Dec. 9, 1941.

Hearing Denied Jan. 7, 1942.

1. Criminal law ⇐1023(12)

Generally, although an appeal may be taken from an order after judgment affecting the substantial rights of appellant, the party who has right of appeal from a judgment is not permitted to move to set it aside, and then appeal from an order denying the motion.

2. Criminal law ⇐1023(12)

An order denying motion to vacate and annul a judgment of conviction is appealable where the question raised by the motion to vacate and annul the judgment could not have been presented by the record on an appeal from the judgment.

3. Criminal law ⇐1023(12)

An order denying motion to vacate and annul judgment of conviction is appealable where the judgment is void on the face of the record.

4. Constitutional law ⇐15

Constitutions like laws must be construed so that full force and effect shall be given to every portion thereof, and the legal intendment is that each sentence and clause has been inserted for some useful purpose, and when rightly understood has some practical operation.

5. Constitutional law ⇐15

In order to ascertain the true meaning of a constitutional provision, sections and sentences are not to be read by themselves,

but as a part only of the whole, and each provision must be read with direct reference to every other which relates to the same subject and so read, if possible, as to avoid repugnancy and conflict.

6. Constitutional law ⇐12

In order that a constitutional provision may be construed so as to avoid repugnancy and conflict, sections, paragraphs and sentences may be transposed, elegance of composition sacrificed and verbal discrepancies disregarded.

7. Constitutional law ⇐16

In order to determine clearly the meaning of a constitutional provision, not only should the context be considered, but the words, phrases and sentences thereof must be construed in contemplation of their fundamental purpose and object, and the provisions considered with reference to their history, the prior state of the law, the conditions existing prior to their adoption and the evils intended to be remedied.

8. Criminal law ⇐273

The electorate of the state, in amending provision of the state constitution relating to procedure to be followed in felony cases in which accused desires to enter plea of guilty, intended to and did establish a procedure which would do away with unnecessary delays and expense in disposing of such cases. Const.Cal. art. 1, § 8.

9. Criminal law ⇐273

The separate provisions of the amendment to the state constitution relating to the procedure to be followed when an accused pleads guilty in felony case are not contradictory and are fully operative. Const.Cal. art. 1, § 8.

10. Criminal law ⇐273

The provisions of amendment to state constitution establishing procedure to be followed in disposing of felony cases wherein accused desires to enter plea of guilty, when he is brought before magistrate, are not in conflict with provision of the state constitution declaring that superior courts shall have original jurisdiction in all criminal cases amounting to felony, since under the procedure established by the amendment, the superior court is granted full jurisdiction to dispose of the case the same as it would have had if the accused had pleaded guilty in such court. Const.Cal. art. 1, § 8; art. 6, § 5.

11. Constitutional law ⇐257

The "due process of law" clause of the Fourteenth Amendment should not be so construed as to interfere with the state in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceedings, so long as the law as enforced by the state affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental rights that are essential to protection of life, liberty and property. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

12. Indictment and Information ⇐1

A person may not be punished for a crime without a formal and sufficient accusation, even though he voluntarily submits to jurisdiction of the court.

13. Constitutional law ⇐257
Criminal law ⇐273

The Penal Code provision relating to procedure to be followed in a felony case, wherein accused desires to enter plea of guilty, does not deprive an accused against whom sufficient accusation has been filed of "due process of law" in violation of Federal Constitution. Pen.Code, § 859a; U.S.C.A. Const. Amend. 14.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Frank Zolotoff was convicted of first degree robbery, and he appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

Appellant was arraigned in the municipal court upon a complaint charging him with having committed the crime of first degree robbery. He was represented by counsel, pleaded guilty to the charge, and in conformity with the provisions of section 8 of article I of the state Constitution and section 859a of the Penal Code the proceeding was certified to the superior court. On December 29, 1937, his counsel being present, he was duly arraigned for

sentence in the superior court and stated that he had no legal cause to show why sentence should not be pronounced; whereupon he was sentenced to imprisonment in the state prison and committed to the custody of the warden. No appeal was taken; but three and a half years later and on June 12, 1941, he presented a motion in the superior court to set aside and annul the judgment upon the ground that it was void. The motion was heard and denied, and from the order of denial this appeal was taken.

Appellant concedes that the proceedings so had in the municipal and superior courts conformed to all of the requirements of the 1934 amendment to section 8 of article I of the state Constitution and of section 859a of the Penal Code enacted in 1935 pursuant to said constitutional amendment; but it is contended that the adoption of said constitutional amendment and the enactment of the code section did not change the then existing law, and that it is still necessary in all felony cases to proceed against the accused in the superior court either by way of information filed by the district attorney, after examination and commitment by a magistrate, or by indictment with or without such examination and commitment. The basis of appellant's contention is that in amending said section 8 of article I in 1934 there was included in the section as amended, as the opening sentence thereof, the first sentence of said section as it stood prior to its amendment. Appellant's second and alternative point is that if the 1934 amendatory portion of said section 8 of article I and the provisions of Penal Code section 859a are operative, they contravene the due process clause of the fourteenth amendment to the federal Constitution.

[1-3] The preliminary question has arisen as to whether the order denying appellant's motion is appealable. The general rule is "that while an appeal may be taken from an order after judgment affecting the substantial rights of appellant the party who has the right of appeal from a judgment is not permitted to move to set it aside and then appeal from an order denying the motion". People v. Birdsell, 21 Cal.App.2d 682, 70 P.2d 231, 232; citing People v. Bowles, 135 Cal.App. 514, 27 P. 2d 411; People v. Brattingham, 91 Cal.App. 527, 267 P. 120; People v. Howard, 7 Cal. App.2d 283, 46 P.2d 268; People v. Swift, 140 Cal.App. 7, 34 P.2d 1041; People v. Ramirez, 139 Cal.App. 380, 33 P.2d 848. To these cases may be added People v. Carkeek, 35 Cal.App.2d 499, 96 P.2d 132; People v. Simms, 41 Cal.App.2d 466, 107 P.2d 86; People v. Simpson, 41 Cal.App.2d 526, 107 P.2d 262; and People v. Bagasol, 22 Cal.App.2d 327, 70 P.2d 970. However, the courts have recognized certain exceptions to the general rule. For example, it has been held that an order denying a motion to vacate and annul a judgment of conviction is appealable where the question raised by the motion to vacate and annul the judgment could not have been presented by the record on an appeal from the judgment. People v. Miller, 140 Cal.App. 241, 35 P.2d 229. Obviously this case does not fall within that exception because the question involved is presented by the judgment roll, which would have formed part of the record on an appeal taken from the judgment. Then again it has been held that an order denying such a motion is appealable where the judgment is "void on the face of the record". People v. Flohr, 30 Cal.App.2d 576, 86 P.2d 862, 863. In that situation, says the court in the case just cited, the judgment "may be attacked either by appeal from the judgment or by a motion to vacate the judgment; that both remedies are not available in the same case; 'that, where a judgment is not void or illegally entered, but is merely erroneous, an order denying a motion to vacate the same is not reviewable when the same points might have been presented upon an appeal from the judgment'." Citing People v. Ramirez, supra, and People v. Birdsell, supra.

[4-10] Assuming that by reason of the two constitutional contentions here urged the present case may be treated as one involving the question of whether the judgment is void on its face, we find no merit in either of the contentions so urged by appellant. With respect to the first, it is a well settled rule of interpretation that constitutions, like laws, must be construed that full force and effect shall be given to every portion thereof. The legal intendment is that each and every sentence and clause has been inserted for some useful purpose, and when rightly understood has some practical operation. In order to ascertain the true meaning, sections and sentences are not to be read by themselves, but as a part only of the whole. Each provision must be read with direct reference to every other which relates to the same subject, and

so read, if possible, as to avoid repugnancy and conflict. To that end sections, paragraphs, and sentences may be transposed, elegance of composition sacrificed, and verbal discrepancies disregarded. Moreover, in order to determine clearly the meaning of a constitutional provision, not only should the context be considered, but the words, phrases, and sentences thereof must be construed in contemplation of their fundamental purpose and object, and the provisions considered with reference to their history, the prior state of the law, the conditions existing prior to their adoption, and the evils intended to be remedied. 5 Cal. Jur. pp. 583, 586, 591, 592. Construing section 8 of Article I as amended in the light of the foregoing rules, it is perfectly clear that by adopting the amendatory portion thereof the electorate of the state intended to and did establish a procedure which would do away with unnecessary delays and expense in disposing of felony cases wherein the accused desired to enter a plea of guilty. As will be noted from a reading of the amendatory portion of said section 8, the procedure established thereby may not be invoked where the felony charged is punishable by death, nor in other cases where the accused is not represented by counsel, or without the consent of the magistrate and the district attorney or other counsel for the People. Consequently, in order to take care of those excepted classes of cases it became necessary to include in section 8 of article I as amended the provisions of said section as they stood prior to the amendment; otherwise there would have been an absence of constitutional authority for the bringing of such cases before the superior court for final disposition. It will be seen, therefore, that the separate provisions of said section 8 as amended are neither conflicting nor contradictory, but on the contrary are fully operative. Nor can we agree with appellant's claim that the 1934 amendatory portion of said section 8 conflicts with section 5 of article VI of the state Constitution, which in part declares that superior courts shall have original jurisdiction "in all criminal cases amounting to felony * * *" for the reason that under the procedure established by the amendatory portions of section 8 the superior court is granted full power and jurisdiction to dispose of the case the same as it would have had "if such defendant had pleaded guilty in such court".

[11-13] Appellant's second point is entitled to little more than passing notice. As held by the Supreme Court of the United States on numerous occasions, the due process clause of the fourteenth amendment to the federal Constitution should not be so construed as to interfere with the state in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as said law, as enforced by the state, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property. See cases discussed in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232, cited in People v. Troche, 206 Cal. 35, 273 P. 767; see, also, Howard v. Kentucky, 200 U.S. 164, 26 S.Ct. 189, 50 L.Ed. 421. No contention is made here that the enactments in question do not afford equal protection to all persons within the jurisdiction of the state, similarly situated; and appellant has presented no argument to substantiate his claim that said enactments are violative of any fundamental or inalienable rights. The single case cited by him in support of his second point is Albrecht v. United States, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505, which is to the effect that a person may not be punished for a crime without a formal and sufficient accusation even though he voluntarily submits to the jurisdiction of the court. Such is the undisputed law in all jurisdictions; but here, as will be observed from reading section 8 of article I of the Constitution and Penal Code section 859a, both require the filing of a formal and sufficient accusation, and admittedly such an accusation was filed in the present case.

The order is affirmed.

PETERS, P. J., and WARD, J., concurred.

48 Cal.App.2d 375

ROACH v. HOSTETTER et al.

Civ. 12717.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1941.

1. Executors and administrators ⇐224

Any claim against an estate arising on contract, whether due, not due, or contingent, must be filed as required by the Probate Code or it is forever barred. Probate Code, §§ 707, 716.

2. Wills ⇐261

Where the complaint in an action against testamentary trustees for violation of covenants of the decedent relative to realty sold by him in his lifetime contained no allegations of any claim ever having been filed against the decedent's estate, the complaint failed to state a cause of action with respect to the allegedly unperformed covenants. Probate Code, §§ 707, 716.

3. Municipal corporations ⇐724

A municipality is not liable for damage resulting from the exercise of purely governmental activities.

4. Municipal corporations ⇐601

Zoning ordinances adopted by the city of Los Angeles at the request of testamentary trustees of a decedent who had made certain covenants relative to realty sold by him in his lifetime were but the expression of a "governmental function" of the city within the rule that a city is not liable for damage resulting from the exercise of purely governmental activities.

See Words and Phrases, Permanent Edition, for all other definitions of "Governmental Function".

5. Municipal corporations ⇐601

A municipality under the "police power" delegated to it may legally establish, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements, and like structures.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

6. Constitutional law ⇐117

Parties are presumed to contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals, and its effect cannot be nullified in advance by making contracts inconsistent with its enforcement.

7. Torts ⇐3

In an action sounding in tort, no cause of action can be stated in a complaint unless a legal duty imposed by statute or otherwise is owing by the defendant to the party injured.

8. Torts ⇐3

To constitute an actionable "tort", there must be a legal duty imposed by statute or otherwise owing by the defendant to the party injured, since in absence of such a duty any damage caused is "damnum absque injuria", that is, injury without wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Damnum Absque Injuria" and "Tort".

9. Trusts ⇐250

Testamentary trustees were not liable in damages to plaintiff because they requested constituted governmental authorities of the city of Los Angeles to rezone the tract of land in which plaintiff's property which he had purchased from decedent was located, since there can be no liability ex delicto for soliciting or requesting the governing body of a municipality to enact an ordinance which it has the power to enact and does enact.

10. Covenants ⇐69(2)

"Covenants running with the land" may be imposed on property to be subdivided and sold by including in the deeds provisions restricting use of the premises and conditions subsequent that a breach of the restrictions will work a forfeiture of the grants.

See Words and Phrases, Permanent Edition, for all other definitions of "Covenant Running With the Land".

11. Covenants ⇐20

The existence of covenants running with the land cannot be implied from the mere making and filing of a map showing a subdivision of the land, nor from the fact that the vendor sold lots in conformity therewith.

12. Wills ⇐261

In absence of an allegation in plaintiff's complaint of an obligation on the part of testamentary trustees not to resubdivide

property which plaintiff had purchased from decedent, or the allegation of a breach of a covenant running with the land, the mere fact that the trustees solicited and induced the city council of Los Angeles to vacate and abandon certain streets and alleys, and that that action by the city caused damage to plaintiff was insufficient to constitute a cause of action against trustees.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by T. T. Roach against Mariam H. Hostetter and others, testamentary trustees of D. Herbert Hostetter, deceased, for violation of covenants of the decedent relative to realty sold by him in his lifetime. From a judgment for defendants, entered after the sustaining of a demurrer to the complaint, plaintiff appeals.

Affirmed.

H. Y. Gibson, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Frederic H. Sturdy, all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

This is an appeal from a judgment rendered by the superior court of Los Angeles county, after sustaining a demurrer to the complaint, without leave to amend.

Therefore, we are required to analyze the complaint to acertain if it does or does not state a cause of action.

The complaint alleges that the plaintiff in 1924 bought certain lots in a recorded tract in the city of Los Angeles from one D. Herbert Hostetter, and that the defendants are testamentary trustees of said Hostetter. The complaint does not say when the said Hostetter departed this life. Then the complaint alleges that the decedent advertised the tract as being subdivided for factories and residence sites, and caused certain restrictions to be placed upon the property; that the plaintiff's property was restricted for use as a factory site; that the decedent represented to the public that he would grade a street running past plaintiff's property; that the decedent would finance the construction of factory buildings and equipment on the tract; and that the decedent agreed to install certain improvements in the tract, and also agreed to commence construction of 750 houses thereon.

It is then alleged that the named defendants, as testamentary trustees, have failed to make the improvements or build the houses mentioned.

It is next alleged that after the death of the decedent and some time in the year 1938 the defendants proposed to the Los Angeles planning commission a scheme for rezoning the tract, which was duly adopted by ordinance of the city of Los Angeles; that this resulted in rezoning plaintiff's property from business to residence use. It is finally alleged that the defendant trustees proposed an ordinance to the city council of the city of Los Angeles which was adopted, resubdividing a part of the tract and vacating streets which on the original subdivision map permitted plaintiff to have access to his lot; and that said defendants are laying out and improving new streets and alleys in the tract; and that plaintiff was thus prevented free egress and ingress to his lots from Olympic boulevard.

This appeal has to do with three questions, which will be stated as we come to them.

[1, 2] 1. May the plaintiff recover from testamentary trustees for violation of covenants of a decedent relative to real property sold by the decedent in his lifetime?

The complaint contains no allegations of any claim ever having been filed against the estate of decedent. An allegation of the filing of a complaint and the rejection thereof is necessary in an action against an estate. Prob.Code, § 716.

Any claim arising upon contract, whether due, not due, or contingent, must be filed as required by the Probate Code or the same is barred forever. Prob.Code, § 707; Estate of Grant, 2 Cal.2d 661, 43 P.2d 266; Id., Cal.App., 34 P.2d 495; Morrison v. Havens, 24 Cal.App.2d 504, 75 P. 2d 515.

Therefore, we do not think the complaint states any cause of action for any of the alleged unperformed covenants of the decedent.

2. May the plaintiff recover from the defendant trustees because they requested constituted governmental authorities of the city of Los Angeles to rezone the tract in which plaintiff's property is located?

[3] As was said in Labozetta v. City of Los Angeles, 34 Cal.App.2d 442, 444, 93 P.2d 571, 572, "It is too well settled to require citation of authority that a municipality is not liable for damage resulting from the exercise of purely governmental activities".

[4] Ordinances of the city of Los Angeles were but the expression of a governmental function of that municipality.

[5] And the leading case of Miller v. Board of Public Works, 195 Cal. 477, 479, 234 P. 381, 38 A.L.R. 1479, holds: "A municipality under the police power delegated to it may legally establish, as a part of a comprehensive zoning plan, strictly private residential districts from which are excluded and absolutely prohibited general business enterprises, apartments, tenements, and like structures."

[6] And in Mott v. Cline, 200 Cal. 434, at page 446, 253 P. 718, 723, the court says: "It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement."

[7] In actions like this one, sounding in tort, there can be no cause of action stated in a complaint unless a legal duty imposed by statute or otherwise is owing by the defendant to the one injured. MacLeod v. Fox West Coast T. Corp., 10 Cal.2d 383; 74 P.2d 276.

[8] "In order to constitute an actionable tort, there must be a legal duty—imposed by statute or otherwise—owing by the defendant to the one injured, for in the absence of such a duty any damage caused is injury without wrong—damnum absque injuria. Wilson v. Union Iron Works Dry Dock Co., 167 Cal. 539, 140 P. 250; Mernin v. Cory, 145 Cal. 573, 79 P. 174; Smith v. Whittier, 95 Cal. 279, 30 P. 529; People v. Schmitz, 7 Cal.App. 330, 370, 94 P. 407, 419, 15 L.R.A.,N.S., 717." Coleman v. California Y. Meeting, etc., 27 Cal.App.2d 579, 582, 81 P.2d 469, 470; see, also, Palmer v. Crafts, 16 Cal.App.2d 370, 60 P.2d 533.

[9] There can be no liability ex delicto for soliciting or requesting the governing body of a municipality to enact an ordinance, which it has the power to enact, and which it does enact.

3. May the plaintiff recover against the trustee defendants for inducing the city to enact an ordinance resubdividing the tract referred to in the complaint?

[10] What we have said relative to the defendants' liability for soliciting enactment of the zoning ordinance is also pertinent to this question. Moreover this contention must be resolved against the plaintiff for a further and additional reason. Covenants running with the land may be imposed upon property to be subdivided and sold, by including in the deeds provisions restricting use of the premises, and conditions subsequent that a breach of the restrictions will work a forfeiture of the grants. Strong v. Hancock, 201 Cal. 530, 258 P. 60.

[11] But "the existence of the covenants cannot be implied from the mere making and filing of a map showing the different subdivision, nor from the fact that the vendor sold lots in conformity therewith". 9 Cal.Jur. 363-4; Wilcox v. Varney, 39 Cal.App. 680, 179 P. 705.

There is no allegation in the complaint that there was any covenant running with the land which would enable the plaintiff to enforce any of the rights which the complaint alleges to have been breached. The most that can be said is that the filing of the map constituted a dedication to the public of the streets and alleys thereon shown. This was recognized by the city council of the city of Los Angeles when, in the exercise of a governmental power vested in the city, certain of these streets and alleys so dedicated were abandoned by ordinance.

[12] In the absence of an allegation in the complaint of a duty or obligation on the part of the defendant trustees not to resubdivide, or the allegation of a breach of a covenant running with the land, the mere fact that the defendant trustees solicited and induced the city council of the city of Los Angeles to vacate and abandon certain streets and alleys, and that this action by the city caused damage to the plaintiff is insufficient to state any cause of action against the defendants.

We conclude therefore that the complaint failed to state a cause of action, and

the demurrer thereto was properly sustained.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 337

BAYSHORE SANITARY DIST. v. SAN MATEO COUNTY.

Civ. 11872.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1941.

1. Statutes ⇐233

The general rule that a corporation, whether private or public, is a "person", is subject to the qualification that, in statutes creating new rights or affording new remedies, general language will not be held to create such rights or to afford such remedies against the state or its political subdivisions in the absence of a clear indication that such was the legislative intent.

See Words and Phrases, Permanent Edition, for all other definitions of "Person".

2. Statutes ⇐233

The state is not bound by general words of a statute or code provision which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the intent to bind it thereby otherwise appears, and general language should not be construed to apply to the government or its agencies unless expressly included by name.

3. Action ⇐6

The statute authorizing any "person" to bring action for declaratory relief against another under certain circumstances does not authorize the bringing of an action for declaratory relief against the state or a political subdivision, such as a county, since the statute contains only general language; there being no express mention by name, of the state or any of its political subdivisions. Code Civ.Proc. § 1060.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action for declaratory relief by Bayshore Sanitary District against the County of San Mateo. From a judgment dismissing the complaint, plaintiff appeals.

Affirmed.

Frank V. Kington, of Redwood City, for appellant.

Gilbert D. Ferrell, Dist. Atty., of Redwood City, for respondent.

SPENCE, Justice.

Plaintiff brought this action seeking declaratory relief against the defendant County of San Mateo. The trial court sustained defendant's demurrer to the complaint without leave to amend and this appeal followed.

A preliminary point raised by defendant should be mentioned. The order sustaining the demurrer without leave to amend was entered on September 23, 1940, but, through inadvertence, no judgment was entered at that time. On October 2, 1940, plaintiff served and filed its notice of appeal "from the judgment entered in the above entitled superior court on the 23rd day of September, 1940, in favor of defendant and against plaintiff, and from the whole thereof". On October 24, 1940, the trial court signed and caused to be entered a judgment in favor of defendant and ordered that "this judgment be entered nunc pro tunc this day as of September 23, 1940".

While defendant calls our attention to the above mentioned facts, it appears unnecessary to discuss the situation thus presented. Defendant has made no motion to dismiss the appeal and, for the reasons hereinafter stated, we believe the trial court correctly sustained defendant's demurrer without leave to amend and that the judgment in favor of defendant should be affirmed.

The main question argued by the parties is the question of whether the section 1060 of the Code of Civil Procedure, relating to actions for declaratory relief, authorizes the bringing of such an action against the state or its political subdivisions. Plaintiff claims that it does and defendant claims that it does not.

Said section 1060 reads as follows: "Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."

The foregoing section authorizes any "person" to bring such action against "another" under certain circumstances. Is the state or one of its political subdivisions a "person" within the meaning of said section?

[1, 2] Plaintiff argues that "A corporation, whether private or public, is a person" (see City of Pasadena v. Stimson, 91 Cal. 238, 248, 27 P. 604), but this general statement is subject to the qualifications that in statutes creating new rights or affording new remedies, general language will not be held to create such rights or to afford such remedies against the state or its political subdivisions in the absence of a clear indication that such was the legislative intent. Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 60 P.2d 825; Kearney Inv. Co. v. Golden Gate Ferry Co., 198 Cal. 560, 246 P. 322; State v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133; Berton v. All Persons, 176 Cal. 610, 170 P. 151; Miles v. Ryan, 172 Cal. 205, 157 P. 5; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016; Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451. This rule of statutory construction is expressed in 23 Cal. Juris. at page 625: "Statutes are ordinarily designed for the government of citizens and residents rather than the state, and it is settled that the state is not bound by general words of a statute or code provision which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it, unless the intent to bind it thereby otherwise clearly appears. General language should not be construed to apply to the government or its agencies unless expressly included by name." See, also, 23 Cal. Jur. 579; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397.

[3] The section under consideration contains only general language, there being no express mention by name of the state or any of its political subdivisions. Furthermore, a reading of the entire section does not give any clear indication that the legislature intended that actions for declaratory relief should be maintained thereunder against the state or any of its political subdivisions. Under these circumstances, we are of the view that the authorities above cited sustain the position taken by the trial court.

In reaching the foregoing conclusion, we are aware of the fact that actions for declaratory relief have been brought against certain political subdivisions of this state and that it has been assumed in certain decisions that said remedy was available. See Henderson v. Oroville-Wyandotte Irrigation District, 207 Cal. 215, 277 P. 487; Andrews v. City of Piedmont, 100 Cal.App. 700, 281 P. 78. It does not appear, however, that it was urged in said cases that said remedy was not available against such political subdivisions because of the rules of statutory construction to which reference has been made. We see no escape from the foregoing conclusion under the authorities hereinbefore cited.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.

48 Cal.App.2d 249

RANDALL v. BANK OF AMERICA N. T. & S. A.

Civ. 2948.

District Court of Appeal, Fourth District, California.

Dec. 2, 1941.

1. Trusts ⇐112

In ascertaining the intention of trustor who invested money in an investment certificate of a building and loan association and which certificate was issued in names of trustor or his nephew "under a trust agreement", the District Court of Appeal was bound to look to instrument alone and gather the purpose from scope of its declaration, and trustor's intention was to be taken from what he said rather than from what he intended to say.

2. Trusts ⇐112

In interpreting language used by trustor who invested money in an investment certificate of a building and loan association and which certificate was issued in names of trustor or his nephew under a trust agreement, the words "in trust for hisself" as used in agreement were to be read in light of entire declaration and not of the quoted phrase as an isolated statement of intention, and trustor's reservation of the right to revoke in whole or in part or to substitute by appealing to association for cancellation of certificate, with direction that upon trustor's death unpaid amounts should vest in nephew, could not be ignored as meaningless.

3. Trusts ⇐14

Under a trust agreement whereby trustor invested money in an investment certificate of a building and loan association and providing that certificate was to be in trust for trustor, during his lifetime with power of revocation and substitution by surrender and cancellation of certificate, and that on trustor's death unpaid principal and interest should vest in trustor's nephew, trustor intended to constitute the association as trustee and himself and nephew as beneficiaries, the nephew's right of enjoyment to be postponed until after trustor's death.

4. Trusts ⇐35(1)

Where one deposits money in his own name and that of another jointly with intention of enabling the other party to draw money after death of depositor, a valid "trust" is created in favor of the other person as beneficiary, and validity of such trust is not negatived because depositor retains power to withdraw deposit during his lifetime or because he retains possession of bank book at all times until his death.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

5. Trusts ⇐14

The creation of a valid "trust" is not dependent upon the present right to beneficially enjoy if there is a present vesting in beneficiary of some interest in property which is subject of trust.

6. Trusts ⇐1

If there is an intention on part of settlor to create a trust, and if subject of trust, the purpose for which it is created, and beneficiaries are indicated with reasonable certainty, and if trustee accepts the trust, the elements of a "trust" are complete. Civ. Code, §§ 2221, 2222.

7. Trusts ⇐44(1)

In suit against executor of alleged trustor under an investment certificate in a building and loan association to quiet title to certificate, evidence was sufficient to sustain finding as to existence of elements for the creation of a valid trust with respect to certificate. Civ.Code, §§ 2221, 2222

8. Trusts ⇐38

Where trustor invested money in an investment certificate of a building and loan association which certificate was issued in names of trustor or his nephew "under a trust agreement", the issuance of certificate under hand and seal of association was sufficient acceptance of the trust, when taken with the fact that declaration of trust was delivered to and remained with association. Civ.Code, §§ 2221, 2222.

9. Trusts ⇐14

Under a trust agreement whereby trustor invested money in an investment certificate of a building and loan association and providing that certificate was to be in trust for trustor during his lifetime with power of revocation and substitution by surrender and cancellation of certificate and that on trustor's death unpaid principal and interest "shall vest" in trustor's nephew, use of quoted words was not inconsistent with a present transfer of interest to nephew.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall Vest".

10. Trusts ⇐140(3)

Under a trust agreement whereby trustor invested money in an investment certificate of a building and loan association and providing that certificate was to be in trust for trustor during his lifetime with power of revocation and substitution by surrender and cancellation of certificate and that on trustor's death unpaid principal and interest should vest in trustor's nephew, the nephew had a "vested remainder", even though enjoyment was postponed and power of revocation or substitution might divest nephew at any time of right to possession which otherwise would pass to him upon trustor's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Remainder".

11. Trusts ⇐140(3)

Where decedent had created a trust in an investment certificate whereby decedent and his nephew were beneficiaries, the nephew's right of enjoyment to be postponed until after decedent's death, and nephew, who had a vested remainder under trust, predeceased decedent, upon decedent's death the nephew's remainder interest passed to nephew's wife as his sole heir, and wife could enforce trust against decedent's executor. Probate Code, § 645.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Suit by Mrs. Thomas B. Randall against the Bank of America N. T. & S. A., as executor of the last will and testament of George Ward, deceased, to quiet title to an investment certificate. From a judgment for plaintiff, defendant appeals.

Affirmed.

John A. Hadaller, of San Bernardino, for appellant.

Elliott H. Pentz, of Los Angeles, for respondent.

WEST, Justice pro tem.

This is an appeal by defendant, as executor of the last will and testament of George Ward, deceased, from a judgment decreeing that plaintiff is the owner of a full-paid investment certificate evidencing money on deposit in a building and loan association, and adjudging that defendant has no interest therein. The following is a summary of the facts. On October 24, 1935, George Ward invested $2,300 in cash in a full-paid investment certificate of Southern California Building and Loan Association which certificate was issued in the names of "George Ward or Thomas B. Randall under a trust agreement". The trust agreement was executed on a separate paper in the following form:

"Southern California Building and Loan Association
"Los Angeles, California
"Dated October 24th, 1935.

"With reference to the Within Full Paid Inv. certificate No. 10022 standing in the name of George Ward, it is understood to be in trust for hisself, during his lifetime with full power of revocation and substitution, by surrender and cancellation of this certificate. And on his death, all unpaid principal and interest, shall vest in Thomas B. Randall.

"Subject to the provisions of all laws then in force.

"Signed X George Ward (G. W.)
"Witness W. L. Worwald"

Ward was the great-uncle of Randall. The transaction was consummated without the knowledge of Randall. No change was made in either the certificate or the declaration during the lifetimes of either Randall or Ward. Randall died September 25, 1938, and Ward died March 25, 1939. The investment certificate remained at all times after its issuance in Ward's possession, and after his death came into the hands of the defendant executor, together with the remainder of Ward's assets. All of these facts were stipulated. It also appears from the record that after Ward's death plaintiff, who is the surviving wife of Randall, procured an order from the probate court setting the certificate aside to her as the only asset of her husband's estate, and pursuant to the provisions of section 645 of the Probate Code. Thereafter, plaintiff instituted this action against the defendant in its capacity as executor to quiet her title to said certificate. Findings were waived by stipulation, and were unnecessary in view of the agreed statement of facts, and the judgment does not specifically indicate the theory upon which the judgment for plaintiff was based.

The appellant attacks the judgment contending that there was in Randall's lifetime no completed gift to him in that there was no actual or symbolical delivery of the certificate or the funds represented there-

by, on the further ground that the declaration was ineffectual as a testamentary disposition, and finally that the declaration did not constitute a valid trust. It may be noted also that one other point is made which will require consideration, viz., that since Randall predeceased Ward, no present vested interest in the property which was the subject of the declaration passed to Randall and therefore that there was no vested remainder to descend to respondent from her husband.

It is unnecessary to accord any great consideration to the questions which might arise as to the effectiveness of the declaration either as a gift inter vivos or as a testamentary attempt. Respondent does not contend that the judgment could have been properly predicated on either theory. She does assert that a valid trust was created by Ward in the execution of the document hereinbefore quoted, and that a vested remainder was thereby established in Randall which passed to respondent as his surviving wife and heir at law. She further contends that even if Randall's status was merely that of a holder of a contingent remainder, such interest descended to her upon her husband's death.

[1, 2] Appellant's contention with regard to the trust theory is that Ward, by his declaration, constituted himself trustor, trustee and beneficiary, and that the only interpretation to be given to the instrument is that he was merely transferring his money from one pocket to another which would not be consistent with either a valid declaration of trust on the one hand or the acceptance of the trust by himself as trustee on the other, and that therefore the status assumed by Ward in making his declaration was that of a mere depositor of money with himself for his own benefit and for the benefit of no other person during his lifetime. If such contention is correct, the document is nothing more than an abortive attempt to make a will. But it seems clear from the reading of the document executed by Ward, as well as from the circumstances surrounding the whole transaction, that a trust was intended to be created. It is true that in determining the intention of the depositor this court must look to the instrument alone and gather the purpose from the scope of its declaration. Title Insurance & Trust Co. v. Duffill, 191 Cal. 629, 218 P. 14. In that case it was held that the trustor's intention must be taken from what he said rather than from what he intended to say. This must be recognized as a sound principle, but in the interpretation of the trustor's language the words "in trust for hisself" must be read in the light of the entire declaration and not of the quoted phrase as an isolated statement of intention. His reservation of the right to revoke in whole or in part or to substitute by appealing to the association for cancellation of the certificate, taken with the direction that upon his death the unpaid amounts should vest in Randall, cannot be ignored as meaningless.

[3] The confusion here may be largely eliminated by a consideration of the true status created by the declaration. We think the trial court was justified in construing that Ward intended to constitute the building and loan association as trustee and himself and his nephew Randall as beneficiaries, Randall's right of enjoyment, however, to be postponed until after the death of Ward. Thus measured, the rule laid down in Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370, applies. In that case the order to the depositary was as follows: "To Oakland Bank of Savings, May 17, 1893: In re savings deposit 7041, in my name. Pay to the individual order of either Cornelia E. Booth, or Aurelia L. James, or myself. (Signed) Frances A. Bell." It appeared in the Booth case that the depositor did not intend that anyone should have the right to withdraw any portion of the deposited funds during her lifetime except herself. She wrote a letter in which she stated that no one could draw the money without an order from her. Again in Sprague v. Walton, 145 Cal. 228, 78 P. 645, the depositor addressed the bank where the fund was deposited authorizing the withdrawal of funds by his wife and stating that she should have the right of survivorship. There appeared some question as to whether it was the intention of the depositor that his wife should draw out the deposits or change them to her own account during the husband's lifetime, but the Supreme Court held that the declaration was consistent with the creation of a valid trust.

[4, 5] We have found no case abrogating the rule established that where one deposits money in his own name and that of another jointly with the intention of enabling the other party to draw money after the death of the depositor a valid trust is created in favor of the other person as

beneficiary, and the validity of such trust is not negatived because the depositor retains power to withdraw the deposit during his lifetime or because he retains possession of the bank book at all times until his death. It is of course true that in both the Booth and Sprague cases the intention to vest a present interest in the beneficiary is more patent than in the instant case in view of the express direction that payment should be made to the order of either the settlor or the beneficiaries, while Ward made it clear that Randall's enjoyment of the fund should in all events be postponed until after Ward's death. But it seems clear that the creation of a valid trust is not at all dependent upon the present right to beneficially enjoy if there is a present vesting in the beneficiary of some interest in the property which is the subject of the trust.

[6-8] Sections 2221 and 2222 of the Civil Code define the method by which a valid trust may be created. If there is (1) an intention on the part of the settlor to create a trust and if (2) the subject of it, the purpose for which it is created, and the beneficiaries are indicated with reasonable certainty, and if (3) the trustee accepts the trust, the elements are complete. It is our opinion that the trial court had before it in the agreed statement of facts ample evidence to sustain the finding as to the existence of each of these elements. The issuance of the certificate under the hand and seal of the building and loan association should be held to be sufficient acceptance of the trust, when taken with the fact, which we must assume to be true, that the declaration was delivered to and remained with the association.

[9] It is well to allude again to the question of vesting, in the light of Ward's declaration that "on his (Ward's) death all unpaid principal and interest shall vest in Thomas B. Randall". It is not inconsistent with a present transfer of interest that the words "shall vest" are used. In Kinney's Estate v. Commissioner of Internal Revenue, 9 Cir., 80 F.2d 568, 570, the trust instrument provided that "Upon the termination of this trust * * * the title to the whole of said property, so held in trust, shall immediately vest in the above named beneficiaries by title absolute". One of the beneficiaries died before the termination of the trust and the question arose whether her beneficial interest was taxable as an asset of her estate. The court determined that a present estate passed upon the creation of the trust and said:

"It is contended that the trustor intended the trust property to vest in the beneficiaries at the termination of the trust, and not before. 'But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate.' Nichols v. Emery, supra, 109 Cal. 323, at page 330, 41 P. 1089, 1091, 50 Am. St.Rep. 43.

"Having in mind these rules and the California Code provisions, we are brought, after study of the declaration of trust, to the conclusion that the legal title to the remainder vested at once in the beneficiaries, and that possession was to vest in them at the termination of the trust."

[10] Without extending the discussion further as to the effect of the words "shall vest" we refer to Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306; Miller v. Oliver, 54 Cal.App. 495, 202 P. 168; and In re De Vries' Estate, 17 Cal.App. 184, 119 P. 109, supporting the existence of a vested remainder even though enjoyment is postponed and even though the power of revocation or substitution might divest the beneficiary at any time of the right to possession which otherwise would upon the trustor's death pass to him.

[11] The trial court did not err in quieting respondent's title to the certificate. Upon the death of Ward the vested remainder interest of Randall passed to his wife as his sole heir, and her right to enforce the trust followed. See Sherman v. Hibernia Savings & Loan Society, 129 Cal. App., Supp. 795, 20 P.2d 138.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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MITCHELL et al. v. BAGOT et al.

Civ. 11606.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1941.

1. Life estates ⇐1

A life interest with right to consume the corpus under certain conditions is recognized in California.

2. Wills ⇐601(2)

A joint will of husband and wife, bequeathing all property to survivor without restrictions except that survivor should not convey any of it by deed of gift or without receiving full market value and, if survivor should not dispose of all property during his lifetime, remainder should be divided between issue and relations, was properly construed as giving survivor a "life estate" with right to consume corpus under certain conditions.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Estate".

3. Wills ⇐601(2)

Under joint will of husband and wife, bequeathing all property to survivor without restrictions except that survivor should not convey any of it by deed of gift or without receiving full market value and, if survivor should not dispose of all property during his lifetime, remainder should be divided between issue and relations, decree of distribution, after wife's death, creating a trust for surviving husband, need not be construed as creating only an ordinary life estate in husband, on theory that provisions for trust were void, but was properly construed as creating a "life estate" with power to consume corpus under certain conditions, if trust provisions were deleted.

4. Executors and administrators ⇐315(6)

Under joint will of husband and wife, bequeathing all property to survivor without restrictions except that survivor should not convey any of it by deed of gift or without receiving full market value and, if survivor should not dispose of all property during his lifetime, remainder should be divided between issue and relations, decree of distribution made after wife's death, creating a trust for surviving husband's benefit, could not be collaterally attacked after it had become final, on ground that will did not authorize the trust.

5. Executors and administrators ⇐315(4)

A court sitting in equity may not declare a decree of distribution void because it does not conform to the will.

6. Executors and administrators ⇐315(6)

A decree of distribution, after becoming final, becomes the measure of beneficiary's rights and is immune from collateral attack, even though in contravention of the will, and the will may be used to interpret but not to impeach such decree.

7. Executors and administrators ⇐315(6)

Generally, in absence of extrinsic fraud or the like, decree of distribution that has become final is the measure of the rights of all persons interested in the estate, even though it is inaccurate from the standpoint of following specific provisions of will.

8. Guardian and ward ⇐163

In action to quiet title and for declaratory relief, contention that probate court had no right to grant guardian a lien in settling her intermediate accounts was a "collateral attack" on orders approving the accounts, and could prevail only if granting of lien was beyond jurisdiction of the court in the guardianship proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

9. Executors and administrators ⇐301, 514

The personal representative of an estate may not be granted a lien for advances made to a distributee until final distribution, though such representative's intermediate accounts, unlike those of a guardian, are conclusive when settled. Probate Code, § 931.

10. Guardian and ward ⇐68

In settling intermediate account of a guardian, trial court has jurisdiction to grant guardian a lien for necessary advancements. Probate Code, § 1502.

11. Guardian and ward ⇐68

Whether facts justify granting a lien to guardian for necessary advancements, and the extent of such lien, is within court's sound discretion, and error in exercising court's power would not go to court's jurisdiction. Probate Code, § 1502.

12. Guardian and ward ⇐68

The credit, authorized by statute, to be allowed to guardian for necessary advancements, is within court's discretion and may include the granting of a lien. Probate Code, § 1502.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Frank M. Mitchell and others against William R. Bagot and others, to quiet title and for declaratory relief construing decree of distribution in the estate of Addie J. Mitchell. From an adverse judgment, plaintiffs appeal.

Affirmed in part and reversed, with instructions, in part.

Snook, Snook & Chase, of Oakland, for appellants.

Roscoe D. Jones, of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought this action to secure a determination that under the decree of distribution in the estate of Addie J. Mitchell their father James A Mitchell received only an ordinary life estate in certain real property with remainder to plaintiffs. The plaintiffs are the adult son and daughter of James A Mitchell, who was married to Addie J. Mitchell at the time of her death. Addie J. Mitchell was the stepmother of plaintiffs. In form, the action is one to quiet title and for declaratory relief.

The decree of distribution, dated December 22, 1936, provides that, by virtue of the provisions of the will of Addie J. Mitchell, it is necessary to appoint a trustee; that the property of the estate consists of $255.31 in cash and a certain described parcel of real property; that James A. Mitchell "is entitled to use and dispose of said estate, save that he shall not convey any thereof by deed of gift or unless he has received the full market value, and it is therefore necessary that a trustee be appointed so that in event of a sale the court may be able to pass upon the question as to whether the full market value is received.

"It is therefore ordered that William R. Bagot be and he hereby is appointed trustee herein * * * and that all the property of said estate should then be distributed to William R. Bagot, as trustee to have and to hold the same and to collect the income therefrom and deliver the income to said James A. Mitchell, during his life, and also to make sale of the said property when and as ordered by the court herein, for the benefit of said James A. Mitchell during his life time, and that upon the death of said James A. Mitchell, the said trustee shall turn over and convey the corpus of the estate then remaining, if any, to Frank M. Mitchell and Ethel G. Nelson, share and share alike."

It was the theory of the appellants at the trial, and it is urged on this appeal, that the portion of the decree creating the trust is void because no mention of a trust is to be found in the will; that under the will, and under the decree of the distribution, if the provisions concerning the trust are deleted, James A. Mitchell received but an ordinary life estate without power to consume the corpus; that the remainder interest, subject only to this ordinary life estate in James A. Mitchell, is vested in appellants.

The trial court found that in January of 1934 James A. Mitchell was adjudged to be an incompetent person, and Mary E. Cadman was appointed guardian of his estate; that the will of Addie J. Mitchell, who died in August of 1934, makes no provision for appointment of or devise to a trustee; that said will was a joint will with her husband, James A. Mitchell; that so far as the property involved is concerned, the will reads as follows: "Now, therefore, each of us does hereby give, devise and bequeath unto the other absolutely all of his or her real or personal property unto the survivor without restrictions as to its use or disposal save that the survivor shall not deed any of it away by deed of gift or unless he or she has received the equivalent of its full market value to the end that should the survivor not have disposed of all of said property during his or her lifetime then the remainder of said property may be divided between our respective issue and relations in the following manner and proportions, to wit:"; that the remainder was devised to appellants; that on December 22, 1936, the decree of distribution heretofore mentioned was entered; that under the will and the decree James A. Mitchell has a life estate with power to consume the corpus for his support, subject only to the limitation that he cannot give the property away and if he sells it he must receive the full market value; that Mary E. Cadman has a lien on the interest of Mitchell in the sum of $1,987.75, with interest. The court held that the portion of the decree attempting to create a trust is null and void; that James A.

Mitchell had a life estate of the type heretofore described; that the guardian had a lien.

[1-3] The decree of distribution was entered in December, 1936, and had become final long prior to the institution of this action in September, 1939. There can be no doubt that under the decree of distribution the trial court created a trust and gave to the beneficiary thereof a life interest with the right to consume the corpus under certain conditions. This type of estate is recognized in this state. Estate of Rath, 10 Cal.2d 399, 75 P.2d 509, 115 A.L.R. 836; Lord v. Atchison, 12 Cal.2d 681, 87 P.2d 346; Colburn v. Burlingame, 190 Cal. 697, 214 P. 226, 27 A.L.R. 1374. So far as the general nature of the estate devised to James A. Mitchell is concerned, there can be no reasonable doubt but that the probate court reasonably interpreted the provisions of the will. Appellants seek to deprive their father of the right to consume the corpus of the estate for his support by the following arguments: They first urge that since the will did not provide for a trust, the probate court had no power to create one, and that, therefore, this provision of the decree is void. They next urge that this either means that there never has been a valid distribution, or if the nullity extends to only part of the decree, then under the decree with the trust provisions deleted James A. Mitchell received only an ordinary life estate with no power to consume principal. It seems too plain to require further discussion that neither under the decree nor under the will was James A. Mitchell given only an ordinary life estate. Appellants want the trust provision deleted from the decree because they contend it is in conflict with the will, but they urge that after these provisions are deleted from the decree, there is left a decree giving James A. Mitchell only an ordinary life estate. What appellants seek, therefore, is to delete one provision of the decree because it is in conflict with the will, and to leave the balance of the decree standing even though it likewise conflicts with the provisions of the will. The law would indeed be impotent if such an unjust result were to be approved. The complete answer to appellants' argument in this respect is that if all provisions of the decree relating to the trust are deleted there would still remain a decree giving James A. Mitchell a life estate with power to sell the property when and as ordered by the court "for the benefit of said James A. Mitchell during his lifetime". There can be no doubt, therefore, that the trial court in this action correctly held that, if the trust provisions are deleted, James A. Mitchell has a life estate with power, under certain conditions, to consume the principal.

[4] The judgment of the trial court must be reversed, however, for another reason. The trial court held that the provisions of the decree creating the trust were void for the reason that the will made no provision for the trust. The decree of distribution became final several years before the present action was instituted. Both parties profess to be mindful of the rule that where distribution has been ordered it is the decree rather than the will which controls in case of conflict between them. Neither side to this appeal, however, objects to the judgment in so far as it adjudges that the trust is a nullity and void. Respondents do not object because it is agreeable to them that James A. Mitchell should have his interest without interposition of a trustee. Appellants do not object because invalidity of the trust provisions in the decree affords them their only opportunity to argue that James A. Mitchell has only an ordinary life estate.

[5, 6] We are of the opinion that the trial court was without power to hold that the trust provisions in the decree were void and could be collaterally attacked. There is no rule of law that will permit a court sitting in equity to declare a decree of distribution void because it does not conform to the provisions of the will. If such were the law there would be no principle that the decree is conclusive as against collateral attack even though in contravention of the terms of the will. The rule is well-settled that once the decree of distribution becomes final it becomes the measure of the rights of the beneficiary and is immune from collateral attack even though in contravention of the terms of the will. The will cannot be used to impeach though it may be used to interpret the decree. Thus in Miller v. Pitman, 180 Cal. 540, 182 P. 50, the will left the land to Charlotte, the wife of decedent for life, remainder to the heirs of his children. Miller was entitled to a one-sixth interest in remainder. By the decree of distribution Charlotte was given a fee simple. Years after the decree had become final Miller commenced this action on the theory that the probate court had no jurisdiction to distribute more than a life estate

to Charlotte, and that the remainder interest had never been distributed. This theory, which is substantially the same theory advanced by the appellants in the instant case, was approved by the trial court. In reversing the judgment the court stated (180 Cal. at page 543, 182 P. at page 51): "It thus appears that the paramount point presented upon the appeal involves the scope, effect, and finality of the decree of distribution which was made and entered in November, 1891, and never appealed from. The fundamental finding of the trial court to the effect that Charlotte Pitman took no more than a life estate by the decree of distribution is not supported by the evidence. The only evidence responding to this phase of the case consists of the will of Elias W. Pitman, the petition for its probate, the petition for the decree of distribution, and the decree itself. Neither extrinsic fraud nor mistake in the procurement of the decree was alleged, shown, or found. The decree is valid on its face. Clearly the probate court had jurisdiction of the subject-matter of the decree of distribution, and the fact that the decree erroneously construed the terms of the will did not operate to render the decree void. The time for appeal from the decree has long since expired. It is well settled that a decree of distribution is not subject to collateral attack, no matter how erroneously it may appear to depart from the terms of the will devising and bequeathing the estate distributed, if all of the interested parties have had due notice of the petition." Again at page 544 of 180 Cal., at page 51 of 182 P., it was stated: "Viewed in the light of this Code section, there is no escape from the conclusion that the decree in controversy, in express terms distributed all of the property of the estate to Charlotte Pitman without limitation and thereby confirmed in her an estate in fee simple absolute. This decree, in the absence of a showing or claim of extrinsic fraud or mistake, was irrevocable save upon appeal within the time provided by law, even though it was in contravention of the terms of the will. McKenzie v. Budd, supra [125 Cal. 600, 58 P. 199]; Mulcahey v. Dow, supra [131 Cal. 73, 63 P. 158]. So long as this decree stands unimpeached by such fraud or mistake, and it has not been so impeached herein by any fact alleged in the pleadings, developed in the proof or found by the court, there is no theory upon which any right or title of the plaintiffs to the land in question can be predicated and sustained. It follows that neither the pleadings nor proof of the plaintiffs suffice to support an action to quiet title, and, consequently, the question of the statute of limitations, which was put in issue by the pleadings, need not now be considered."

[7] The rule, citing many cases, is stated as follows in Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508, 510: "In general, and in the absence of some existing and affecting condition such as extrinsic fraud, or anything akin thereto, the rule would appear to be well established that even though from a standpoint of following the specific provisions of the will, a decree of distribution of the estate is inaccurate and incorrect, nevertheless after the decree has become final, for all time thereafter, it remains the unalterable measure of the rights of all persons who may be interested in the estate." See, also, Lord v. Atchison, 12 Cal.2d 681, 87 P.2d 346; In re Ewer, 177 Cal. 660, 171 P. 683; Wills v. Wills, 166 Cal. 529, 137 P. 249; 11B Cal.Jur. p. 796, sec. 1296; 26 Cal.Jur. p. 878, sec. 194. Under these authorities the rights of all parties in the estate, in the absence of extrinsic fraud, are conclusively measured by the decree of distribution. The probate court interpreted the will as requiring the appointment of a trustee. Whether that determination was right or wrong is not now in issue. Once interpreted by the decree, when the decree becomes final, that interpretation is conclusive. For these reasons it was clearly error for the trial court to have set aside the portion of the decree creating the trust.

[8] Appellants also complain of that portion of the judgment which decrees that Mary E. Cadman, guardian of the person and estate of James A. Mitchell, has a lien on the interest of Mitchell in the real property in the sum of $1,987.75. Mary E. Cadman was appointed guardian of the estate and person of James A. Mitchell, an aged incompetent, in January, 1934, before the death of Addie J. Mitchell. In her first and second accounts current in the guardianship proceedings she set forth that she had advanced for the support and care of the ward the sum of $1,987.75 in excess of guardianship receipts. The order settling the second account is included in the record herein. It recites that on settling the first account the court decreed that the guardian had a lien upon the property of the guardianship estate in the sum of

$833.77. The order settling the second account grants the guardian a lien in the sum of $1,987.75, which includes the $833.77 first allowed, plus $1,153.98 advanced in the period during the first and second accounts. The judgment in the present suit determines that this lien is valid and subsisting. Appellants urge that the probate court, in settling the intermediate accounts of the guardian, had no legal right to grant the guardian a lien. This is obviously a collateral attack on the orders approving these accounts. For that reason, in the present proceeding, appellants can prevail only if the granting of the lien was beyond the jurisdiction of the court in the guardianship proceeding.

[9] Appellants rely on the rule that orders settling intermediate accounts of a guardian are not conclusive, but the items thereof may be re-examined upon final accounting incident to the termination of the guardianship. Guardianship of Di Carlo, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990; Guardianship of Vucinich, 3 Cal.2d 235, 44 P.2d 567; Estate of Eaton, 38 Cal.App. 2d 180, 100 P.2d 813. Appellants urge that, in view of this rule, until final accounting it cannot be determined conclusively if any sum is owing the guardian. Appellants do not attack the propriety of the guardian advancing her personal funds to support and care for the ward where guardianship income is insufficient, and they concede that, in a proper case, on termination of the guardianship the guardian, under the decisions, would be entitled to a lien for the excess of advances over income. Appellants also refer to the well-settled rule that the personal representative of the estate of a decedent may not be granted a lien for advances made to a distributee until final distribution. Estate of Ross, 179 Cal. 358, 182 P. 303; Estate of Bennett, 13 Cal.2d 354, 90 P.2d 84, 126 A.L.R. 771. This is the rule, although intermediate accounts of a personal representative, unlike those of a guardian, are conclusive when settled. 11B Cal.Jur., p. 610, sec. 1145; sec. 931, Probate Code.

[10, 11] It seems to us that these arguments do not establish that the trial court in settling the intermediate account of a guardian has no jurisdiction to grant the guardian a lien for necessary advancements. In spite of the lack of finality of the intermediate accounts of a guardian it would be a very harsh rule that would preclude the guardian from reimbursing herself for advancements during the pendency of the guardianship proceeding and that would compel her to await the termination of the guardianship, which may last indefinitely. No hardship can be visited upon the ward by such allowances. If, on the final termination, it develops that some of the intermediate allowances were improper and that for that reason the guardian owes the ward a sum of money, the guardian would be liable therefor, and the ward would be protected by the guardian's bond. Whether the facts justify a lien in a particular case, and the extent of that lien, is a matter within the sound discretion of the court. Error in exercising that power, even if error existed in the present case, would not go to the jurisdiction of the court.

[12] A guardianship presents an entirely different problem from that involved in the estates of decedents. The personal representative of an estate may not be granted a lien for advances to a legatee because until final distribution it cannot be ascertained if that legatee is entitled to any portion of the estate. But in a guardianship proceeding there is always the ward's estate. In the present case, whether the ward James A. Mitchell had a normal life estate, or whether he had a life estate with power to consume the corpus, he had some interest in the property. The lien granted is merely on the interest of the ward. The guardian, in the instant case, has waived all compensation as guardian but has been compelled to expend nearly $2,000 of her own money for the care and maintenance of her ward. The income of the real property is not sufficient to care for the ward. Because of this litigation the ward has been prevented from selling the corpus. If a guardian had to wait until final termination to be reimbursed for necessary advances there would be few guardians who would make such advances. It was undoubtedly with this thought in mind that the legislature enacted section 1502 of the Probate Code. So far as pertinent here, that section provides: "When a guardian has advanced, for the suitable support, maintenance or education of his ward, an amount not disproportionate to the value of the ward's estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements." Just how that credit is to be allowed is

clearly within the discretion of the court. If the court determines that the granting of a lien is reasonably necessary, that power clearly is granted by the section. It will be noted that the section provides that the guardian shall be allowed credit for advancement "in his settlements". The legislature was careful not to say on "final settlement", but used the plural, obviously including intermediate settlements. Under this section we think the trial court acted well within its jurisdiction in granting the guardian a lien to secure her advancements.

For the foregoing reasons, that portion of the judgment declaring that the part of the decree of distribution creating a trust is void is reversed with instructions to the trial court to amend its findings of fact and conclusions of law and to enter its judgment to the effect that the decree of distribution is effective in all particulars, and that thereunder the trustee named has the right to sell the corpus and apply the proceeds to the support of James A. Mitchell, with the right in appellants to receive on the death of Mitchell only such part of the property as may not then be consumed for his support. The balance of the judgment is affirmed. Both sides to bear their own costs in this appeal.

KNIGHT and WARD, JJ., concurred.



48 Cal.App.2d 276

BADER et al. v. COALE et al.

Civ. 6731.

District Court of Appeal, Third District, California.

Dec. 4, 1941.

Hearing Denied Jan. 29, 1942.

1. Contracts ⇐147(2)

To interpret a contract is to ascertain the true intent of the contracting parties, which intention is to be ascertained from a construction of the language employed and the subject matter of the contract.

2. Contracts ⇐169

If the intention of contracting parties is doubtful under the terms of the instrument, the surrounding circumstances may be considered to determine its meaning.

3. Contracts ⇐147(1)

In interpreting a contract, the court will ascertain the relation of the parties to each other and to the subject matter and, if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if that can be done without disregarding the language of the instrument.

4. Deeds ⇐160

The erection of a firehouse upon land, conveyed to city for use as a public park upon express conditions that after 25 years land could be devoted to any public benefit or use deemed wise, did not violate express conditions of deed that land should not be sold or used commercially and that there should never be allowed thereon "any cemetery, incinerator, jail, hospital, crematory, or infirmary, house of correction, garbage disposal plants, or anything of like character", a firehouse not being of "like character", with the expressly prohibited uses.

See Words and Phrases, Permanent Edition, for all other definitions of "Like Character".

5. Deeds ⇐155

In determining the meaning of the phrase "or anything of like character", following the enumeration of certain uses of land expressly prohibited by deed, the court properly resorted to doctrine of "ejusdem generis", according to which general words following specific terms must be strictly limited in meaning to things of like kind and nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Ejusdem Generis".

6. Deeds ⇐90

In construing deeds, words are to be given their ordinary meaning and courts are never justified in searching for subtlety of expression.

7. Deeds ⇐93

In construing a deed, the intent of the parties must be ascertained not from subsequent denials or affirmations of the parties, but from the language used in the instrument under scrutiny, and the parties are presumed to mean, unless the contrary clearly appears, exactly what they say.

8. Deeds ⇐155

Where land was conveyed to city for park purposes upon express condition that after 25 years land should be devoted to any public benefit or use deemed wise, except that it should never be sold or used commercially and that there should never be allowed thereon "any cemetery, incinerator, jail, hospital, crematory or infirmary, house of correction, garbage disposal plants or anything of like character", the phrase of "like character" referred not to any classification of governmental functions, but to any actual similarity in a proposed use to each or any of the uses prohibited.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by W. A. Bader and others against Woodrow Coale and others to enjoin the City of Stockton and its council from erecting a firehouse upon one of city's parks. From a judgment denying an injunction, plaintiffs appeal.

Judgment affirmed.

J. Leroy Johnson, of Stockton, for appellants.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondents.

TUTTLE, Justice.

This action was brought to enjoin respondent city of Stockton (and its council) from erecting a firehouse upon one of its parks. Findings were filed, disposing of all issues in favor of respondents, and judgment was entered denying an injunction. Plaintiffs appeal from said judgment.

As we view it, the only question of any merit arises out of the construction of the deed by which the city acquired the property, and the following provision thereof: "And it is further provided, and this conveyance is made and accepted upon the further express condition that after the period of twenty-five years from date hereof, said City of Stockton may devote said premises, except the strips heretofore mentioned, to any public benefit or use that in the judgment of the then properly vested powers of the Municipality may deem most wise for public benefit, but in no event is said property to be sold or used commercially or for income purposes nor shall there ever be allowed on said property any cemetery, incinerator, jail, hospital, crematory or infirmary, house of correction, garbage disposal plants or anything of like character."

It is the contention of appellants that a firehouse is "of like character" as the preceding uses mentioned.

[1-3] The rule governing the situation is thus expressed in 6 Cal.Jur., section 163, pages 252, 253, 254 and 255: "The primary object of all interpretations is to ascertain and carry out the intention of the parties. 'To interpret a contract is to ascertain the true intent of the contracting parties.' Intention is to be ascertained from a consideration of the language employed and the subject matter of the contract. Resort is first had to the contract itself; and if the intention is doubtful under the terms of the instrument, the surrounding circumstances may be considered to determine its meaning. The court will ascertain the relation of the parties to each other, and to the subject matter, and if possible, so construe the instrument, however inartificially drawn, as to give effect to the intention of the parties, if it can be done without disregarding the language of the instrument."

It is obvious that the parties contemplated different and other uses at the end of twenty-five years. In a paragraph of the deed preceding the one quoted above, we find the following language: "Provided, also, and this grant is made upon and accepted subject to the express condition that for the period of twenty-five years from and after the date hereof, said land, except the strips above referred to is to be used and maintained by the City of Stockton as a free, open, public park for recreation and promenade purposes."

[4] In the clause first quoted above, the use after the expiration of twenty-five years is not limited to park purposes. That restriction is eliminated, and it may be reasonably assumed that thereafter the city might devote the property "to any public benefit or use that in the judgment of the then properly vested powers of the municipality may deem most wise for public benefit". Then follows the language which gave rise to this action. Is a firehouse "of like character" with the uses interdicted? We think not. In disposing of this phase of the case we adopt the following excerpt from the opinion of the trial judge:

"Plaintiffs argue that the limitation in the deed goes far beyond the enumerated objections, namely, cemeteries, incinerators,

jails, hospitals, crematories, infirmaries, houses of correction and garbage disposal plants; and relies upon the phrase, which follows the last named word, 'or anything of like character'. A reasonable interpretation of these words, it is urged, must result in banning the proposed fire engine house on the theory that it is, under a sort of general classification, of like character to the improvements specifically mentioned and prohibited.

[5-7] "Here we have the crux of the problem. Manifestly the phrase cannot be brushed aside as too uncertain for application. It has a very definite relationship to the words which precede it and must be given, if possible, the meaning intended—or at least the meaning which courts of last resort have given it in similar situations. Obviously the phrase is a precautionary generality, or catch-all, and unfortunately, like all such language, is open to conflicting interpretations. The law, therefore, must adopt a formulæ to meet such situations and this formulæ, known as an aid to interpretation, is the doctrine of ejusdem generis, which means that when general words follow specific terms (such in this case as jails, hospitals, et cetera), the former will be strictly limited in meaning to things of like kind and nature. Words are to be given their ordinary meaning; in interpreting language courts are never justified in searching for subtlety of expression. Intent must be ascertained, not from the subsequent denials or affirmations of the parties, but from the language used in the document under scrutiny; and the parties are presumed to mean, unless the contrary clearly appears, exactly what they say. When there is a controversy as to the meaning of the words or the scope of language, courts invariably resort to the modern dictionary.

"In a definitive sense we are here concerned with but two words of the phrase—'like character'. According to Webster the word 'like' means 'equal in quantity, quality or degree or exactly corresponding', while the word 'character' is defined (in the sense here used) as 'that by which a thing is especially known or distinguished; a quality; property'. The two words taken together do not imply identity, but only similarity. (Words and Phrases, 3rd Series, Vol. 4, page 913 [Words and Phrases, Perm.Ed., Vol. 25, page 283.]) It is clear that in searching for the meaning of the phrase, 'or anything of like character', the court is governed by the definitions above set forth. The parties may have had several things in mind when they used the phrase. For example, it may be seen at a glance that a clinic could not be established in the park because it is related to a hospital; nor could the city build a mausoleum there because, while not a cemetery, it is certainly of like character. The same may be said of a juvenile detention home because of its similarity to a house of correction. In these random comparisons we have a similarity in fact, not in fancy. But it is a far cry from these illustrations to a fire engine house, which is not similar to any of the prohibited uses; to so hold would render meaningless other language in the quoted provision, namely, the express agreement that the city, after the lapse of 25 years, may devote the premises to such public benefit or use as it may deem wise. It is just as important to give force and effect to this provision as to the phrase on which the plaintiffs rely. As already pointed out, the city, by reason of the objectionable uses specifically enumerated, has little opportunity for making a choice."

[8] It is the contention of appellants that the uses prohibited are structures used by the city government in conducting the administration of its governmental affairs, and within that group should be placed a "firehouse". We believe that the phrase "of like character" was intended to refer not to any classification of governmental functions, but to any actual similarity in a proposed use to each or any of the uses prohibited. Otherwise, the granting of the right to the city to devote the property to any use or public benefit would be practically meaningless.

We find nothing which requires further discussion.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.

48 Cal.App.2d 255

PEOPLE v. SCHMIDT.

Civ. 11877.

District Court of Appeal, First District, Division 2, California.

Dec. 3, 1941.

Hearing Denied Jan. 29, 1942.

1. Intoxicating liquors ⇐90(1)

The fact that after federal court enjoined enforcement of provisions of Alcoholic Beverage Control Act relating to collection of beer importer's license fees, but before federal court's judgment was reversed by the United States Supreme Court, a beer importer's license was issued with a typewritten notation thereon that the license was issued without the fee provided for in the act in accordance with the federal court's judgment, did not thereafter preclude the state from recovering the license fees from the licensee after the reversal by the United States Supreme Court, since the licensee's obligation to pay the fees was an "obligation implied in law" under the act. St.1935, p. 1123.

See Words and Phrases, Permanent Edition, for all other definitions of "Obligation Implied in Law".

2. Intoxicating liquors ⇐90(1)

The fact that application for beer importer's license showed under the printed heading of "Fee Tendered" the written notation "No fee" would not prevent the state which had issued licenses without payment of fees because of federal court's judgment enjoining enforcement of provisions of the Alcoholic Beverage Control Act relating to collection of beer importer's license fees from recovering those fees after the United States Supreme Court reversed the federal court's judgment. St.1935, p. 1123.

3. Intoxicating liquors ⇐80, 90(1)

The temporary suspension of powers of state officials to collect beer importer's license fees under the Alcoholic Beverage Control Act because of a judgment of a federal court enjoining enforcement of provisions of the act relating to collection of such fees did not render invalid beer importer's licenses issued after that judgment and before the judgment was reversed by the United States Supreme Court, and did not preclude the state from recovering the license fees after reversal of the judgment by the United States Supreme Court. St.1935, p. 1123.

4. Intoxicating liquors ⇐90(1)

The fact that the Legislature repealed the provisions of the Alcoholic Beverage Control Act imposing license fees on beer importers did not prevent the state from collecting license fees from a beer importer to whom licenses had been issued prior to the repeal without license fees being charged because of a federal court's judgment, subsequently reversed by the United States Supreme Court, enjoining enforcement of provisions of the act relating to collection of beer importer's license fees, since the Legislature could not surrender a right which had theretofore vested in the state in view of the constitutional provision that the Legislature shall have no power to give or to lend the credit of the state or its subdivisions. St.1935, p. 1123; St.1937, p. 2126; Const. art. 4, § 31.

Appeal from Superior Court, Santa Cruz County; James L. Atteridge, Judge.

Action by the People against Ludwig Schmidt to recover license fees allegedly due from defendant by reason of the issuance to defendant of two beer importer's licenses under the Alcoholic Beverage Control Act. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Hearing denied; EDMONDS and CARTER, JJ., dissenting; TRAYNOR, J., not participating.

Sans, Hudson & Perry, of Watsonville, for appellant.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Plaintiff sued to recover from defendant license fees of $250 and $500, respectively, alleged to have become due from defendant by reason of the issuance to defendant of two beer importer's licenses under the provisions of the Alcoholic Beverage Control Act of 1935, Stats. 1935, chap. 330, p. 1123. Plaintiff had judgment and defendant appeals.

Shortly after said act became effective, certain interested parties commenced an action entitled Young's Market Co. et al. v. State Board of Equalization et al. in the United States District Court for the Southern District of California, central division, said action being numbered therein Equity 736-H. A court of three judges heard said cause and a judgment was

entered permanently enjoining the defendants therein from enforcing against plaintiffs therein and others similarly situated certain provisions of said act including the provisions thereof relating to the collection of beer importer's license fees. See Young's Market Co. et al. v. State Board of Equalization et al., D.C., 12 F. Supp. 140. Said judgment was thereafter reversed by the United States Supreme Court. State Board of Equalization et al. v. Young's Market Co. et al., 299 U. S. 59, 57 S.Ct. 77, 81 L.Ed. 38.

After the entry of the judgment in that case but prior to the reversal of said judgment, a beer importer's license was issued to defendant bearing the following typewritten notation upon the face thereof: "This license issued without fee provided for in Alcoholic Beverage Control Act, in accordance with decree recorded and entered on October 9, 1935, in the District Court of the United States for the Southern District of California, central division, in the cause entitled 'Young's Market Company, a corporation, et al. v. State Board of Equalization of the State of California et al., No. Eq. 736-H.'" Thereafter, and prior to the reversal of said judgment, said license was renewed without the payment of the fee provided in said act. After said judgment was reversed in December, 1936, demand was then made upon defendant to pay the fees provided in said act for said licenses which had been previously issued. Defendant refused to pay said fees and this action was commenced for the purpose of collecting the same. The evidence showed that defendant had made extensive importations of beer under said licenses prior to the demand for said fees but had ceased to make said importations after the demand for said fees.

Defendant makes several contentions but all are to the effect that the trial court erred in overruling his demurrer to the complaint and in entering judgment in favor of plaintiff. We do not believe that defendant's contentions can be sustained.

[1] The parties are agreed that the factual situation is unique and that there are no authorities directly in point. They seem to be further agreed that the act required the tender of such fees at the time of making application for the licenses; that such fees were not demanded at that time by reason of the injunction then in force and effect preventing the collection of, or the attempt to collect, such fees; and that the act contained no express provision authorizing the plaintiff to bring an action for the purpose of collecting such fees. We find no authorities which compel the conclusion that plaintiff could not bring an action for that purpose and we are of the view that plaintiff was entitled to bring such action upon the obligation implied in law by the provisions of said act. This is not a case similar to United States v. Jourden, 9 Cir., 193 F. 986, or People v. Craycroft, 2 Cal. 243, 56 Am.Dec. 331, cited by defendant, in which attempts were made to collect license fees from unlicensed persons upon the sole ground that such persons had done the acts requiring a license.

[2, 3] Defendant argues at length that the license fees provided by the act were regulatory fees and not fees for revenue but, under the circumstances before us, we believe this question is immaterial. He further argues that there was no obligation implied in fact as the application showed, under the printed heading of "Fee Tendered", the written notation "No fee". This likewise appears immaterial as the obligation was one implied in law from the terms of the act, which act was ultimately held to be valid and constitutional. He further argues that there could be no implied obligation whatever as he claims that the licenses were void because issued in "direct violation" of the terms of the act. In support of this claim, he cites cases involving attempts to collect license fees in cases where public officials had issued licenses on credit or otherwise in direct violation of the licensing act. See Town of Gallup v. Gallup Cold Storage Co., 26 N.M. 253, 191 P. 465; Woolen and Thornton on Intoxicating Liquors, sec. 491; Joyce on Intoxicating Liquors, sec. 196. But said authorities refer to licenses issued by public officials in direct violation of the licensing acts and without any legal justification. In the present case, the then existing injunction prevented any attempt to collect the license fees in question, and the public officials were, for the time being, powerless to collect such fees. Such temporary suspension of the powers of said public officials can not be held to have resulted in rendering invalid the licenses issued pending the ultimate determination of the validity of the act.

[4] Defendant makes the further point that any right to collect said license fees

was lost by virtue of the repeal in 1937 of the provisions imposing license fees upon beer importers. Stats. 1937, chap. 758, p. 2126. In effect, this amounts to a contention that the legislature had the power, by repealing said provisions in 1937, to surrender, without consideration, a right which had theretofore vested in the state. We find no merit in this contention, as the legislature may not, under the guise of a repeal, violate section 31 of article IV of the Constitution. Trippet v. State, 149 Cal. 521, 528, 86 P. 1084, 8 L.R.A.,N.S., 1210.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



48 Cal.App.2d 397

MERRY v. GARIBALDI et al.

Civ. 6549.

District Court of Appeal, Third District, California.

Dec. 9, 1941.

1. Cancellation of Instruments ⇐53

In suit to cancel a deed of trust and note on ground that plaintiff's signature on instruments was a forgery, findings that instruments were delivered by plaintiff's son-in-law and that plaintiff learned of their existence during months of July or August, 1938, but refrained from informing defendants of circumstances surrounding execution and delivery of instruments until commencement of suit, were sufficient to support judgment denying relief.

2. Mortgages ⇐64

Where plaintiff's signature on a deed of trust and note was forged before instruments were delivered to trustees, plaintiff was bound to notify beneficiaries under deed of trust of facts without delay when plaintiff first learned of forgery, as regards plaintiff's right to cancellation of instruments on ground of forgery.

3. Equity ⇐65(1)

He who comes into equity must come with clean hands.

4. Cancellation of Instruments ⇐34(1)

Where plaintiff's signature on a deed of trust and note was forged by plaintiff's son-in-law, and defendants loaned money on instruments by a check which was payable to plaintiff and on which plaintiff's signature was also forged, and the statute of limitations had run against any action which defendants might have brought against bank for cashing forged check when defendants received notice of son-in-law's acts, plaintiff's failure to promptly notify defendants of fraud and forgery after plaintiff had knowledge thereof constituted "laches" barring recovery in suit to cancel deed of trust and note on ground of forgery.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Equity ⇐71(1)

There is no hard and fast rule either as to lapse of time or circumstances which will justify application of doctrine of "laches".

6. Equity ⇐84

Laches is a "question of fact" to be determined by consideration of circumstances of the particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

7. Equity ⇐67

The matter of laches is one which reposes in sound discretion of chancellor.

8. Mortgages ⇐74

In suit to cancel a deed of trust and note and to quiet title to realty on ground that plaintiff's signature on instruments was a forgery, evidence sustained finding that plaintiff was estopped from denying validity of instruments.

9. Estoppel ⇐95

An "estoppel" may arise from silence as well as from words or conduct, but this is only where there is a duty to speak and where the party upon whom such duty rests has an opportunity to speak and, knowing that the circumstances require him to speak, remains silent.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

10. Cancellation of Instruments ⇐34(1)
Mortgages ⇐64

That a check under which defendants loaned money under a deed of trust and

note bearing plaintiff's forged signature was that of a title company as escrowee did not preclude defendants from setting up defenses of laches and estoppel in suit to cancel deed of trust and note on ground of forgery, where company was defendants' agent for purpose of handing over proceeds of loan to plaintiff's son-in-law, who forged the signatures, and defendants could have brought an action against bank, which cashed check bearing a forged endorsement of plaintiff's name as payee, within the year provided by statute.

11. Contracts ⇐41

The owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may "estop" him from denying its validity.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

12. Contracts ⇐134, 136

Ratification or estoppel cannot be invoked if a contract is void because prohibited by law or public policy.

13. Contracts ⇐97(1)

Where the object of a contract is lawful and the party is under no disability, his previous disability does not arrest the law of estoppel.

14. Mortgages ⇐64

Where plaintiff's son-in-law forged plaintiff's signature on a deed of trust and note, and defendants advanced money in good faith as a loan on security of instruments, and plaintiff learned of circumstances regarding execution and delivery of instruments but did not inform defendants thereof until after statute of limitations had run on defendants' cause of action against bank which cashed check representing loan, and which check was cashed under a forged endorsement of plaintiff's name as payee, "estoppel" was a proper defense against plaintiff in suit to cancel deed of trust and note on ground of forgery.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Suit by Nettie F. Merry against H. Garibaldi and others to cancel a deed of trust and promissory note and to quiet title to a parcel of real property. From a judgment denying relief, plaintiff appeals.

Affirmed.

J. M. Inman and E. R. Vaughn, both of Sacramento, for appellant.

Hinsdale, Otis, Johnson & Ware, of Sacramento, for respondents Garibaldi and Henderson.

Elliott, Atkinson & Sitton, of Sacramento, for respondent Omer E. Cheek.

TUTTLE, Justice.

This action was brought to cancel a deed of trust and promissory note, and to quiet title to a certain parcel of real property in the city of Sacramento, upon the ground that the signature of plaintiff, appearing upon said instruments, was a forgery. The answer of defendants sets up laches and estoppel as defenses. Upon a trial by the court, findings were entered in favor of defendants upon all issues. Judgment was entered denying any relief. The appeal is from the judgment.

The facts are undisputed. The plaintiff is a widow, and resided upon the premises in question with her daughter and son-in-law, Gordon A. Lilly. Shortly before September 30, 1937, Lilly went to Omer E. Cheek, a realtor, and stated that plaintiff desired a loan upon said property. On the date mentioned Lilly delivered to Cheek a deed of trust and promissory note, each purporting to bear the signature of plaintiff. The matter was escrowed through Capital City Title Company, who delivered to Lilly a check for $1,420.80 in favor of plaintiff. That check was presented to the bank by Lilly, bearing the purported endorsement of plaintiff, and the amount thereof was paid by the bank to Lilly. All of the signatures of plaintiff were admittedly forgeries perpetrated by Lilly. Prior to the consummation of the transaction, defendants H. Garibaldi and Rose Garibaldi had entrusted to Cheek the sum of $1,500 which they wished to loan, and this is the money which was paid over by the title company to Lilly. Defendants Cheek and Henderson were trustees under said trust deed, and the Garibaldis were beneficiaries thereunder.

All went well until some time during July or August of 1938. Up to that time Lilly had paid the interest due on said note, and his mother-in-law was blissfully ignorant that her home had been incumbered. During either of said months,—plaintiff was not sure which one,—Cheek called at the home and encountered plaintiff. He informed her that interest on her loan was overdue. This was the first knowledge she had received of the fraud which had been committed by her

son-in-law. Upon requesting an explanation from him, he admitted the forgery, but agreed to pay the interest and said he would begin to pay off the loan as soon as possible. The following testimony of plaintiff explains the understanding between her and Lilly:

"Q. In other words, to protect your family you agreed that if he would pay the interest you would say nothing about it; is that correct? A. Yes, sir.

"Q. And from the time, then, of your first intimation that there was a loan on this property,—when I say this property, I mean the Swanston Park property,—you agreed to do nothing and say nothing, and you never conveyed that information to anyone, did you? A. No, we were ashamed of it, we kept it quiet."

The Garibaldis knew nothing of the fraud until they were served with the summons and complaint in this action.

The trial court made the following findings: "That said note and deed of trust were not, in fact, executed by said plaintiff, but her name was forged thereon, and said instruments were delivered by Gordon A. Lilly, plaintiff's son-in-law; that after such fraudulent execution and delivery, said plaintiff learned for the first time during the month of July or August, 1938, of the existence of said note and deed of trust, and of such forgery; that at all times thereafter, up to the time of the filing of this action, plaintiff remained silent and refrained from informing said defendants or their agents of the facts and circumstances surrounding the execution and delivery of said note and deed of trust; that plaintiff at all times, and particularly when notices were received by her, both written and by telephone, to the effect that interest installments under said note were delinquent, conducted herself in a manner calculated to prevent, and which did prevent, said defendants from learning the true facts and circumstances surrounding the execution and delivery of said note and deed of trust, and said plaintiff acted in a manner calculated to cause said defendants and which in fact did cause said defendants, to continue to believe that said note and deed of trust were lawfully executed and delivered by said plaintiff; that said defendants were without knowledge of the true facts and circumstances surrounding the execution and delivery of said note and deed of trust, and consequently failed, to their detriment, to commence any actions or proceedings against said Gordon A. Lilly; that in this connection, the sum of $1,500, which was loaned by the defendants H. Garibaldi and Rose Garibaldi, his wife, and which was the consideration for said note and deed of trust, was disbursed by the escrow agent for said lenders by check made payable to said plaintiff; that the endorsement of said plaintiff was likewise forged on said check by said Gordon A. Lilly, who received the proceeds therefrom; that the bank, on which said check was drawn, honored said check with the forged endorsement thereon on October 1, 1937; that said bank, until the running of the statute of limitations on the 1st day of October, 1938, was subject to a suit by said escrow agent, or by said lenders as principals, for wrongfully honoring said check; that the defendants H. Garibaldi and Rose Garibaldi, his wife, were deprived of the benefit of seeking reimbursement from said bank, which was a substantial detriment, because of the aforesaid acts and conduct of plaintiff.

"That said plaintiff is estopped from denying the validity of said note and deed of trust and from urging any infirmity in connection with the execution and delivery thereof, and has been guilty of laches in the commencement of this action; that plaintiff should be denied the relief prayed for in said complaint."

[1-3] We think the findings are sufficient to support the judgment. When plaintiff first learned of the forgery, it was her duty to give the facts to the Garibaldis without delay. Her agreement to conceal the crime and condone it places her in little better position than the forger himself, so far as her attack upon the legality of the transaction is concerned. In 10 Cal. Jur., pages 515-516, section 55, it is stated: "A commonplace maxim of equity, which has also escaped certification, is that which declares that he who comes into equity must come with clean hands. This maxim says 'that whenever a party, who as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy.'"

[4-7] Furthermore, the failure of plaintiff to promptly notify defendants of the fraud, constitutes laches which will bar recovery. When defendants finally received notice of the contumacious act of Lilly, the

statute of limitations had run against any action which they might bring against the bank for cashing the forged check. Thus, through the delay in receiving notice, defendants were deprived of any right to recoup. On page 526, same volume, section 64, it is said: "There is no artificial or hard-and-fast rule either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. The question must be determined by a consideration of all the facts and circumstances of the particular case. Laches is a question of fact, on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor."

[8, 9] The finding of estoppel is also sustained by the evidence. In 10 Cal.Jur., page 631, section 16, it is stated: "An estoppel may arise also from silence as well as from words or conduct. But this is only where there is a duty to speak, and where the party upon whom such duty rests, has an opportunity to speak, and, knowing that the circumstances require him to speak, remains silent."

[10] It is the contention of appellant that defendants are not entitled to set up the defenses mentioned, because the check was not their own, but that of the escrowee. The answer must be that the title company was the agent of the Garibaldis for the purpose of handing over the proceeds of the loan to Lilly. Defendants could therefore have brought an action against the bank within the year provided by the statute.

[11-13] Appellant contends that a forged instrument carries no title, and that the defense of equitable estoppel cannot be invoked by an innocent purchaser. She relies upon the case of Gioscio v. Lautenschlager, 23 Cal.App.2d 616, 73 P.2d 1230. The court there held that the evidence was not sufficient to estop the grantor of a forged deed from asserting its invalidity. The court went on to say that equitable estoppel did not apply to a forged deed. The latter holding was not necessary to the decision. It was held in the case of Blaisdell v. Leach, 101 Cal. 405, 35 P. 1019, 1020, 40 Am.St.Rep. 65, that "the owner of property cannot be divested thereof by a forged instrument, but his conduct in reference to the instrument may estop him from denying its validity". In the case of Dool v. First National Bank of Calexico, 209 Cal. 717, 290 P. 15, 18, Dool executed a note and deed of trust at a time when he was entirely without understanding. Such instruments were therefore void. Subsequently, Dool regained his understanding, and allowed and induced the bank from whom he had borrowed the money to lay out and expend money under said trust deed. Dool died, and the executors of his estate brought this action to cancel the said instruments upon the ground that they were void, having been executed when Dool was entirely without understanding and of unsound mind. The bank set up estoppel as a defense, and the judgment of the trial court upholding that defense was affirmed. The pertinent portion of the opinion reads as follows: "The above recital of facts in this case seems clearly to call into action this rule of law. But it may be said that, inasmuch as the contract when made was absolutely void, neither ratification nor estoppel could be invoked. This is doubtless true of contracts that are void because prohibited by law or void because of violation of rules of public policy. Lukens v. Nye, 156 Cal. 498, 505, 105 P. 593, 20 Ann.Cas. 158, 36 L.R.A.(N.S.) 244; Colby v. Title Ins., etc., Co., 160 Cal. 632, 644, 117 P. 913, Ann.Cas.1913A, 515, 35 L.R.A.(N.S.) 813, involve contracts of this type. But, where the object to be attained is a lawful one, and the party is under no disability (sui juris), no reason exists why his previous disability should arrest the law of estoppel. This, in fact, has been in principle held by this court respecting the contracts of minors under the age of eighteen years. Such contracts are void, but the minor may, after attaining his majority, so deport himself as to be estopped to plead his minority as a defense to the contract entered into while under the age of eighteen years. Hakes Inv. Co. v. Lyons, 166 Cal. 557, 561, 137 P. 911, where it is stated that, while ratification will not apply, estoppel may. To the same effect is Lee v. Hibernia Savings, etc., Soc., 177 Cal. 656, 659, 171 P. 677."

[14] We are therefore of the opinion that estoppel was a proper defense in the action before us.

Concluding the discussion, the Garibaldis were entirely innocent throughout the entire episode. They advanced the money in good faith. On the other hand, plaintiff agreed to conceal the commission of the felony, and to permit Lilly to work

the situation out. In good conscience, it was the imperative duty of plaintiff to speak out. Her silence deprived defendants of an opportunity to recoup from the bank before the expiration of the statute of limitations. Equity and justice should not compel defendants to bear the loss.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.



LOS ANGELES COUNTY v. LA FUENTE. *

Civ. 12645.

District Court of Appeal, Second District, Division 1, California.

Dec. 2, 1941.

Hearing Granted Jan. 29, 1942.

1. Paupers ⇐43(2)

To be "in need" or to be one of the "aged poor" within meaning of Old Age Security Law, a person need not be entirely without resources, but may own any property and receive any income below the limits stated in the law. St.1937, pp. 1078 et seq., 1079, 1083, 1085, 1094, §§ 2000 et seq., 2009, 2020, 2160, 2163–2165, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Aged Poor" and "In Need".

2. Paupers ⇐43(2)

In construing statute, providing for the granting of old age aid to person meeting other requirements of the statute who is not receiving adequate support from a husband, wife or child, able and responsible under the law to furnish such support, the rule that the expression of one thing means the exclusion of another must be applied. St.1937, pp. 1078 et seq., 1085, §§ 2000 et seq., 2160.

3. Paupers ⇐43(2)

Those who are receiving adequate support from relatives are not "in need" within Old Age Security Law, but one, who was otherwise eligible to aid under the law, was not rendered ineligible by reason of an offer of support by his child, which offer was rejected. St.1937, pp. 1078 et seq., 1085, §§ 2000 et seq., 2160.

4. Constitutional law ⇐70(3)

Whether an aged person in need, after rejecting an offer of support by relatives, shall be entitled to apply for and receive aid from the public is a question of policy for the legislative power, and where the Legislature has spoken on the subject, the courts cannot decide otherwise. St.1937, pp. 1078 et seq., 1085, §§ 2000 et seq., 2160.

5. Paupers ⇐51

Any judgment against the spouse or child of a recipient of old age assistance for recovery by county of the aid granted must be based on the ability of spouse or child to pay the amount thereof, and trial court has considerable discretion in balancing other duties and other expenses against the duty of reimbursement imposed by the Old Age Security Law. St.1937, pp. 1078 et seq., 1094, §§ 2000 et seq., 2224.

6. Paupers ⇐51

In action by county to recover reimbursement for aid granted under Old Age Security Law to parents of defendant, who had an annual income of approximately $2,700, a $3,300 mortgage against her house, and an 18 year old son to support in addition to herself, court did not abuse its discretion in rendering judgment against defendant in the sum of $738, with interest and costs. St.1937, pp. 1078 et seq., 1094, §§ 2000 et seq., 2224.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by the County of Los Angeles against Gretta La Fuente to recover under provisions of the Old Age Security Law for aid furnished by the county to defendant's father and mother. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Gretta La Fuente, in pro per.

J. H. O'Connor, Co. Counsel, and Gerald G. Kelly, Deputy Co. Counsel, both of Los Angeles, for respondent.

SHAW, Justice pro tem.

The questions presented for decision in this case arise under the provisions of chapter 1 of division III of the Welfare and Institutions Code, St.1937, p. 1078. This chapter is self-denominated as the "Old Age Security Law" (section 2000). All sections herein referred to are parts of it and are viewed as enacted in 1937, this case

* Subsequent opinion 129 P.2d 378.

having arisen before any subsequent amendments became effective.

Section 2001 declares that "Subject to the provisions of this chapter, every person residing in the State, if in need, shall be entitled to aid in old age from the State". The remainder of the chapter provides for fixing the amount of this aid, sets forth a more particular description of the persons who may claim it, states the terms and conditions on which it may be received, and provides the details of administration of the act. The primary duty of administration, including the decision whether aid shall be granted, and if so, how much, is cast upon the boards of supervisors of the several counties, subject to supervision by the State Department of Social Welfare. Payment of aid granted is to be made, subject to partial reimbursement, by the counties. Section 2224 provided when this case arose that "If the person receiving aid has within the State a spouse or adult child pecuniarily able to support said person", then on request of the board of supervisors of the county granting aid, the "civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relatives, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay."

This is an action brought under the authority of section 2224. The complaint alleged, in two counts, that under the Old Age Security Act aid had been rendered by plaintiff county to defendant's father and mother, and that defendant was pecuniarily able to support her parents. Defendant in her answer denied that her income and property were as great as stated in the complaint. She further alleged as to each parent that "at all times referred to in the complaint herein, defendant has been ready, able and willing and has offered to support and provide for her said parent at and in the home of defendant, but said parent has refused to accept said offer or support"; that this offer was made known to plaintiff's department of charities before any aid was granted, and that she was still ready, able and willing to support the parent in her home. While the findings covered the various allegations in some detail, their general effect was that the complaint was true and the answer was untrue. Regarding defendant's offer of support, the findings were that defendant was not at the times alleged in plaintiff's complaint ready, able and willing, nor did she at any time offer, to support her parents "in adequate living quarters", and that she never offered to give them "any financial assistance", and she was not "ready, able and willing" to do so.

Defendant's principal contention is that prior to the payment of any money by plaintiff county to her parents, she had offered to support them in her own home and had made that offer known to the plaintiff, and therefore they were not "in need" within the meaning of section 2001, and so not eligible for the relief furnished.

It is undisputed that defendant did make such an offer and communicate it to plaintiff, but plaintiff argues that the home offered was inadequate, both from a physical standpoint and because of an incompatibility of temperament between defendant and her parents which made it impossible for them to "get along", as the mother testified. Since we conclude that a mere offer, such as defendant made, constitutes no defense to this action, we need not consider the matter of adequacy of the home offered.

[1] To discover the legal rule on this point, we must read and consider together the various relevant sections of the Old Age Security Law. Section 2001, Welfare and Institutions Code, is the general provision declaring the policy of the law. As already noted, it limits the persons eligible for aid to those "in need". Section 2004 casts some light on this provision by declaring that the chapter does not repeal other acts for the support of "the poor", and is an additional method of supporting and providing for "the aged poor". Other sections operate to fill in the details of the picture outlined by these provisions. Thus section 2020 limits the total amount of aid to be granted to the amount by which $35 per month exceeds the applicant's income from all other sources—certain described income being excluded from consideration here. By sections 2164 and 2165 a single person owning real property assessed at more than $3,000, or either one of a married couple which owns such property, cannot be given aid. Section 2163 prohibits aid to one owning personal property the value of which exceeds $500. The person receiving aid is not to be deemed a pauper or dubbed an indigent by reason thereof. Section 2009. From these provisions it is obvious that to be "in need", or to be one of the "aged poor", a person need not be entirely without resources, but may own any property

and receive any income below the limits stated in these sections.

[2-4] What of support offered or furnished by a relative responsible for the support of the person? Does such offer or furnishing render the person to whom support is offered or furnished ineligible for aid under this law? We naturally expect to find the law dealing with these problems, and looking at section 2160 we find its answer to them. That section begins with the statement: "Aid shall be granted under this chapter to any person who comes within all of the following descriptions:" Then follow separate lettered paragraphs of descriptive matter, covering age, citizenship, residence, status as inmate or not of an institution, nonconveyance of property to qualify for aid, and this: "(f) Who is not receiving adequate support from a husband, wife, or child, able and responsible under the law of this State to furnish such support". This provision is negative, rather than positive, and is quite similar in its effect to an exception. It debars from the receipt of aid persons who are receiving support as specified. It is the only provision of the law dealing with the subject of support by relatives, and must be regarded as covering the whole subject of such support, whether offered or furnished. To this provision must be applied the rule that the expression of one thing is the exclusion of another, Homestead Valley Sanitary Dist. v. Donohue, 1938, 27 Cal.App.2d 548, 550, 81 P.2d 471; Merchants Nat. Bank v. Continental Nat. Bank, 1929, 98 Cal.App. 523, 532, 277 P. 354, and we must conclude that no further limitation or exception regarding support from relatives was intended. Those who are receiving adequate support from relatives are not, for the purpose of the law, "in need". But no such declaration is made regarding those to whom support has been offered but who have not accepted it. If otherwise eligible, they remain, both in law and in fact, "in need". One who is without food, clothing and shelter is in need of them, even though he has just rejected an offer to supply them. Whether, upon such rejection, he should be entitled to apply for and receive from the public aid toward getting them is a question of policy for the legislative power. Since it has spoken on the subject, the courts cannot declare otherwise.

This construction of the statute is favored by a consideration of its history. This chapter of the Welfare and Institutions Code is a codification of a previously existing "Old Age Security Act", St.1929, p. 914. Section 2 of that act set forth the qualifications necessary to entitle one to receive aid, covering the same subject matter as section 2160 of the present law; and, as amended by Statutes of 1935, page 1767, paragraph (f) of said section 2, read as follows: "(f) Has no relative of the following degree of kindred; Husband, wife or child, able and responsible under the law of this State for his support". By the effect of this provision the mere existence of relatives responsible and able to support an old person excluded him from the benefits of the law. After this provision was placed in section 2160 of the Welfare and Institutions Code, in 1937, an amendment was made to it, at the same session, to make it read as we have already quoted it. See Stats.1937, pp. 1083–4, 1343–4. Thus the legislature went from the one extreme, of denying aid to one having responsible relatives, to the other, of denying it only to those actually supported by such relatives. The legislature might have stopped at the intermediate position of declaring that no aid should be granted to those to whom an offer of support had been made. Its failure to do so is significant of its intention not to establish such a condition to the furnishing of aid.

The legislature manifestly intended to leave considerable freedom of action to those receiving aid. Thus the county granting aid cannot render it in kind but must pay it in warrants for money (section 2183), which, of course, the person aided may expend as he sees fit. One receiving aid may move from one county to another without losing his right to aid (section 2200). The statute, as we have construed it on the point under consideration, is in accord with this apparent policy; it leaves the person in need free to accept or reject a home and support offered by a relative. The legislature might properly expect that he would accept in cases where the support offered was adequate and, if the one to be supported was invited into the home of the supporter, where the relations between the parties were reasonably harmonious. It might also have believed that in other cases it was better to let the support be furnished by the public and the amount thereof later collected from the relative, if able to pay, thus avoiding family contention and unpleasantness. Such considerations would afford sufficient justification for casting the

legislation in the mold which, we think, was used.

[5, 6] Any judgment rendered against defendant, under section 2224, must be based on her ability to pay the amount thereof. The amount of the judgment here is $738, with interests and costs. It appears that defendant has an annual income of approximately $2,700, and a $3,300 mortgage against her house, and she has one eighteen-year-old son to support, as well as herself. Nothing is shown as to the amount of her necessary expenses. The trial court must be allowed a considerable amount of discretion in balancing other duties and other expenses against the duty of reimbursement imposed by the Old Age Security Law. Upon the meager evidence produced by defendant on this point we cannot say that such discretion was abused, or that the finding of defendant's ability to pay is not supported by the evidence.

The judgment is affirmed.

YORK, P. J., concurred.

WHITE, Justice (concurring).

I concur in the judgment, but am not in accord with some of the views and reasoning of my associates.

A reading of the reporter's transcript of the testimony given in this case impresses me that the trial court was justified in finding that the support offered her parents by appellant was not of that "adequate" character contemplated by subdivision (f) of section 2160 of the Welfare and Institutions Code. However, it was the theory of the trial court, and upon which the majority opinion herein seems to place its *imprimatur*, that no matter how "adequate" might be the support offered by responsible relatives, the needy person is not required to avail himself or herself thereof, but is entitled to public aid by simply rejecting the support offered. By its language the main opinion holds that the legislative policy, as enumerated in the Old Age Security Law, "leaves the person in need free to accept or reject a home and support offered by a relative", which is tantamount to saying that an applicant for aid under the act in question is entitled to receive support in cash from public funds by rejecting adequate support tendered by responsible relatives. I cannot bring myself to believe that such is the intent or purpose of the statutes. I do feel that there are cases wherein the support offered by relatives might be determined to be inadequate, not only by reason of the amount of cash support offered, but as well because of the conditions under which the needy person might be required to live, such as the inadequacy of accommodations offered or incompatibility existing in the home. If the law is as stated in the majority opinion, it matters not how "adequate" the support offered may be, the needy person may, nevertheless, obtain public aid by refusing to accept any kind of support, however adequate, offered by responsible relatives.

To my mind this conclusion does violence to the plain intent of the provisions of subdivision (f) of section 2160 of the Welfare and Institutions Code, which entitles a person to old age relief, among other things, only when such person "is not receiving *adequate* support from a husband, wife, or child, able and responsible under the law of this State to furnish such support". (Italics added.)

It is to be noted that the statute does not require from the responsible relative financial or cash support, but only such support as is "adequate".



48 Cal.App.2d 312

WARD et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 13350.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1941.

1. Workmen's compensation ⇐1487

Where it appeared that newsboy on occasion worked for milk distributor who called the home of the newsboy while he was making collections from newspaper subscribers, that when informed thereof, the newsboy went to see the milk distributor and on the return trip the newsboy was fatally injured, that scene of accident was within greater territory covered by the newspaper distributor within which the newsboy was authorized to solicit subscribers but was about two miles from the specific territory within which

he delivered newspapers and collected for subscriptions, evidence sustained finding that death was not proximately caused by injury "arising out of and occurring in course of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and Occurring in Course of Employment".

2. Workmen's compensation ⇐1939

Decision of Industrial Accident Commission based on, and in accord with, finding supported by evidence may not be disturbed.

Proceeding by Clair V. Ward and others to review and have set aside an award of the Industrial Accident Commission denying compensation for the death of John R. Ward, employed as a newsboy by W. J. Baldwin.

Award affirmed.

Keller & Smith, of Alhambra, for petitioners.

Everett A. Corten and J. Gould, both of San Francisco, for respondent Industrial Accident Commission.

DORAN, Justice.

By this proceeding petitioners seek to have set aside a decision and award of the Industrial Accident Commission denying compensation for the death of John R. Ward, seventeen years of age, who was employed as a newsboy at Arcadia, California, on December 11, 1940, and who met with a fatal accident on that day.

After a hearing upon the application of petitioners the commission had found in favor of petitioners and had awarded compensation; but later, upon a rehearing of the matter the commission found that the evidence did not establish that the death of the said employee was proximately caused by an injury arising out of and occurring in the course of said employment, and decided that petitioners were not entitled to compensation. The commission also found that the evidence did not establish that petitioners were dependent upon the employee at the time of his injury; but that question need not be here considered.

[1, 2] It was established at the hearings that Ward, a schoolboy, was employed by W. J. Baldwin, a distributor for the Times Mirror Publishing Company, to deliver newspapers and collect from newspaper subscribers within a designated territory in the city of Arcadia, which territory was a part of the larger territory covered by Baldwin as a distributor. Ward was also authorized by Baldwin to solicit newspaper subscriptions anywhere within the entire territory covered by Baldwin. In pursuit of his duties as employee of Baldwin, Ward used a motor scooter of his own. Ward, who lived with his family in Arcadia, arrived home after school around 3 p.m. on December 11, 1940, and then went out to make collections from newspaper subscribers. It appears that Ward also worked on occasions for Clarence A. Boston, a milk distributor of Monrovia, a neighboring community, and on the day in question, and while Ward was out making his collections, Boston called Ward's home to inquire why Ward had not come to work for him that afternoon. Later, Ward returned home to make some repairs or adjustments to his motor scooter, and when told of Boston's call, Ward rode off on his scooter to see Mr. Boston and clear up an apparent misunderstanding as to his work for Boston. It was on the return trip from having seen Mr. Boston that Ward met with the fatal accident. The scene of the accident was within the greater territory covered by Ward's employer, the newspaper distributor, and about two miles from the specific territory within which Ward delivered newspapers and collected for subscriptions. The accident also occurred a little over a block beyond what would appear to have been the most direct route to Ward's home from the place where Ward had met Boston. At the time of the accident Ward had with him the book of slips or receipts which he carried with him when making collections and had money on his person, presumably obtained from collections. A witness who was present at Ward's meeting with Boston stated that at that time Ward had said, to quote the witness, "That from where we were parked and had the conversation, he was going on to collect and solicit for the Times". There was no evidence that Ward had solicited any subscriptions on his way back from seeing Boston, or that at the time of his accident he was actually on the way to make a solicitation. The accident occurred about 5:02 p.m.; and from the location thereof there is nothing to indicate definitely whether Ward was returning home at the time or was return-

ing to his territory to resume collections. The evidence does not uncontrovertibly establish that Ward was upon the business of his employer at the time of the accident, and permits either an affirmative or negative inference to be drawn. The finding of the commission upon rehearing that the death of the employee was not caused by an injury arising out of and occurring in the course of his employment is therefore supported by the evidence and the decision of the commission based thereon and in accord therewith may not be disturbed.

The award is affirmed.

YORK, P. J., and WHITE, J., concurred.



48 Cal.App.2d 230

SALGADO v. MATSUI et al.

Civ. 2943.

District Court of Appeal, Fourth District, California.

Dec. 2, 1941.

1. Automobiles ⇐244(10)

Where motorist slowly traveling in center lane of three-lane highway was properly signaling for a left-hand turn and was struck by truck proceeding in opposite direction, in motorist's action for personal injuries and property damage, evidence justified inference that truck driver had ample time after passing any other vehicle to return to his proper lane.

2. Automobiles ⇐172(15)

The passing of another vehicle at an intersection is unlawful.

3. Appeal and error ⇐1008(1)

Where motorist slowly traveling in center lane of three-lane highway was properly signaling for a left-hand turn and was struck by truck proceeding in opposite direction, in motorist's action for personal injuries and property damage, whether the truck driver had right to be traveling in middle lane and whether he was not some 600 or 700 feet away at the time the motorist entered that lane were questions for the trier of facts.

4. Automobiles ⇐244(10)

Where motorist slowly traveling in center lane of three-lane highway was properly signaling for a left-hand turn and was struck by truck proceeding in opposite direction, in motorist's action for personal injuries and property damage, evidence sufficiently supported finding that truck driver was negligent.

5. Automobiles ⇐245(79)

Where motorist slowly traveling in center lane of three-lane highway was properly signaling for a left-hand turn and was struck by truck proceeding in opposite direction, in motorist's action for personal injuries and property damage, where there was evidence that motorist could not observe that the truck was traveling in the middle lane because of curve and rise in grade of highway and motorist reduced his speed and was almost stopped at time of collision, the question of motorist's contributory negligence was one of fact and not one of law.

6. Automobiles ⇐225

Where it could reasonably be inferred that motorist was confronted with a real and sudden peril, whether he did the best possible thing was not the controlling factor in determining his contributory negligence.

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action for personal injuries and property damages by Joe Salgado against Roy S. Matsui and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and John Y. Macno, all of Los Angeles, for appellants.

N. D. Meyer and Forgy, Reinhaus & Forgy, all of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries and property damage resulting from a collision between an automoblie driven by the plaintiff and a truck driven by one of the defendants and owned by the other defendants. On a first trial a jury returned a verdict in favor of the plaintiff for $7,833. A new trial was granted because of conceded errors in the instructions. By stipulation, the cause was submitted to the trial judge upon the transcript of the evidence received at the former trial. The

trial judge also visited the scene of the accident. The court found in favor of the plaintiff upon all of the issues, and awarded damages in the same amount as the verdict of the jury. From the judgment entered, the defendants have appealed.

The collision occurred at about 6:30 p. m. on August 18, 1940, a few miles southerly from Santa Ana and near the intersection of Highway 101 and Culver road. At that point Highway No. 101 is a three-lane highway and Culver road, which intersects it at approximately right angles, is a paved highway. As you approach this intersection from the north Highway 101 curves to the right so that the intersection is on the curve, and there is also a slight rise in grade at that point.

On the occasion in question the respondent was driving southerly on the right-hand side of Highway 101. As he approached this intersection he turned toward the middle lane, straddling the first white line and at the same time extended his left arm signaling for a left turn, with the intention of turning to the left on Culver road. As he neared the intersection he moved further to the left until his car was almost or entirely in the middle lane. He slowed down and was traveling about 10 miles an hour at the time of the collision, which occurred 98 feet northerly from the intersection. As the respondent was thus proceeding the driver of the appellant's truck, who will be referred to as the appellant, was approaching the same intersection from a southerly direction. There is evidence that he was traveling at from 50 to 55 miles an hour, and it appears without dispute that he was traveling in the center lane or that at least one-half of his truck was in that lane. The truck struck the respondent's car a short distance northerly from the intersection, damaging that car along its entire left side. The respondent's left arm, which was extended in a left-turn signal was so badly injured that it was necessary to amputate it near the middle of the forearm.

The only questions raised are whether the evidence supports the finding that the appellant was guilty of negligence, and whether contributory negligence on the part of the respondent appears as a matter of law. While the appellant maintains that there is no conflict in the evidence he relies on portions thereof which are in sharp conflict with other portions and upon inferences therefrom which are entirely at variance with other inferences which might reasonably be drawn. In this manner he arrives at the conclusion that the respondent, when within 35 feet of the point of impact, suddenly turned his car into the center lane and into the side of appellant's truck when he knew that that truck was already in the middle lane, where it was lawfully entitled to be. On the other hand, a part of the evidence, and apparently a preponderance thereof, indicates that as the respondent was slowly traveling in the center lane and properly signaling for a left-hand turn his car was struck by appellant's truck, and that the appellant was cutting the curve at a rapid speed at a time when he had no lawful right to be in the middle lane and when he had ample opportunity, after seeing the respondent's car, to take proper steps to avoid the accident.

[1-4] It would serve no useful purpose to review all of the evidence. It is argued that the appellant was passing another car and was lawfully in the middle lane and that the respondent had seen his truck while it proceeded a distance of some 700 feet and knew, or should have known, that it was then traveling in the middle lane. The evidence is conflicting with respect to whether the appellant had passed another car at a point which would have affected this accident, and a part of the evidence justifies the inference that he had ample time after passing any other car to return to his proper lane. An officer testified that the appellant told him immediately after the accident that he had passed no other cars since leaving Irvine, which was some miles away. Moreover, if appellant's version of the evidence be accepted it would appear that he must have passed the other car at the intersection which was, in itself, unlawful. Whether or not the appellant had a right to be traveling in the middle lane, and whether he was not some 600 or 700 feet away at the time the respondent entered that lane were pure questions of fact. It cannot be held, as a matter of law, that he was free from negligence and the evidence sufficiently supports the finding that he was negligent.

[5, 6] With respect to the issue of contributory negligence on the part of the respondent there is evidence that he could not have seen, at least for a considerable part of the time after he observed the approaching truck, that this truck was traveling in the middle lane on account of the curve and rise in grade of the highway.

He reduced his speed and was almost stopped at the time of the collision. He had moved over into the proper lane to make the left turn and was giving the proper signal at and before the time of the accident. In view of the curve in the highway, the speed at which the truck was coming, and all of the other circumstances which appear, it is merely a matter of conjecture whether the respondent could have safely proceeded to complete his turn a second or two earlier, or whether he could have returned to his right-hand lane in time to have avoided the oncoming truck. It may reasonably be inferred that he was confronted with a real and sudden peril and whether or not he did the best possible thing is not the controlling factor. The entire question as to his contributory negligence is clearly one of fact and not one of law.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



48 Cal.App.2d 372

GRAY v. HORNE et al.

Civ. 12671.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1941.

1. Brokers ⇐1

The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be honest, truthful, and of good reputation. Gen.Laws 1937, Act 112, § 20.

2. Liens ⇐1

The word "lien", in its broadest sense and common acceptation, denotes a legal claim or charge on property, either real or personal, as security for payment of some debt or obligation, and includes every case in which personalty or realty is charged with payment of a debt. Civ.Code, § 2872.

See Words and Phrases, Permanent Edition, for all other definitions of "Lien".

3. Brokers ⇐42

Complaint, alleging that plaintiff's assignor rendered services to defendants in refinancing and refunding of numerous claims against defendants by securing reduction, compromise, and satisfaction thereof and procuring extensions of time for payment of the claims which were or appeared to be liens against certain realty or leases thereon, stated cause of action without allegation that plaintiff's assignor had a real estate broker's license, since complaint did not necessarily show that assignor performed services which could be rendered only by licensed real estate broker. Gen.Laws 1937, Act 112, §§ 1, 2, 20.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Helen R. Gray against Walter W. Horne and others for services allegedly rendered by the plaintiff's assignor to defendants in refinancing and refunding of numerous claims against, and indebtedness of, defendants and other services. From an adverse judgment, the plaintiff appeals.

Reversed, with directions.

Ratzer, Bridge & Gebhardt, of Los Angeles, for appellant.

Hurt & Hurt, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

Appeal from a judgment against the plaintiff after demurrer to complaint was sustained without leave to amend.

The complaint alleges that the plaintiff's assignor rendered services to the defendants of the reasonable value of $3,527 in refinancing and refunding of numerous claims against, and indebtedness of, the defendants; in securing reduction, compromise and satisfaction of claims, judgments and indebtedness of the defendants; and in procuring extensions of time for the payment, compromise and satisfaction of said claims, judgments and items of indebtedness. "That said claims, judgments and items of indebtedness were, or appeared to be, liens against certain real property and/or leases thereupon located in the City of Long Beach, County of Los Angeles, State of California, belonging to defendants."

The demurrer raised the sole question to be determined on this appeal, namely: Whether or not the services described in

the complaint were embraced within those defined in the California Real Estate Act as services of a real estate broker. If they are broker's services, concededly, the complaint fails to allege that the assignor of the plaintiff had a realty broker's license, and, concededly, the complaint fails to state a cause of action. California Real Estate Act, sec. 20, Gen.Laws 1937, Act 112; Davis v. Chipman, 210 Cal. 609, 293 P. 40.

But, if the services so described are not within the provisions of the California Real Estate Act, the complaint does state a cause of action and the order sustaining the demurrer without leave to amend, and the judgment based thereon, were improperly made. In such a case, whether the plaintiff's assignor holds a broker's license or not is immaterial. Lewis v. Scazighini, 130 Cal.App. 722, 20 P.2d 359; Allen v. Vanderbeck, 132 Cal.App. 242, 22 P.2d 561; McKenna v. Edwards, 19 Cal.App.2d 327, 65 P.2d 810.

Neither the plaintiff nor the defendants have cited to us any case directly bearing upon the point involved. Both parties cite and rely upon pertinent sections of the California Real Estate Act.

[1] As was said in Koeberle v. Hotchkiss, 8 Cal.App.2d 634, 640, 48 P.2d 104, 107: "The primary purpose of the Real Estate Brokers' Act was to require real estate brokers and salesmen to be 'honest, truthful and of good reputation'."

And not the least important among modern beneficial trends in government has been the policy of the state of California, licensing realty brokers, and prescribing standards of professional conduct for them. It is in the light of this policy that we have considered this appeal.

The California Real Estate Act, Deering's Gen.Laws, Act 112, makes it "unlawful for any person * * * to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker * * * without first obtaining a license from the State Real Estate Division". California Real Estate Act, sec. 1.

Then the act, in section 2, defines a real estate broker as "a person who * * * sells or offers for sale * * * or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases * * * for another or others".

And section 20 of the act provides that no broker "shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two hereof without alleging * * * that such person * * * was a duly licensed real estate broker * * * at the time the alleged cause of action arose.

A careful review of the act as applied to the facts alleged in the complaint discloses that the complaint does state a cause of action, and that the demurrer was improperly sustained. It will be observed that the complaint alleges that the services rendered by the plaintiff's assignor had to do with claims, judgments and items of indebtedness which were or appeared to be liens against real property. The face of the complaint does not necessarily show that the allegations thereof must be construed to mean that the plaintiff's assignor performed such services, and such services only, as can be rendered by a licensed real estate broker.

[2] A lien is defined by our Civil Code (sec. 2872) as a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act.

"In its broadest sense and common acceptation, it is understood and used to denote a legal claim or charge on property, either real or personal, as security for the payment for some debt or obligation . . . it includes every case in which personal or real property is charged with the payment of a debt." 37 C.J. 306.

[3] There are many kinds of liens, among them being mechanic's liens, mortgage liens, liens arising in the course of judicial proceedings, maritime and tax and assessment liens. It almost goes without saying that it would be entirely improper to hold that one having anything to do with every type and character of lien must first have a real estate broker's license, and this is what we must do in order to affirm the judgment of the lower court.

The judgment is reversed with directions to the trial court to overrule the demurrer and permit the defendants to answer to the complaint if they shall elect so to do.

YORK, P. J., and DORAN, J., concurred.

JACKS v. MONTEREY COUNTY TRUST & SAVINGS BANK.*

Civ. 11860.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1941.

Hearing Granted Jan. 29, 1942.

1. Trusts ⇐280, 281

The statute providing that legacies for maintenance bear interest from testator's death and that annuities commence at testator's death applies only to testamentary provisions and does not apply to inter vivos trusts. Probate Code, § 162.

2. Trusts ⇐112

In absence of any specific statutory provisions, inter vivos trust instruments must be construed with aid only of general principles governing such construction and of such limited aid as may be afforded by consideration of the authorities dealing with testamentary provisions.

3. Trusts ⇐112

The intention of trustor as expressed in trust instrument governs.

4. Trusts ⇐280

Where there is no evidence of prior acts of trustor in supporting and maintaining beneficiary, nothing short of a clear expression of intention in trust instrument itself will sustain a conclusion that provision for periodic payments to beneficiary was a provision for "maintenance" so as to advance the time of commencement of such payment to date of trustor's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Maintenance".

5. Trusts ⇐280

The ordinary "trust for maintenance" provides for periodic payments during the entire lifetime of beneficiary recognizing that the need for maintenance ordinarily continues and perhaps increases with the passage of years.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust for Maintenance".

6. Trusts ⇐280

The provision of inter vivos trust instrument authorizing trustee to pay to beneficiary sums greater than $500 per month during periods of illness, want or necessity, was not of controlling importance in determining whether instrument created a "trust for maintenance" thereby advancing the time of commencement of payments to date of trustor's death, where instrument expressly provided that excessive payments should be in the "absolute and uncontrolled discretion of the trustee" and that trustee "shall in no event be required so to do".

7. Trusts ⇐280

An inter vivos trust instrument requiring trustee to set aside a trust fund of $25,000 from which trustee was to pay $500 per month to trustor's brother who had not been dependent on trustor, which provision was followed by elaborate spendthrift trust provisions, and authorizing trustee in its "absolute and uncontrolled discretion" to increase the monthly payments in case of illness, want or necessity did not create a "trust for maintenance" so as to advance the time of commencement of such payments to date of trustor's death.

8. Trusts ⇐281

That inter vivos trust instrument allegedly provided for an "annuity" within broad definition of term by providing for monthly payments of $500 out of $25,000 trust fund did not entitle beneficiary to monthly payments commencing as of date of trustor's death, since time for commencement of payments upon annuity created by instrument setting up inter vivos trust is ordinarily at time when such trust becomes effective which is ordinarily at time of execution of trust instrument, and trust providing for monthly payments did not become effective until distribution.

See Words and Phrases, Permanent Edition for all other definitions of "Annuity".

9. Trusts ⇐112

The trustor's intention must be determined from terms of trust instrument.

10. Trusts ⇐280

The word "withhold" within inter vivos spendthrift trust instrument providing that if attempt was made to subject income or property to payment of any of beneficiary's debts, trustee in its sole discretion might withhold any further payments to beneficiary, connoted a permanent retention or refraining from granting, giving, allowing or the like, notwithstanding the word "withhold" may be used to connote a mere tem-

* Subsequent opinion 127 P.2d 532

porary holding back, and hence trustee could withhold payments even after the lifting of distraint warrants issued by the United States to enforce beneficiary's debt for unpaid income taxes.

See Words and Phrases, Permanent Edition, for all other definitions of "Withhold".

Appeal from Superior Court, Monterey County; James L. Atteridge, Judge.

Action by Romie C. Jacks against the Monterey County Trust & Savings Bank as trustee to recover certain sums claimed to have become due to plaintiff as beneficiary under a trust. From a judgment for plaintiff, defendant appeals.

Reversed.

Rosendale, Thomas & Muller, of Salinas, for appellant.

Wyckoff, Gardner & Parker, of Watsonville, and Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, who was a brother of Will Jacks, deceased, and a beneficiary under a trust created by the latter during his lifetime, brought this action against the defendant, as trustee, to recover certain sums claimed to have become due to said beneficiary under the terms of said trust. Plaintiff had judgment and defendant appeals.

In 1935, Will Jacks, as trustor, conveyed to defendant in trust a large amount of real and personal property having an approximate value of $500,000. The instrument provided for the payment of the income from the trust estate to Will Jacks during his lifetime and contained further provisions for the subsequent disposition of the trust estate. It was provided that "Upon the death of the Trustor the Trustee shall proceed to liquidate this trust estate, converting all of said trust estate into cash, as soon as practicable and advantageous in the absolute discretion of the Trustee, and upon such liquidation the Trustee shall distribute whatever there remains of the trust estate in the following manner:" Then followed directions to distribute specific sums totaling about $75,000 to the persons therein named and directions to distribute the residue to the Shrine for the benefit of the Shriner's Hospital for Crippled Children in San Francisco. All of the directions for distribution of specific sums provided for distribution directly to the intended beneficiaries except those creating the trust under consideration here. The last-mentioned provisions read as follows:

"To Monterey County Trust & Savings Bank in trust for Romie C. Jacks the sum of Twenty Five Thousand Dollars ($25,000.00), which said Trustee is hereby directed to set aside as a fund to be known as the 'Romie C. Jacks' Trust Fund', which fund shall be within the management and control of said Trustee, with the same powers, duties, terms, conditions, and subject to the payment of the same costs, charges, fees, and compensation, that the other portions of the trust property of Trustor is held by Trustee under the provisions hereof.

"Said Trustee is directed to pay to said Romie C. Jacks out of said fund the sum of Five Hundred Dollars ($500.00) per month, which said sum shall be paid for the remainder of the lifetime of said Romie C. Jacks or until said fund is exhausted.

"It is herein expressly declared and provided that no interest of whatsoever nature, given to Romie C. Jacks shall be subject to or subject to be taken for the payment of any debts whatsoever contracted by said Romie C. Jacks either before or after the date of this instrument, and for any purpose whatsoever, and that Romie C. Jacks shall have no power or capacity to make any disposition whatsoever of any of said income, by his assignment or by his order, voluntary or involuntary, and whether made by the order or direction of any court or courts, whether of bankruptcy or otherwise; nor shall said interest be subject to any process of attachment issued against said Romie C. Jacks or to be taken in execution under any form of legal process directed against him or against any one connected with the trust estate, the income thereof, or any part of said income. Any interest of Romie C. Jacks in this trust is subject to the condition that he shall be without power to anticipate said income, to assign, convey, pledge, or otherwise encumber or transfer any part of said income, or any interest in said trust, and in the event of his doing any of these inhibited things, or in the event that

an attempt is made to subject said income or property, or any part thereof, to the payment of any of his debts or obligations, the trustee in its sole discretion may withhold any further payment or payments to said Romie C. Jacks.

"Upon and at the time of the demise of said Romie C. Jacks said Romie C. Jacks' trust shall ipso facto cease and determine, and the balance remaining in said Romie C. Jacks' Trust Fund shall go and be, by said Trustee, conveyed, transferred, and delivered to the Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, to be used for the use and benefit of the Shriner's Hospital for crippled children in San Francisco, California.

"If in the absolute and uncontrolled discretion of said Trustee the monthly payment of Five Hundred Dollars ($500.-00) shall not be sufficient to provide for the reasonable needs and comforts of my said brother Romie C. Jacks during any period or periods of his illness, or other want or necessity, said Trustee may, and it is hereby authorized and empowered, but it shall in no event be required so to do, and as often as it shall deem necessary, pay to, or use, apply or expend, for the use and the benefit of said Romie C. Jacks such portions of the principal of the trust fund created for the benefit of Romie C. Jacks up to and including the whole thereof, as said Trustee in its absolute discretion may determine to be adequate to provide for Romie C. Jacks, for the purposes aforesaid."

Will Jacks, the trustor, died on January 28, 1937, and the defendant, as trustee, thereafter proceeded to liquidate the trust estate. It does not appear when the liquidation of the entire trust estate was completed but the trial court found that the period from January 28, 1937, to December 20, 1937, was a reasonable time within which defendant could accomplish liquidation. This matter becomes immaterial for the reason that on May 29, 1937, defendant created the "Romie C. Jacks' Trust Fund" by depositing $500 therein; that in October, 1937, the balance, amounting to $24,500, was deposited therein; and the undisputed evidence shows that said sums were deposited as soon as the money was available and prior to the time found by the trial court to have been a reasonable time. Following the deposit in the trust fund of the above-mentioned $500 on May 29, 1937, defendant immediately paid that sum over to plaintiff.

Prior to that time, the United States Board of Tax Appeals had determined that plaintiff had become indebted to the United States of America in the total sum of approximately $34,000 for unpaid income taxes and said determination had become final and conclusive. On June 5, 1937, being about seven days after the making of the above-mentioned first payment of $500 to plaintiff under the terms of said trust, there were served upon defendant a notice of levy and a distraint warrant and a similar notice was thereafter duly recorded in the office of the county recorder. Again on March 9, 1938, a similar notice of levy and distraint warrant were so served on defendant. It was stipulated and the trial court found that said acts constituted an attempt on the part of the United States of America to subject the trust fund and the interest of plaintiff therein to the payment of plaintiff's debt for unpaid income taxes and that the United States of America claimed a lien upon said fund and said interest at all times from June 5, 1937, to and including June 27, 1938.

Defendant made no payments to plaintiff during the period last mentioned and on April 22, 1938, and prior to the expiration of said period, plaintiff commenced this action after making demand upon defendant. The United States of America thereupon filed its complaint in intervention asserting its claim of lien. On or about said June 27, 1938, plaintiff paid or caused to be paid to the United States the entire sum due from plaintiff, said payment having been made from funds other than the above-mentioned trust fund. The complaint in intervention was thereupon dismissed. Since the time of said payment and dismissal, defendant has regularly made monthly payments to plaintiff in the sum of $500 each.

This cause proceeded to trial, plaintiff claiming that he was entitled to judgment for all unpaid payments, commencing from the time of the trustor's death, together with interest thereon. The trial court entered its judgment in favor of plaintiff and against defendant in the sum of $8,000, together with interest on the sum of $1,500 from December 20, 1937, at the rate of 4 per cent per annum and with interest on the sum of $6,500 from June 27, 1938, at the

rate of 4 per cent per annum. It was provided in the judgment that such interest should be payable from the "individual funds and property" of defendant and not from the trust fund. It thus appears that the trial court sustained plaintiff's claims (1) that plaintiff was "entitled to receive monthly payments from the trust commencing as of the date of the death of the trustor" and (2) that plaintiff was further "entitled to the prescribed monthly payments maturing between the date of the levy of the distraint warrant and the time of its release".

It is defendant's main contention on this appeal that the trial court erred in awarding any judgment to plaintiff and our review of the record leads us to the conclusion that this contention must be sustained. A consideration of this contention divides itself logically into a discussion of the two claims of plaintiff as set forth above.

With respect to the time of commencement, plaintiff argues that the trust instrument created a trust for the maintenance of plaintiff and provided for an annuity. Plaintiff therefore concludes that plaintiff was entitled to monthly payments from the time of the death of the trustor. The trial court so found and concluded.

[1-3] The search of able counsel has disclosed no authority directly in point on the subject under discussion. The decided cases which deal with alleged provisions for maintenance and for annuities and which might throw light upon the subject deal exclusively with testamentary provisions rather than with provisions found in instruments creating inter vivos trusts. It is apparently conceded that section 162 of the Probate Code applies only to testamentary provisions and we believe there can be no doubt of its inapplicability here. Not only is that section found in the division of the Probate Code entitled "Wills" and under the chapter of that division entitled "Legacies and Interest", but the very wording of the section shows that its application is limited to testamentary provisions. It may be noted in passing, however, that even in case of testamentary provisions, the code provides that the provisions of said section 162 and of all other sections of said chapter "are in all cases to be controlled by a testator's express intention". Prob.Code, § 163. In the absence of any specific statutory provisions which are applicable here, the trust instrument must be construed with the aid only of general principles governing such construction and of such limited aid as may be afforded by a consideration of the authorities dealing with testamentary provisions. Among those general principles is what has been termed the "guiding principle", namely, the intention of the trustor as expressed in the trust instrument. Title Ins. & Trust Co. v. Duffill, 191 Cal. 629, 642, 218 P. 14.

Our review of the trust instrument and of the entire record before us and of the authorities leads us to the conclusion that the trial court's finding and conclusion that the trust was one for the maintenance of plaintiff cannot be sustained. There is no evidence in the record to show that plaintiff ever was or now is dependent upon the trustor or the trust estate for his maintenance or that the trustor ever contributed to the maintenance of plaintiff during the lifetime of the trustor. The significance of the absence of such evidence will presently appear.

In reaching the last-mentioned conclusion, we find support in some of the authorities relating to testamentary provisions. We may eliminate from consideration those authorities dealing with situations where the testator expressly provided that the payments should commence upon his death and those authorities, such as Crew v. Pratt, 119 Cal. 131, 51 P. 44, in which the testator used the expression "for her maintenance" or some similar expression. No such provisions are found here or in the testamentary provisions found in certain of the authorities, among which are some of the authorities relied upon by plaintiff such as In re Estate of Mackay, 107 Cal. 303, 40 P. 558, and In re Estate of Dare, 196 Cal. 29, 235 P. 725.

Said authorities, cited by plaintiff, are distinguishable and the distinction has heretofore been emphasized by the courts. In Re Estate of Mackay, supra, there was a bequest of income for the life of the beneficiary and not merely an annuity for a limited period and the evidence showed that the beneficiary had been supported and maintained by the trustor for fourteen years preceding his death. The court there said on page 308 of 107 Cal., on page 559 of 40 P., "Construing the words of the will, however, in connection with the circumstance

that respondent had been supported by the testator for a long period, and was in receipt of such support at the time of the making of the will, we are of opinion that the provision in question created a 'legacy for maintenance'."

In Re Estate of Brown, 143 Cal. 450, at page 454, 77 P. 160, at page 162, the court made the distinction using the following language, "Reliance is placed upon the decision in the case of In re [Estate of] Mackay, 107 Cal. [303], 308, 40 P. 558, in which it was held that although the will did not expressly declare that the legacy was for the maintenance of the legatee, yet, if the evidence showed that the legatee had been supported by the testator for many years prior to his death, it would be construed to be a legacy for maintenance. *The essential element present in that case, however, is lacking in this.*" (Italics ours.)

In Re Estate of Dare, supra, the court said at page 37 of 196 Cal., at page 728 of 235 P., "The appellant herein strongly relies upon [In re] Estate of Brown, 143 Cal. 450, 77 P. 160, as in point in opposition to this conclusion. There are some points of similarity between the two cases, but the dissimilarity between that case and the case of [In re] Estate of Mackay, supra, and also of this case, furnish the essential points of differentiation between them. In the Brown Case the element of past dependence and support was lacking, but was present in both the Mackay Case and the case at bar."

[4] It thus appears that the courts have refused to declare provisions in wills for periodic payments to beneficiaries to be provisions for maintenance, thereby advancing the time of commencement of such payments to the date of death, in the absence of clear evidence that such was the testator's intention as shown by the terms of the will itself or as shown by the terms of the will together with the prior acts of the testator in supporting and maintaining the beneficiary. Where, as here, there is no evidence of prior acts of the trustor in supporting and maintaining the beneficiary, we believe that nothing short of a clear expression of intention in the trust instrument itself will serve to sustain a finding and conclusion that the provision was a provision for maintenance.

Turning to the trust instrument before us, we find that it provided for what may be termed a primary trust and also provided for what may be termed a secondary trust. The primary trust was to terminate following distribution of the trust estate, which distribution was to follow the liquidation of the entire trust estate. The trustor directed that the trust estate be liquidated as soon as "practicable and advantageous" after his death but left the exact time for liquidation to the "absolute discretion" of the trustee. The secondary trust did not become effective until after distribution following liquidation of the trust estate in the primary trust and the trustee of the secondary trust was directed to set aside a trust fund with the money so distributed to it as trustee of the secondary trust. Out of said secondary trust fund so set aside the trustee was directed to make the payments of $500 per month to plaintiff as therein provided "during the lifetime of said Romie C. Jacks or until said fund is exhausted". The total sum to be so set aside was $25,000 and payments of $500 per month from said fund would normally exhaust the fund in approximately four years and two months from the time of the first payment.

[5] Up to this point, there appears nothing in the trust instrument to indicate that the trustor intended a trust for maintenance or that payments to the plaintiff should commence as of the date of the trustor's death. The nature of the trust is such that it differs from the ordinary trust for maintenance. The ordinary trust for maintenance provides for periodic payments during the entire lifetime of the beneficiary, recognizing that the need for maintenance ordinarily continues and perhaps increases with the passage of years. But here, the regular periodic payments would exhaust the entire trust fund in the short period of approximately four years and two months, with no provision being made for the beneficiary after the time when the fund would become exhausted. And the trust instrument is entirely devoid of any provision as to the time for the commencement of the payments to plaintiff but the only reasonable construction to be placed upon the language used by the trustor is that he intended such payments to commence after the secondary trust had become effective by the distribution of the secondary trust fund to the trustee of the secondary trust.

The provisions of the trust agreement above referred to are followed by elaborate spendthrift trust provisions and we believe that the intention of the testator is made clear by these provisions. It shows that his real intention in creating the secondary

trust and providing for payments of $500 each rather than in directing the distribution of the entire $25,000 to plaintiff himself was to protect the gift to plaintiff from the acts of plaintiff's creditors and from the acts of plaintiff himself. To this end the trustor gave broad powers to the trustee in withholding payments but provided for normal monthly payments in the sum of $500 each, which would result in plaintiff's normally receiving the entire gift within a comparatively short period of time but in comparatively small amounts. The intention to protect the gift in this manner was obviously the dominant intention of the trustor in creating the secondary trust.

[6, 7] Plaintiff calls our attention to the paragraph of the trust instrument which shows that the trustee was authorized to pay over to plaintiff sums greater than $500 per month during periods of illness, want or necessity. We do not believe that said paragraph is of controlling importance. It was expressly provided that this should be in the "absolute and uncontrolled discretion of the trustee" and that the trustee "shall in no event be required so to do". The making of such larger payments would have further shortened the comparatively short time required to exhaust the trust fund. Considering the nature of the trust as appears from a reading of all of the terms and provisions thereof, we find no justification for declaring that the trust created was one for maintenance as that term has been defined in the authorities above cited.

[8, 9] While it may be conceded that the trust instrument provided for an "annuity", within the broad definition of that term (3 Cyc., p. 200), it does not follow that plaintiff was entitled to monthly payments commencing as of the date of the trustor's death. This was an inter vivos trust rather than a testamentary trust and the inapplicability of section 162 of the Probate Code has been heretofore discussed. The time for the commencement of payments upon an annuity created by an instrument setting up an inter vivos trust is ordinarily at the time when such inter vivos trust becomes effective which is ordinarily at the time of the execution of the trust instrument. But the secondary trust here became effective only upon distribution and the intention of the trustor must be determined from the terms of the trust instrument. As above indicated, we believe that the only reasonable construction to place upon the trust instrument here is that the trustor intended that payments should not commence until distribution of the secondary trust fund had been made to the trustee of the secondary trust.

[10] We turn now to a consideration of the question of whether plaintiff was entitled to judgment for the payments withheld by defendant between the time of the levy of the distraint warrant and the time of the release thereof. The discussion of this subject is simplified by plaintiff's statement that he "does not dispute the power of the trustee to exercise its discretion to withhold payments during such time as the Federal distraint warrants were in effect". But plaintiff claims that he was entitled as a matter of right to said withheld payments after "the distraint warrants were lifted". We are of the opinion that this claim cannot be sustained.

The trust instrument provided that in the event of the plaintiff's "doing any of these inhibited things, or in the event that an attempt is made to subject said income or property, or any part thereof, to the payment of any of his debts or obligations, the trustee in its sole discretion may withhold any further payment or payments to said Romie C. Jacks". This language appears to be clear and unambiguous. It was obviously the trustor's intention to protect the gift from either attempts by plaintiff to anticipate the payments or attempts by plaintiff's creditors to subject such payments to the satisfaction of their claims. To that end, the trustor gave to the trustee the sole discretion "to withhold any further payment or payments" in the event any such attempt might be made. It was stipulated that such an attempt was made.

While the word "withhold" may sometimes be used to connote a mere temporary holding back as contended by plaintiff, it is probably more frequently used to connote a permanent retention or refraining "from granting, giving, allowing, or the like". (See Webster's New Inter. Dict., 2d Ed.) A consideration of all of the terms creating the trust here compels the conclusion that the trustor intended to use the word "withhold" in the latter sense. We are dealing here with a typical spendthrift trust and the obvious purpose of the trustor in creating such a trust would be defeated by a construction which would permit the accumulation of the prescribed payments and the distribution of a large lump sum to the beneficiary at any one time.

In view of the conclusions which we have reached, it becomes unnecessary to discuss the question of the right of plaintiff to interest as that right, if any would have existed, was dependent upon his right to judgment for some of the payments claimed by him.

The judgment is reversed.

NOURSE, P. J., and DOOLING, J. pro tem, concurred.



48 Cal.App.2d 329

JOHNSON v. WARDEN et al.

Civ. 13322.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1941.

1. Quieting title ⇐7(2)

In action to quiet title, complaint, alleging that deed which did not show on its face that property was registered under Land Title Law was recorded in office of county recorder and not in office of registrar of titles, and that defendant upon discovering inadvertence of innocent parties by falsehood and trickery obtained quitclaim deed from the grantors, stated a cause of action. Gen.Laws 1937, Act 8589, § 37.

2. Records ⇐9(13¼)

Where, due to mistake and inadvertence on part of grantors, deed did not show on its face that property was registered under Land Title Law, and because of ignorance and inexperience of grantee deed was recorded in office of county recorder and not in office of registrar of titles, and defendant accepted quitclaim deed from the grantors knowing that they had no equitable title to or interest in the property, the defendant acquired no title thereby as against the grantee. Gen. Laws 1937, Act 8589, § 37.

3. Quieting title ⇐44(3)

In action to quiet title by grantee in deed which conveyed property registered under the Land Title Law and which was recorded in office of county recorder and not in office of registrar of titles, against defendant who accepted quitclaim deed from the grantors knowing that they had no equitable title to or interest in the property, evidence sustained finding for the plaintiff grantee. Gen.Laws 1937, Act 8589, § 37.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action to quiet title by Ella M. Johnson against Charles P. Warden and others. From an adverse judgment, the named defendant appeals.

Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Nadia Williams, of Glendale, for respondent.

R. H. SCOTT, Justice pro tem.

Defendant Warden appeals on the judgment roll from a judgment for plaintiff quieting title to certain real property.

The questions requiring consideration on this appeal are whether the amended complaint states facts sufficient to constitute a cause of action and whether the findings support the judgment against defendant Warden.

The complaint alleges, in count one, ownership in plaintiff and adverse wrongful claim by defendants. Count two alleges that defendants Chamberlain and Elstrod borrowed $2,000 from plaintiff in November, 1931, and gave her a mortgage on the land in question as security for the loan, which was duly recorded with the registrar of titles. Four years later, being a year after the loan had matured, plaintiff accepted a deed to the property in lieu of payment of the mortgage. This deed did not show on its face that the property was registered under the Land Title Law (Torrens Act), Deering's General Laws (1937), volume II, page 4045, Act 8589, due to mistake and inadvertence on the part of Chamberlain and Elstrod. Plaintiff, because of ignorance and inexperience, recorded the deed in the office of the county recorder and not in the office of the registrar of titles. Both offices were in the same room. Plaintiff took possession of the property and placed a "for sale" sign on it giving her name and address. Sometime in 1937 plaintiff discovered that an insurance company in 1934 had recorded a deficiency

judgment against Chamberlain and Elstrod in a sum in excess of $6,000, which had become a lien on the property. It is further alleged that in February, 1940, defendant Warden came to Chamberlain and Elstrod and told them he had purchased the land from the tax collector and held tax title thereto, and that as "a matter of formality to satisfy the title company" he needed a quitclaim deed from the former owners. Chamberlain told him of the deed to Johnson, and Warden said he intended to secure a deed from her and that he was paying to have the deficiency judgment satisfied. Warden paid Chamberlain and Elstrod $10 each to sign a quitclaim deed to the property.

Count two further alleges that Warden had not purchased the land, that he had paid nothing for the deficiency judgment, which was then barred by the statute of limitations, that his representations were knowingly false and were made to deceive Chamberlain and Elstrod and to obtain the conveyance, and that if the latter had known the truth they would not have executed the quitclaim deeds. It further sets out that Warden is in the business of acquiring land by fraudulent methods and by taking advantage of ignorant and inexperienced persons, and had given no consideration except the total sum of $20, paid to his co-defendants.

Count three alleges the mutual mistakes concerning the form of deed necessary to convey title from Chamberlain and Elstrod to plaintiff and the requirement of law concerning the recording or registering of the same, and that plaintiff first knew of the requirement of registering the conveyance under the Torrens Act in May, 1940, after Warden had secured the documents from Chamberlain and Elstrod.

Section 37 of that act provides: "In case of fraud, any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act; provided, that nothing contained in this section shall affect the title of a registered owner who has taken bona fide for a valuable consideration, or of any person bona fide claiming through or under him."

[1, 2] It appears from the complaint that Warden was not an innocent purchaser for value, but that upon discovery by him of an inadvertence of innocent parties, dealing with each other in good faith but under a mistaken idea of what they were required to do, sought to take advantage of them by falsehood and trickery which equity is bound to disapprove. He accepted the quitclaim deeds knowing that Chamberlain and Elstrod had no equitable title to or interest in the property, and he acquired no title thereby as against this plaintiff.

[3] The trial court found the allegations of the complaint to be true, and set out its conclusions of law pursuant thereto. It thereupon rendered judgment for plaintiff quieting title to the property and requiring Chamberlain and Elstrod to execute new instruments to make its decree effective.

The appeal is without merit. Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 263

In re HETTERMANN'S ESTATE.
ZIEGLER v. CRICE et al.
Civ. 13274.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1941.

Hearing Denied Jan. 29, 1942.

1. Judgment ⇐199(1)

The power of court to order judgment notwithstanding verdict is subject to same rules as power to grant nonsuit or to direct verdict.

2. Judgment ⇐199(3)

An order granting judgment notwithstanding verdict can be made only when, disregarding conflicting evidence and giving to the evidence favoring the party for whom the verdict was returned all the value to which it was legally entitled, and indulging in every legitimate inference in his favor which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support the verdict.

3. Judgment ⇐199(3)

In granting motion for judgment notwithstanding verdict, trial court cannot weigh all the evidence of both sides or judge of credibility of witnesses as it may do on motion for new trial, but must accept evidence tending to support verdict as true, unless on its face it should be inherently incredible.

4. Judgment ⇐199(1)

The rules regulating granting of motion for judgment notwithstanding verdict are applicable to probate proceedings tried before a jury.

5. Wills ⇐165(1)

In will contest on ground of undue influence, testator's statements to relative, that wife was insisting that testator sign will and that wife had signed paper before marriage agreeing to take only one-half of estate, were incompetent as evidence of the facts declared by testator, and as to such matters the statements were "hearsay" and inadmissible, but statements were admissible for purpose of showing testator's state of mind and feelings toward those interested in his estate at the time he executed his will.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. Wills ⇐165(1)

In will contest on ground of undue influence, conversations between testator and wife regarding making of will, overheard by testator's relative who testified concerning such conversations, were sufficiently connected with will in contest to be admissible in evidence, where record contained nothing to suggest that testator had any other will in contemplation at time of conversations, and will in contest was executed only a few days after conversations.

7. Wills ⇐166(2)

Evidence warranted revocation of probate of will naming testator's wife as sole beneficiary, on ground that will was product of undue influence exerted by wife on testator.

8. Wills ⇐157

A wife may legitimately urge upon her husband her views of the manner in which he should dispose of his property by will, and if she is able to convince him that what she urges is the proper thing for him to do, or otherwise inspire in him a real desire to do it, a finding of undue influence cannot be based on her urgency, but her influence may become "undue influence" if carried to the extent of overriding husband's volition and destroying his free agency.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

9. Wills ⇐166(1)

General influence not brought to bear upon testamentary act is not "undue influence", but there must be proof that the influence was used directly to procure the will, and such proof exists where evidence is of such nature as to warrant inference that will was direct result of influence exerted for purpose of procuring will, and was not natural result of uncontrolled will of testator.

10. Wills ⇐155(1)

The true test of "undue influence" is that such influence overcomes the will of testator without convincing the judgment

11. Wills ⇐166(2)

That a day or two elapsed between making of will and previous conversation between testator and wife indicating that wife demanded that testator sign will which wife had had prepared and threatened him with divorce and her suicide and other troubles if he did not sign, and that he was not convinced but had yielded to wife's pressure, was insufficient to overcome inference of "undue influence" which could be drawn from wife's demands and threats.

12. Wills ⇐158

"Undue influence" must be an influence exerted and used prior to or at time of making of will and of which the will is the product.

13. Wills ⇐158

That wife was not present at husband's execution of will did not, as a matter of law, overcome inference of undue influence which could be drawn from wife's demands and threats concerning making of will.

14. Wills ⇐166(12)

Undue influence in execution of will may be proved by circumstantial or indirect evidence.

15. Wills ⇐166(2)

That testator lived nearly 15 years after executing will should be considered by jury in passing on question whether wife exerted undue influence on husband, but

did not necessarily prove that will was not a product of undue influence, where jury could have found from the evidence that the influence may have persisted through the years and prevented any change of the will.

16. Wills ⇐165(1)

In will contest on ground of undue influence of wife who was sole beneficiary under will, that testator executed previous holographic will substantially like will in contest should be considered by jury, but jury were not bound to accept existence of holographic will, which was not produced in evidence and which was testified to only by wife and her sister, whose testimony the jury were at liberty to reject.

17. Wills ⇐341

On motion for judgment notwithstanding verdict in favor of will contestants, trial court could not consider evidence favorable to contestee.

18. Wills ⇐337, 341

In will contest, trial court deeming jury's verdict in favor of contestants to be against preponderance of evidence should grant a new trial rather than enter judgment notwithstanding verdict.

19. Wills ⇐358

An order granting motion for judgment notwithstanding verdict in favor of will contestants is not an "appealable order," and appeal from such order is nugatory and must be dismissed. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

20. Wills ⇐358, 384

A judgment or order refusing to revoke probate of will is an "appealable judgment" or "appealable order', and on such appeal the error in granting motion for judgment notwithstanding verdict in favor of will contestants may be reviewed. Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Judgment".

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Proceeding in the matter of the estate of John Hettermann, deceased, wherein the probate of the will of the deceased was contested by Marie Ziegler and others. The contest was opposed by Olga Wunderlich Hettermann, as executrix, etc. From a judgment denying petition for revocation of probate of will and from order granting motion for judgment notwithstanding verdict, the contestants appeal.

Appeal from order granting motion for judgment notwithstanding verdict dismissed. Appeal from judgment denying petition for revocation of probate of will reversed.

E. Neal Ames and Delamere F. McCloskey, both of Los Angeles, for appellants.

Edward T. Sherer and Wendell P. Hubbard, both of Los Angeles, for respondent.

SHAW, Justice pro tem.

A will of the decedent, John Hettermann, was regularly admitted to probate on petition of the respondent Olga Wunderlich Hettermann. Thereafter a contest of this will was filed by the appellant, Marie Ziegler. The other appellants were made defendants to this contest, but filed an answer in which they admitted the truth of the contesting petition and joined in the prayer for revocation of probate of the will, and, pursuant to stipulation, at the trial they were deemed and treated as contestants, and we refer to them as such. After a verdict in favor of appellants, the respondent, having previously made an unsuccessful motion for a directed verdict in her favor, made a motion for judgment in her favor notwithstanding the verdict. This motion was granted and all the contestants appeal from the order granting the motion and from the judgment entered upon the order.

Several grounds of contest were alleged by the original contestant, Marie Ziegler, one of which was undue influence of the respondent. At the trial a nonsuit was granted as to all the grounds of contest other than undue influence and the ground last mentioned was submitted to the jury, which rendered a verdict in appellants' favor thereon. No complaint is made by the appellants regarding the nonsuit, so we have for consideration only the propriety of the court's action in granting the motion for judgment notwithstanding the verdict.

[1-4] The law of this state regarding the power of the court to grant such a

motion is well established and was stated by this court in Collins v. Nelson, 1936, 16 Cal.App.2d 535, 537, 538, 61 P.2d 479, with citation of supporting authorities. As there held, the power of the court to order a judgment notwithstanding the verdict is subject to the same rules as the power to grant a nonsuit or to direct a verdict. Such an order can be made only when, disregarding conflicting evidence and giving to the evidence favoring the party for whom the verdict was returned all the value to which it is legally entitled, herein indulging in every legitimate inference in his favor which may be drawn from the evidence, the result is a determination that there is no evidence of sufficient substantiality to support the verdict. In making such an order the trial court may not weigh all the evidence of both sides or judge of the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. These rules are applicable to probate proceedings tried before a jury. Estate of Flood, 1933, 217 Cal. 763, 768, 769, 21 P. 2d 579; Estate of Leahy, 1936, 5 Cal.2d 301, 303, 54 P.2d 704; Estate of Arnold, 1940, 16 Cal.2d 573, 576, 581, 582, 107 P. 2d 25.

Respondent is the widow of the decedent, and the sole beneficiary of the will in contest, which was executed on September 7, 1923. The decedent formerly lived in Louisville, Kentucky. In 1916 he came to Los Angeles to live, and there met the respondent, whom he married June 1, 1918, his age then being 68 and hers 43. They established themselves in a house on Harvard street in Los Angeles, where they lived until 1926, and then they moved to a house at Santa Monica, where they lived until his death, August 16, 1938. Apparently he engaged in no business after he took up his residence in California, other than the management of his investments, and the estate which he left (valued at $300,000 when the will was made) appears to have been his separate property. During the 20 years of their marriage he and the respondent made several trips to Europe, visiting Germany, where the decedent was born. The contestant, Marie Ziegler, was also born in Germany and is the daughter of a sister of decedent, who brought her with him from Germany to Louisville on his return from a trip he made long before he left Louisville. The other contestants are the children of William Hettermann, a brother of decedent, who lived in Louisville, Kentucky, where these contestants still reside. It is conceded that all the contestants are heirs of decedent and are legally qualified to contest his will.

The facts above stated are undisputed. The contestants introduced evidence regarding many other matters, some of which it is necessary to set forth in detail. Contestant Marie Ziegler testified that in the summer of 1923 she had a conversation with the decedent in which he said to her, "Don't worry; I took care of you, provided a will for you"; that just before he left Louisville for California in 1916, he said to her, "Don't worry, I will take care of you"; and further, on cross-examination, "Q. Mrs. Ziegler, isn't it a fact that almost every time you came to see Mr. Hettermann you inquired of him if he was taking care of you in his will? A. Yes, he said he was going to."

John P. Ziegler, a son of Marie Ziegler, came to California from Louisville in 1917, and after he arrived here was a frequent visitor in decedent's household. He testified to several conversations he had with decedent. One of them was held in July or August, 1923 (which would be a short time before the execution of the will), and decedent said to him, "I am having some trouble about my will. My wife thinks that she should have everything, and the relatives should get nothing; I don't think this is right. She is insisting I sign a will that she has had made up for me at the lawyer's office, and I don't want to do it; but tell your mother not to worry. Olga signed the paper before we were married, agreeing to be satisfied with half of what I had on my estate; she knows the relatives are to get the other half". During another conversation in August, 1923, decedent said: "My wife wants me to go down to the lawyer's office and sign that will, and I don't want to do it; but to keep peace I guess I will have to do it; but tell your mother not to worry".

[5] These statements by the decedent were not competent as evidence of the facts declared by him, as, that his wife was insisting that he sign a will, that she had signed a paper before she was married, etc. As to such matters they were hearsay and inadmissible. Estate of Jones,

1913, 166 Cal. 108, 117, 135 P. 288; Estate of Anderson, 1921, 185 Cal. 700, 719, 198 P. 407. They were admissible for the purpose of showing the decedent's state of mind and feelings toward those interested in his estate, at the time he executed the will, and the court in allowing their introduction properly limited it to that purpose. Estate of Snowball, 1910, 157 Cal. 301, 308, 107 P. 598; Estate of Sproston, 1935, 4 Cal.2d 717, 722, 52 P.2d 924.

John P. Ziegler further testified that he had overheard two conversations between the decedent and the respondent, regarding the making of the will. The first conversation occurred on Labor Day, 1923, or the day after. The parties stipulated that Labor Day that year fell on September 3. Ziegler testified to this conversation as follows, omitting questions and other immaterial parts of the record: "Well, I heard Aunt Olga say, 'Daddy, when are you going to sign that will I have had prepared for you?' * * * 'I don't want to sign that will; I don't think it is fair.' * * * She said, 'Well, I am your wife, and I am entitled to all of your estate, and not only part of it.' And he said, 'Well, Olga,' or 'Mama,' I don't remember which, he called her both, he said, 'There will be plenty for you even if you have half. You will have plenty.' And then I heard Aunt Olga say, 'I don't care; I want it all; you don't owe the relatives anything any more.' He said, 'But I do. I promised the relatives I would take care of them; and there is Boss Bill with his money; he has to have his money, and I promised it to him in my will.' * * * I remember, too, Olga said, 'If you don't sign it, I will cause you so much trouble you will always regret it,' or words to that effect. 'I will commit suicide,' or, 'I will get a divorce. I will do plenty that will make you wish you had.' Then I heard Uncle say, 'Oh, Mama, don't talk like that. There is no hurry. There is no hurry.'" Ziegler further testified that "a little while" after this conversation he saw decedent and the latter appeared "upset and nervous". The term "Boss Bill" appearing in the foregoing conversation was the decedent's nickname for William Hettermann, father of some of the contestants. The other conversation overheard by Ziegler occurred two or three days later, and ran as follows: "I heard Olga say, 'John, are you going to sign that will?' And Uncle John said, 'Well, there is no hurry; there is no hurry; there is plenty of time. I don't want to sign that will, yet; that is not fair.' * * * She said, 'Well, if you don't sign that will, I will make you lots of trouble.' He said, 'Oh, Mama, don't talk like that.' And she said, 'Well, you had better sign that will.' He said, 'Oh, don't worry about it. If you are so upset, I will take care of it. I will take care of it. I will do it.' * * * She said she wanted him to sign that will; she had waited long enough, words to that effect. If he didn't sign it she would make lots of trouble; she would commit suicide if necessary, * * * Q. And what was the last thing you heard of the conversation, whether from Uncle John or Aunt Olga? A. He said, 'I don't want any trouble; I don't want any trouble, I will do it. I will take care of it.'"

[6] The respondent argues that these conversations are not definitely connected with the will in contest. It is true, the connection is not directly established; but the record contains nothing to suggest that the decedent had any other will in contemplation at this time, and since the will in contest was executed only a few days after the conversations, the jury could properly infer that it was the will under discussion.

Dr. Thomas J. Crice, husband of one of the contesting parties, who lived in Louisville, Kentucky, testified that he had known decedent since 1910, had met him occasionally up to the decedent's departure from Louisville in 1916, and had heard him declare in 1915 to his brother, William Hettermann (father of the contestants other than Marie Ziegler), that, "I am going to provide in my will for you and your family." This witness further testified that decedent and respondent visited Louisville in the fall of 1923, either late in November or early in December, and came to the witness' home for dinner. Having qualified as a physician and psychiatrist, the witness further testified that on this occasion the decedent "came up the steps rather stooped on his wife's arm, and holding a cane with the other hand. * * * His gait wasn't as snappy and set as it was when I last saw him in 1916. His long flowing brown beard was cropped to a close white; his shocky brown hair was turned white as snow; he was a little uncertain on his feet, and when he got into the room he seemed to breathe a little heavily as though the exertion had some effect on him. * * * In engaging him in

general conversation I was impressed with the rather retardation of his mental activity, changing from one of great activity, great force, great foresight to one of an indifference to things in general. * * * His general appearance to my mind as a medical man was that he was undergoing a pre-senile condition, particularly mental pre-senility. Q. What do you mean by that, Doctor? A. I mean a change of personality, a change of the general physical, the general appearance of the man's face, his eyes, his manner of speech, and his subdued mental activity, retarded mental activity. It was quite noticeable, because I had known Mr. John Hettermann years previous to that to be absolutely the reverse physically and mentally." The witness further testified: "The cause of that" (the physical condition) "from observation, knowing the man as I did, in my opinion that was the beginning of general arteriosclerosis, or hardening of the arteries. * * * I am not able to be definite just when the condition begun, how fast it had developed, but as a medical observer it was apparent. * * * General arteriosclerosis, or hardening of the arteries, comes on slowly, insidious." The witness said further, "Q. And what effect does that have on the activity of the brain, if any, and mentality? A. In early manifestations of arteriosclerosis, and, particularly, I am speaking now of the brain, we have slowness of thought. * * * In this particular case I noticed a change in personality as far as his mental condition is concerned, a mental indefiniteness and a slowness of thought." Dr. Crice also testified that a person in such condition would not have the resistance to threats of the kind to which Ziegler testified, that one otherwise in good health would have.

This witness also testified that during the dinner which decedent and respondent attended at the witness' house, respondent told decedent not to eat the food served, after the soup, as it might be poison, and decedent ate nothing more. Mrs. Crice, wife of the witness last mentioned, testified to this same occurrence, the time of which she also fixed as November or December, 1923, and she also gave similar testimony as to the physical appearance of decedent at the time of the dinner.

[7-12] Accepting the testimony we have reviewed as true, and drawing from it all legitimate inferences in favor of the verdict, we find it sufficient to support the jury's finding that the contested will was the product of undue influence exerted by the respondent on the decedent. This testimony presented to the jury a man considerably weakened, mentally and physically, from his former condition, and not well able to resist importunities urged upon him; a man well disposed toward the contestants and apparently desirous of making provision for them in his will. It is true Dr. Crice's testimony related to a time nearly or quite three months after the will was executed, but from his testimony it appeared that the described condition of the decedent must have been developing for some time, and the jury may properly have inferred that such condition existed to a considerable extent when the will was executed. Respondent was the wife of decedent and thus in a confidential relation to him. By her own admission, in one of the conversations to which John P. Ziegler testified, she had the will prepared, and she strenuously urged her husband to execute it. It is true, as respondent contends, that a wife may legitimately urge upon her husband her views of the manner in which he should dispose of his property by will, and if she is able to convince him that what she urges is the proper thing for him to do or otherwise inspire in him a real desire to do it, a finding of undue influence cannot be based on her urgency. Estate of Donovan, 1903, 140 Cal. 390, 395, 73 P. 1081. But her influence may, nevertheless, become undue if carried to the extent of overriding the husband's volition and destroying his free agency. In Estate of Snowball, 1910, 157 Cal. 301, 307, 107 P. 598, 601, supra, the court held that, "While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence (In re McDevitt, 95 Cal. [17], 33, 30 P. 101), such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix. See Estate of Arnold, 147 Cal. [583], 589, 82 P. 252; Estate of Welch, 6 Cal.App. [44], 50, 91 P. 336." This statement was approved in Estate of Sproston, 1935, 4 Cal.2d 717, 722, 52 P.2d 924, supra, and Estate of Leahy, 1936, 5 Cal.2d 301, 304, 54 P.2d 704, supra. "The true test of undue influence is that it overcomes the will without convincing the judgment." Es-

tate of Donovan, supra, at page 394 of 140 Cal., at page 1082 of 73 P.; Estate of Greuner, 1939, 31 Cal.App.2d 161, 164, 87 P.2d 872. Here the jury could find from the evidence above reviewed that exactly this had happened. Within a day or two before the execution of the will the respondent is represented as demanding of decedent that he sign the will, and threatening him with divorce, her suicide and other troubles if he does not sign, and he as saying to her, "I don't want to sign that will, I don't think it is fair," but then adding, "If you are so upset * * * I will do it." These are not the words of a man whose judgment is convinced, but of one who yields against his will to overwhelming pressure. The lapse of time, which may have been only a day or two, between this conversation and the execution of the will, does not necessarily dispel the inference. As the court stated in Estate of Ricks, 1911, 160 Cal. 450, 460, 117 P. 532, 536, undue influence must be "* * * an influence exerted and used *prior to* or at the time of the making of the will and of which the will is the product." (Emphasis ours.) The case at bar is very much like Estate of Greuner, supra, where it appeared that a husband, in order to please his wife, and at her insistence, but contrary to his own judgment, executed a will which she desired, and it was held that undue influence was sufficiently shown to require the denial of a nonsuit.

Respondent cites a considerable number of decisions where the evidence was held insufficient, as a matter of law, to make out a case of undue influence, but we do not regard any of them as controlling here, because of differences in the facts. Typical of them are, In re McDevitt, 1892, 95 Cal. 17, 33, 30 P. 101, 106, cited in many of the later cases for its declaration that "Evidence must be produced that pressure was brought to bear directly upon the testamentary act," and Estate of Anderson, 1921, 185 Cal. 700, 198 P. 407, where many other cases were reviewed and the rule of the McDevitt case was reiterated. In the McDevitt case the court said, speaking of the testator and his brother Andrew, who was charged with undue influence, "* * * there is no proof whatever that he was urged or importuned by Andrew or any one else to make a will, or that it was ever suggested by any one that he ought to give his property to Andrew or any one else." 95 Cal. 17, 33, 30 P. 101, 103. In the Anderson case, where undue influence of decedent's aunt was alleged, the court said, "There is no evidence of the aunt importuning the decedent or otherwise exercising any pressure upon her either to make a will or to make one in her aunt's favor." 185 Cal. 700, 198 P. 407, 409. Examination of the cases cited in the Anderson case in support of its holding, and of the other cases cited by respondent on this point, discloses that in all of them there was the same absence of any showing that the person charged with undue influence had suggested the making of a will, or the terms thereof, to the testator.

[13, 14] It appears from respondent's evidence, to which contestants offered no contradiction, that the respondent was not present at the execution of the will; but that fact alone does not, as a matter of law, overcome the inference of undue influence which may be drawn from the other facts already mentioned. Estate of Greuner, supra, 31 Cal.App.2d 161, at page 163, 87 P.2d 872; Estate of Miller, 1936, 16 Cal. App.2d 154, 168, 60 P.2d 498. If it be thought that such absence of respondent reduces the case to one of circumstantial evidence, it is settled that undue influence may be proved by circumstantial or indirect evidence. Estate of Sproston, supra, 4 Cal.2d 717, 722, 52 P.2d 924; Estate of Leahy, supra, 5 Cal.2d 301, 304, 54 P.2d 704; Estate of Presho, 1925, 196 Cal. 639, 654, 238 P. 944.

[15] It appears that decedent lived nearly 15 years after he executed the will, but this fact also, while it should be considered by the jury in passing on the question, does not necessarily prove that the will was not the product of undue influence. See Estate of Lances, 1932, 216 Cal. 397, 404, 14 P.2d 768. The jury may have thought that the influence persisted through these years and prevented any change of the will.

[16] Respondent lays some stress on the claimed fact that about two years before the will in contest was executed decedent made a holographic will substantially like it. Such a fact would be deserving of consideration but we need not determine how much weight should be given it, for the jury were not bound to accept the fact as established in this case. The holographic will was not produced, and its existence directly appeared only from the testimony of respondent, which the jury were at liberty to reject if they saw fit. Respondent's

sister testified to a declaration made to her by decedent, the purport of which was that he had made such a will; but she had not read the paper he displayed to her, and this declaration was no more competent to prove the fact stated than were the other declarations above discussed. Moreover, this witness' relation to respondent was such that the jury might in their discretion, reject her testimony also, and we must assume that they did so.

[17, 18] The respondent, in her testimony, denied that she had the conversations with decedent to which John P. Ziegler testified, denied the dinner table incident to which the Crices testified, and stated that she and the decedent did not visit Louisville at all in 1923. On the last point she was corroborated by some other witnesses. She also produced many apparently disinterested witnesses who testified that during various parts of a period of time beginning before the will in contest was executed and ending several years after its execution they knew and frequently saw the decedent and that he was a man of great mental and physical vigor, of great determination and strong will, a man who could not be easily swayed or convinced; that he stood erect and walked with a military bearing and a firm step and did not use a cane for support; that he worked in his garden frequently, though not at heavy work; that he had a good memory for names and facts, was a good card player and remembered the cards well; that he took a keen interest in the events of the day, conducted all his own business transactions himself and could not be easily sold on investments but investigated each thoroughly before making a purchase; that he made his decisions independently of advice of others and on one occasion rejected that of respondent on an investment; and that he seemed very fond of, and considerate toward, respondent. Respondent urges that this testimony completely overcomes the effect of that produced by contestants; and looking merely at the cold record, it does appear that the evidence as a whole preponderates in her favor. She also argues that the testimony of Ziegler is fantastic and incredible, claiming, among other things, that separate accounts given by him of the same event are identical and hence must have been invented and memorized. The story told by him, considered by itself, does not relate anything that could not have happened, and the last-mentioned claim finds no support in the facts, for inspection of the separate statements shows that they vary greatly in wording and somewhat in details of the matters narrated. But, as we have already held, none of these matters was proper for the consideration of the court on the motion for judgment notwithstanding the verdict. In addition to the cases already cited, see Gindraux v. Maurice Mercantile Co., 1935, 4 Cal.2d 206, 209, 47 P.2d 708; also, Estate of Burre, 1940, 38 Cal.App.2d 518, 521, 101 P.2d 549, 550, where this court held that, "Even though it might appear that the trial would have resulted in a judgment for respondent under and by virtue of the evidence adduced, it does not follow that the motion for a nonsuit should have been granted." If the trial court deemed the verdict of the jury to be against the preponderance of the evidence, its proper course, as stated in Hunt v. United Bank & Trust Co., 1930, 210 Cal. 108, 118, 291 P. 184, was the granting of a new trial, not the making of the order of which complaint is made here.

[19, 20] An order granting a motion for judgment notwithstanding the verdict is not one of the orders listed as appealable in section 1240, Probate Code. The appeal attempted here from such an order is therefore nugatory and must be dismissed. Estate of O'Dea, 1940, 15 Cal.2d 637, 104 P.2d 368. However, an appeal will lie, under that section, from the judgment or order refusing to revoke the probate of the will; and on such appeal the error in granting the motion may be reviewed.

The appeal from the order granting respondent's motion for judgment notwithstanding the verdict is dismissed. The judgment denying petition for revocation of probate of will is reversed and the superior court is directed to enter judgment in accordance with the verdict, and thereafter to hear and determine such other and further proceedings as may be necessary to a final disposition of the cause.

YORK, P. J., and WHITE, J., concurred.

48 Cal.App.2d 259

DRAKE v. QUINN et al.

Civ. 6466.

District Court of Appeal, Third District, California.

Dec. 3, 1941.

Hearing Denied Jan. 29, 1942.

1. Municipal corporations ⇐198(3)

Where city's charter provided that council should make all rules necessary to secure discipline and efficiency in fire department, and could discharge a member of the fire department for neglect of duty, disobedience of orders, or conduct injurious to the public welfare, and city council gave notice to fireman of charges against him and of hearing thereon, and hearing was had, council had the power to hear and determine the matter and to discharge the fireman. St.1895, p. 355.

2. Municipal corporations ⇐198(1)

Where city which was governed by charter, and which had a volunteer fire department, passed an ordinance declaring that paid fire department of the city should consist of 11 paid men in addition to chief engineer, and in a later ordinance reference was made to firemen receiving compensation as the paid members of fire department, city had a "paid fire department", rather than a "volunteer fire department" as claimed by discharged fireman, who contended that he could not be discharged for the good of the service, either with or without a hearing, on ground that the fire department was a volunteer fire department. St.1895, p. 355.

See Words and Phrases, Permanent Edition, for all other definitions of "Paid Fire Department" and "Volunteer Fire Department".

3. Municipal corporations ⇐198(1)

The constitutional provision that when the term of any officer or commissioner is not provided for in the Constitution, the term of such officer or commissioner may be declared by law, and if not so declared, such officer or commissioner shall hold his position during the pleasure of the authority making the appointment, was applicable, where no term of office was fixed for members of city's fire department, and fireman could be discharged for cause at any time. Const. art. 20, § 16.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Petition for writ of mandate by Curtis P. Drake against John F. Quinn and others. From a judgment dismissing the petition after demurrer thereto had been sustained without leave to amend, the petitioner appeals.

Judgment affirmed.

T. F. Peterson, of Eureka, for appellant.

E. S. Mitchell, City Atty., of Eureka, for respondents.

PER CURIAM.

This is an appeal from a judgment dismissing the petition for a writ of mandate after demurrer thereto had been sustained without leave to amend.

It is alleged in the petition for the writ that Curtis P. Drake was a member of the Volunteer Fire Department of the City of Eureka, receiving an annual salary of $1,660, payable monthly, and that on the 4th day of February, 1938, the chief engineer of the fire department suspended petitioner Drake and filed proper charges against him, alleging that petitioner was disqualified, incompetent and inefficient. A hearing was had before the city council, which adopted the resolution sustaining the charges and discharging petitioner for insubordination, inefficiency, and for the benefit of the citizens of the City of Eureka. It was declared this action was taken for the benefit of the public service and for the improvement of the fire department. This latter ground is pursuant to summary proceedings authorized by the charter. That power is vested in the council. The charter further provides "no salary shall be payable * * * from the date of suspension."

On or about the first day of February, 1938, the chief engineer of the City of Eureka filed charges against petitioner, who is the appellant herein, setting forth certain facts, and alleging dereliction of duties, disobedience of orders, insubordination, incompetency and misconduct, and that the efficiency of the department would be improved by his removal. A copy of these charges were served upon appellant. Eureka is governed by a charter adopted in 1895 (Stats. 1895, page 355). At that time the entire fire department of the city was voluntary. In 1928 the city passed Ordinance No. 1041, which declared "the paid

fire department of the city of Eureka shall consist of eleven (11) paid men in addition to the chief engineer", and in later ordinances reference is made to firemen receiving compensation as the paid members of the fire department.

One of the questions here for determination is whether Eureka has a paid fire department. Another question is, when charges are filed against a municipal employee, after a full hearing of the charges, has the city council authority to discharge such an employee without passing an ordinance providing procedure for trials?

Considering first the question as to whether or not the city council had authority to discharge an employee without passing an ordinance providing procedure for trials.

Respondent refers us to the case of Coffey v. Way, 126 Cal.App. 43, 14 P.2d 143, 145. In that case the city council of the city of Eureka, without notice or trial, passed an ordinance discharging three policemen. These discharged employees had no notice or opportunity to present a defense but the council concluded that for the improvement of public service they should be discharged. The court there said: "Appellants further contend that the city council never adopted an ordinance providing for the procedure to be followed in the removal of its officers. So far as concerns the removal of an appointed officer, where the officer is not appointed for a fixed term, we see no merit in this contention. The passage of an ordinance to do that which the city council was already authorized to perform would be an idle act. In re Thomas v. City of Petaluma, 33 Cal. App. 547, 165 P. 1021; City of Petaluma v. Hughes, 37 Cal.App. 473, 174 P. 336."

Section 124 of the charter provides: "The said council shall make all rules and regulations necessary to secure discipline and efficiency in the fire department, and any officer, member, or employee in said department guilty of violation of such rules and regulations, neglect of duty, disobedience of orders, absence without leave, or conduct injurious to the public peace and welfare, immoral conduct, or breach of discipline, shall be liable to punishment and reprimand, dismissal from the department, forfeiture of pay or the withholding thereof, when found guilty of the offense charged, by the council upon a trial held for that purpose; provided, that not more than thirty days' pay shall be forfeited or withheld for one offense, and provided further, that by affirmative vote of three members of the council, any officer, member, or employee of the fire department may be dismissed at any time without trial, when in the judgment of said council the public service or efficiency of the department will be improved thereby."

[1] In the instant case the council gave notice to appellant and granted him a hearing of the charges and rendered its decision in accordance with the evidence as specified in resolution No. 2079. It would thus appear that the council had the power and authority to hear and determine the matter and to discharge the employee from his position.

Appellant admits that if the City of Eureka had a paid fire department the above-quoted section 124 of the charter would be applicable, and that appellant could then be discharged for the good of the service, either with or without a hearing. But he contends the city did not have a paid fire department, and on the contrary that it had but one department, which is a volunteer fire department.

[2] It seems clear, however, that after the enactment of section 27¾ of Ordinance No. 1041, which was passed in 1928, the city did have a paid fire department. It is therein provided the department should consist of eleven paid men in addition to the chief engineer. Each of the eleven men were to receive a salary of $1,680 per year.

[3] Under Ordinance No. 1041 no term of office is fixed for members of the fire department. It would therefore seem clear the provisions of section 16 of article XX of the Constitution controls that situation. It is there provided that when the term of any officer or commissioner is not provided for in this Constitution, the term of such officer or commissioner may be declared by law, and if not so declared, such officer or commissioner shall hold his position during the pleasure of the authority making the appointment. By resolution the city council dismissed petitioner for the benefit of the public, and for the improvement of the fire department.

Finding no error in the action of the trial court in sustaining the demurrer without leave to amend, the judgment of that court should be affirmed. It is so ordered.

48 Cal.App.2d 326

HUSAR v. HUSAR et al.

Civ. 13316.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1941.

Hearing Denied Feb. 2, 1942.

1. Appeal and error ⇐1024(4)

In suit to vacate a default judgment, the truth of testimony was for trial court's determination.

2. Judgment ⇐419

In suit to vacate a default judgment on ground that plaintiff had not been served with summons and complaint in the action and had no knowledge of such action until after entry of judgment therein, a decree vacating the judgment was proper on ground that summons and complaint were not served on plaintiff.

3. Appeal and error ⇐1024(4)

In suit to vacate a default judgment, the matter of evaluating testimony supporting plaintiff's claim that she was without knowledge or notice of commencement or pendency of action wherein judgment was entered until a certain time was for trial court.

4. Judgment ⇐461(4)

In suit to vacate a default judgment, testimony was sufficient to support findings favorable to plaintiff on question of plaintiff's knowledge or notice of commencement or pendency of action wherein judgment was entered.

5. Appeal and error ⇐1024(4)

In suit to vacate a default judgment on ground that plaintiff had not been served with summons and complaint in the action and had no knowledge of such action until after entry of judgment therein, a decree vacating judgment would be affirmed, where trial court found, upon evidence which was sufficient to sustain such finding, that essential elements of plaintiff's case were true.

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Suit by Lois Husar against Leonard Husar and others. From a decree vacating a default judgment in a previous action, defendants appeal.

Affirmed.

Wood, Crump & Rogers, of Los Angeles, for appellant Husar.

J. H. O'Connor, Co. Counsel, and Ned Marr, Deputy Co. Counsel, both of Los Angeles, for appellant County of Los Angeles.

Jennings & Belcher, Louis E. Kearney, and Hampton Hutton, all of Los Angeles, for respondent.

R. H. SCOTT, Justice pro tem.

Defendants appeal from a decree vacating a default judgment in a previous action.

Plaintiff and defendant Husar were formerly husband and wife. Defendant Biscailuz, as sheriff, is involved only because there is a dispute concerning service by one of his deputies of the complaint and summons in the earlier case.

The complaint in the instant case alleges that on January 6, 1939, Leonard Husar brought suit against Lois Husar, in case No. 435,369, to recover certain personal property or in lieu thereof damages in the sum of $15,045. On January 24, 1939, judgment was rendered in favor of Leonard Husar. More than a year later, on January 29, 1940, he caused an execution to be levied on certain personal property of Mrs. Husar. The complaint further alleges that in said action Mrs. Husar was never served with summons and complaint, that her default had been entered upon proof of service and judgment rendered thereon, but without actual service having been made on her, and that she had no knowledge or notice of the commencement or pendency of said action or judgment until about February 14, 1940. It included further allegations that for more than ten years prior to the former action Mrs. Husar had been in exclusive possession of the property in question and that Mr. Husar had executed a quitclaim deed for the property to her.

The trial court in the instant case found the allegations of the complaint as above outlined to be true. It further found that during the trial the parties to this action stipulated in open court "that if this court should find from the evidence that the plaintiff had not been served with summons or complaint in said action number 435,369, there was sufficient showing and probability to justify the trial of said action number 435,369 upon its merits, and that by reason of said stipulation it would not be necessary for the court to receive or hear evidence upon the alleged meritorious defense

of the plaintiff herein, Lois Husar, to the alleged cause of action set forth in the complaint in said action". The court also found that "Lois Husar was never served with summons or complaint in said action number 435,369 and by reason of such finding of fact the stipulation above referred to has become operative"; and the court found in accordance therewith.

In substance the only question which appellants raise is whether there is sufficient evidence to support the finding of the trial court as to nonservice of the summons and complaint and lack of knowledge by plaintiff of the proceedings in the former case.

As to the service of the summons and complaint, the deputy sheriff testified that 10 a. m. on January 9, 1939, he handed them to Mrs. Husar as she was backing a tan Oldsmobile coupe out of the driveway at her home. He identified her as being the same person whom he had served with other papers more than a year later and who was present in the courtroom at the trial of this case. His brother, who was with him, testified that he had seen the deputy approach the coupe, talk to a woman and hand her the papers he was holding. The deputy made the usual return of service in the case.

Mrs. Husar clearly and explicitly denied service at that or any other time. She testified that she was home on the day and at the hour indicated, and that she did not drive her car that morning because it had been taken away before 8 a. m. by a service station operator who returned it shortly before she left the house at noon. The operator corroborated her testimony concerning the car and was fortified by a written memorandum made at the time. A woman friend staying at the house supported Mrs. Husar's testimony in that and other respects.

[1, 2] Even when there is a charge that some of the testimony is false, it is a matter for the trial court to decide. Here we have evidence which, if believed, is ample to support the finding of the trial court that the summons and complaint in the earlier case were not served on Mrs. Husar. The judge who observed the witnesses' appearance and demeanor when testifying had an opportunity to consider the obvious self-interest of Mrs. Husar and the reasonable desire of the deputy to uphold the correctness of his return of service. We cannot say that it was unreasonable for the trial court to conclude that the deputy, because of the press of official duties, was honestly mistaken, rather than that the plaintiff was deliberately perjuring herself. Burrows v. Burrows, 18 Cal. App.2d 275, 63 P.2d 1135; Robinson v. Robinson, 159 Cal. 203, 113 P. 155.

[3, 4] The matter of evaluating the testimony supporting the plaintiff's claim that she was without knowledge or notice of the commencement or pendency of the action until February of 1940 was likewise for the trial court. The testimony was sufficient to support the findings favorable to plaintiff in this regard. There was a definite and unequivocal statement by her to that effect. In opposition thereto were some questions and answers relating to a conversation she had with Mr. Husar about that time to the effect that he was suing her or had a service out for her. The trial court may well have considered that Mr. Husar was and is an attorney and that he knew that Mrs. Husar had an attorney representing her. The delay of a year after judgment before proceedings to enforce it is not fully explained, but might account for any difficulty experienced by Mrs. Husar in presenting her case. No suggestion has been advanced as to why the trial court should not have considered the equities and disabilities of both parties.

The question of whether this plaintiff had a meritorious defense in the earlier case was disposed of by the stipulation and requires no discussion.

[5] Since the trial court in this case found the essential elements of plaintiff's case to be true, there is no reason why it should not be upheld in its conclusion that the judgment in the former case should be set aside and the parties should have their rights to the property in dispute settled by a fair and impartial trial of the case on its merits.

Judgment affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

48 Cal.App.2d 319

STODDARD v. GOLDENBERG et al.

Civ. 13192.

District Court of Appeal, Second District, Division 2, California.

Dec. 5, 1941.

Hearing Denied Feb. 2, 1942.

1. Sales ⇐7

In determining whether a contract is one of "sale" or one of "agency", intention of parties must be ascertained from scope and effect of language employed.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency" and "Sale".

2. Mines and minerals ⇐74

A written agreement, by terms of which plaintiff agreed that if he was successful in acquiring certain oil leases he would sell or assign to defendant the leases of 200 acres for a fixed price and upon stated terms and conditions, was not a contract of "agency" but was a contract of "sale", and hence plaintiff was not precluded by reason of a confidential relationship between the parties from making a secret profit.

3. Mines and minerals ⇐97, 101

Where written agreement provided that plaintiff, if he was successful in acquiring certain oil leases, would sell or assign to defendant leases of 200 acres for a fixed price and upon stated terms and conditions, and agreement contained no provision for sharing in profits and losses, parties were not engaged in a "joint enterprise" or as "partners".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Enterprise" and "Partner".

4. Joint adventures ⇐1
Partnership ⇐5

Before it can be shown that parties are engaging in a "joint enterprise" or as "partners", it must be shown that there is a community of interests and an agreement to share jointly in the profits and losses resulting from the enterprise.

5. Contracts ⇐32

Where it is understanding of parties that an oral agreement is to be reduced to writing, it is essential to validity of the contract that it be reduced to writing.

6. Mines and minerals ⇐74

Where, at conclusion of their conversation relative to certain oil leases, defendant stated to plaintiff, "O. K., put it in writing and send it to me", and plaintiff then wrote letter confirming oral negotiations, which defendant altered in one respect and then signed and returned to plaintiff, and thereafter plaintiff wrote another letter which contained statement "referring to letter arrangement of March 14th" and "everything else in our letter of March 14 to remain as is", trial court properly found that agreement of parties was contained in the letters.

7. Mines and minerals ⇐74

In action on three postdated checks given in part payment of oil leases, evidence supported finding that plaintiff did not make false and fraudulent representations authorizing defendant to rescind the transaction.

8. Appeal and error ⇐1011(1)

The conclusion reached by trial court on conflicting evidence cannot be disturbed on appeal.

9. Trial ⇐404(1)

Apparent inconsistencies in trial court's findings of fact did not require a reversal, where it appeared that inconsistencies resulted from method court adopted in making its findings, and that they were concerned with matters not material to decision, and that, when the findings were read as a whole, there were no inconsistencies as to any material issues.

10. Appeal and error ⇐1152

In action on three postdated checks given in part payment of certain oil leases, a judgment for plaintiff, based on finding that defendant was not induced to enter into agreement by any fraudulent representations made by plaintiff, would be modified so as to require plaintiff to deliver to defendant assignments of the leases, where, under terms of agreement, defendant was entitled to have the assignments delivered to him upon payment of full purchase price.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by J. B. Stoddard against George B. Goldenberg to recover on three postdated checks, wherein the defendant filed a cross-complaint to rescind the transaction in which the checks were given, and wherein

the Bank of America N. T. & S. A. filed a cross-complaint against the original defendant. From a judgment for plaintiff, the defendant appeals.

Judgment modified, and, as so modified, affirmed.

Schell & Delamer and Le Roy N. French, all of Los Angeles, for appellant.

Salisbury, Robinson & Himrod, B. R. Ware, and W. K. Lindsay, all of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover on three checks in the principal sum of $2,500 each which had been executed by defendant in favor of plaintiff. By cross-complaint defendant sought to rescind the transaction in which the checks were given because of the alleged false and fraudulent representations of plaintiff, and to recover $16,500 paid by defendant to plaintiff as a part of the transaction. Defendant has appealed from a judgment in favor of plaintiff on both the complaint and the cross-complaint.

The evidence, which was conflicting, when viewed in the light most favorable to plaintiff, discloses the following facts: Plaintiff, who resided in Dallas, Texas, was engaged in the oil business and had known defendant for approximately fifteen years prior to the date of the transaction involved in the litigation. Several days prior to March 14, 1938, plaintiff incurred gambling losses of $4,000 at the Clover Club in Los Angeles and by arrangement with defendant (whose connection with the club is not shown) paid the loss by delivering his personal check to defendant. A few days later the parties had a conversation in which plaintiff stated that he was negotiating for additional acreage in the K. M. A. oil field in Texas and proposed to drill a well on the land; and that if he was successful in consummating such negotiations, he would let defendant have a certain number of acres for a stated price. At this time the parties discussed generally the terms and conditions under which defendant was to acquire the acreage. Defendant indicated that he was favorable to the deal as outlined and said to plaintiff: "O.K., put it in writing and send it to me." On March 14, 1938, plaintiff sent the following letter to defendant:

"Referring to and confirming our conversation of this afternoon, we are in the process of negotiating for two hundred and forty acres described approximately as follows:

* * *

"If we are successful in consummating our present negotiations for this acreage, we will assign to you two hundred of the above two hundred and forty acres upon the payment of twenty four thousand dollars ($24,000) cash and twenty four thousand dollars ($24,000) in oil payable out of one-eighth of seven-eighths of all oil and gas saved, produced and sold. We agree to accept your check for twelve thousand dollars ($12,000) as soon as the leases in question have been acquired by us, however, holding them in our possession until such time as the balance of twelve thousand dollars ($12,000) has been paid, which amount you have agreed to pay us within sixty days from ~~today~~ *on day derrick is being erected* providing we are in a position to deliver said leases to you.

* * *

"It is understood in connection with this transaction that we will, at the earliest possible moment, drill a well to the new producing horizon in this area of approximately 4,000 feet, said well to be drilled entirely at our expense. * * * This well is to be drilled at our option either on the 160 Acres we now own or on the 40 Acres of the 240 Acres above referred to, at our option. In any event, it will be an offset location to one of your properties.

* * *

"If the above is in accordance with your understanding, kindly sign the copy of this letter and return to me at the Town House. I am very hopeful and firmly believe that you will have many opportunities to dispose of any part of these holdings at a substantial profit to yourself shortly after drilling operations are commenced."

This letter was received by defendant, who struck out the word "today" and inserted the words which we have italicized, signed the letter thus altered and returned it to plaintiff. A few days later defendant paid plaintiff the sum of $14,000 by delivering to him a cashier's check for $10,000 and returning the uncashed check for $4,000 which plaintiff had given defendant to cover the gambling loss. Thereafter, on March 18, 1938, plaintiff prepared and mailed the following letter which was signed by defendant and returned to plaintiff: "Referring to letter arrangement

of March 14. * * * It is now agreed that you will acquire 200 acres instead of 240 acres, the price for the 200 acres to be $20,000 cash and $20,000 out of oil. Everything else in our letter of March 14th to remain as is, with the exception of the balance of $10,000 due, which amount I agree to pay you out of the first sale made of any of my holdings, and in case there are no sales made, the balance of $10,000 to become due May 14, 1938."

Although the letter of March 18th purports to change the terms of the original letter of March 14th, it was established by the evidence that it in fact made no change in the number of acres to be acquired by defendant or the cash consideration to be paid. Plaintiff testified that under both agreements the total cash consideration was to be $24,000 and that the reason that the March 18th letter called for the payment of $20,000 cash only was because the additional $4,000 had, in effect, been paid by the return to plaintiff of his uncashed check for that amount. Since both letters provided that defendant was to acquire only 200 acres, there was obviously no change in the amount of acreage involved. In any event, it is of no moment whether the cash price to be paid was $20,000 or $24,000, for by the letter of March 18th, which was signed by defendant after he had paid plaintiff $14,000, defendant admitted that there was an unpaid balance of $10,000. Subsequently defendant delivered to plaintiff four checks, each in the amount of $2,500, thereby again recognizing that the unpaid balance was $10,000.

Having acquired the acreage in question, plaintiff on April 17, 1938, commenced drilling operations on property adjacent to the 200 acres which defendant was to acquire. The well was completed to the new producing horizon, a depth of approximately 3737 feet, but no oil was produced. Since none of defendant's holdings were sold, the $10,000 balance became due on May 14, 1938, at which time defendant was granted additional time to make the payment. The parties met to discuss the matter and at plaintiff's request defendant executed four post-dated checks, each in the amount of $2,500, which he delivered to plaintiff in payment of the balance due on the contract. The checks were dated June 1st, July 1st, August 1st and September 1st, all in 1938. The check dated June 1st was paid but the other three were not paid. The present action to recover on the unpaid checks were filed on October 4, 1938. Approximately a month later plaintiff was served with notice that defendant had elected to rescind the contract. A similar notice of rescission had been mailed to plaintiff on August 16, 1938, but it was not received by plaintiff.

[1-4] Defendant's principal contention is that the evidence is insufficient to sustain the findings and judgment. It is urged that the evidence shows that plaintiff was the agent of defendant, or that the parties were engaged in a joint adventure in the transaction in question. Defendant argues, that the relationship between the parties was confidential, precluding plaintiff from making a secret profit. The evidence discloses that plaintiff acquired the leases on the land in question for less than $100 per acre, which fact was not disclosed to defendant, who made no inquiry concerning the matter. Since under the contract defendant was to pay $120 per acre, plaintiff would, of course, realize a profit from the transaction. In determining whether a contract is one of sale or one of agency the intention of the parties must be ascertained from the scope and effect of the language employed. 55 Corpus Juris, 43; Bessing v. Prince, 52 Cal.App. 190, 198 P. 422. It is obvious from an examination of the contract under consideration that it is not a contract of agency but that it is in reality a contract of sale. By its terms plaintiff agreed that if he was successful in acquiring on his own behalf certain oil leases, he would sell or assign to defendant the leases on 200 acres for a fixed price upon stated terms and conditions. Nowhere in the agreement is there any indication that plaintiff was to acquire the property as agent for defendant. It is also evident that the parties were not engaged in a joint enterprise or as partners, for before such relationship can exist it must be shown that there is a community of interest and an agreement to share jointly in the profits and losses resulting from the enterprise. United Farmers Association v. Sakiota, 7 Cal.App. 2d 559, 46 P.2d 770. Clearly there was no community of interest, for plaintiff was to have no interest in the 200 acres to be acquired by defendant and conversely, defendant was to have no interest in

the other property acquired by plaintiff. There was no agreement to share in the profits and losses. By the express terms of the agreement plaintiff alone was to bear the expense of drilling the well and if it proved to be unproductive, plaintiff alone was to bear the loss. The contract was merely one for the sale of oil leases, involving no fiduciary or confidential relationship which would prohibit plaintiff from making a profit out of the transaction.

[5, 6] The trial court properly found that the agreement of the parties was contained in the letters of March 14th and 18th. Where it is the understanding of the parties that an oral agreement is to be reduced to writing, it is essential to the validity of the contract that it be reduced to writing. Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 397, 400, 139 P. 1077. The court could properly conclude that the parties intended the agreement to be in writing. At the conclusion of their conversation prior to March 14th, defendant said to plaintiff: "O.K., put it in writing and send it to me." It is significant that the letter of March 18th contains the following: "Referring to letter arrangement of March 14th" and "Everything else in our letter of March 14th to remain as is".

[7, 8] Defendant also contends that the findings upon which the judgment denying relief on the cross-complaint is based are not supported by the evidence. The record discloses a conflict in the evidence on the subject of the claim of defendant that plaintiff made false and fraudulent representations. There is ample evidence to sustain the findings on this point and also the findings on the claim that there was no consideration. Defendant's argument in this regard is tantamount to a contention that plaintiff's evidence is inherently improbable. We find nothing other than a conflict in the evidence which was resolved by the trial court in favor of the plaintiff. The conclusion reached by the trial court on conflicting evidence may not be disturbed on appeal.

[9] In making its findings the trial court adopted the method of referring to specific paragraphs in the various pleadings and finding them to be either true or untrue. As a result there are several apparent inconsistencies in the findings which, according to the contention of defendant, require the reversal of the judgment. We have carefully examined the findings criticized. It appears that without exception they are concerned with matters not material to the decision. When the findings are read as a whole we find no inconsistencies as to any material issue. The trial court found that the checks upon which this action is based were executed and delivered by defendant to plaintiff and that they were not paid when due; that the checks were given as part of the consideration for the purchase of oil leases on 200 acres of land in accordance with the agreement of the parties; that there was no failure of consideration; and that defendant was not induced to enter into the agreement by any false or fraudulent representations made by plaintiff. Defendant makes no complaint concerning the findings necessary to support the judgment.

[10] Under the terms of the agreement defendant is entitled to have the assignments of the leases on the 200 acres in question delivered to him upon payment of the full purchase price, but the judgment is entirely silent in respect to this condition. The trial court is directed to modify the judgment by providing that as a condition of the payment of the judgment by defendant, plaintiff shall be required to deliver to defendant the assignments in question. As so modified, the judgment is affirmed. Respondent to recover his costs on appeal.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

DUNTLEY v. TUTT.

Civ. 12672.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1941.

Rehearing Denied Jan. 7, 1942.

Hearing Denied Feb. 5, 1942.

1. Partnership ⇐342

In an action for dissolution of copartnership, findings that parties formed a copartnership for purpose of conducting an insurance brokerage business, that agreement had been entered into as to division of the profits and expenses thereof, and that defendant applied $9,783.53 of receipts of business to his own use, and by reason thereof became indebted to plaintiff in such amount were sufficient to support judgment entitling plaintiff to such an amount.

2. Contracts ⇐138(1)

Any contract which has for its object an illegal purpose will not be enforced either in law or in equity.

3. Contracts ⇐153

A court must give every contract such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties. Civ.Code, §§ 1643, 3541.

4. Contracts ⇐153

As between two permissible constructions, that which establishes a valid contract is preferred. Civ.Code, §§ 1643, 3541.

5. Contracts ⇐153

The parties to a contract are deemed to have intended a lawful, rather than an unlawful act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract. Civ.Code, §§ 1643, 3541.

6. Contracts ⇐141(1)

All intendments being against fraud it will not be presumed against a writing that it contemplated a violation of the law, unless the conclusion becomes irresistible from the very reading of the instrument. Civ. Code, §§ 1643, 3541.

7. Insurance ⇐12

Evidence supported finding that copartnership agreement for purpose of conducting an insurance brokerage business was not illegal on ground that it contemplated a greater percentage of controlled business than authorized by statute, notwithstanding that as time went on a greater percentage of partnership's business became controlled business than authorized by statute. St. 1937, p. 1789, § 760; Civ.Code, §§ 1643, 3541; Code Civ.Proc. § 1963, subds. 19, 33.

8. Insurance ⇐12

Evidence supported finding in favor of plaintiff as to provision of copartnership agreement for purpose of conducting insurance brokerage business relating to allocation of profits arising out of the controlled business.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Lennon M. Duntley against Walter S. Tutt for the dissolution of a copartnership. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

H. C. Millsap and W. E. Lady, both of Los Angeles, for appellant.

Wallace K. Downey, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The plaintiff and defendant entered into an oral contract of co-partnership for the purpose of conducting an insurance brokerage business in Los Angeles. This partnership began August 1, 1934, and continued until October 6, 1938. An audit and accounting of the affairs of the partnership disclosed that the defendant was indebted to the plaintiff in the sum of $9,783.53, whereupon the partnership was terminated. The trial court rendered judgment against the defendant for the amount found to be due by the audit.

At least 90 per cent of the partnership business came from two sources:

(a) From insurance premiums paid by companies controlled directly or indirectly by one corporation. This corporation employed the plaintiff and he was also a director of it.

(b) Concerns of which the father of the plaintiff was the owner or interested as a partner.

The business from these two sources will hereafter be referred to as controlled business.

The partnership contract was oral and in substance the trial court found it to be that the partners would solicit and obtain insurance from the public generally, and would divide the profits in the following manner:

Two and one-half per cent of the total premiums from the controlled business to be paid to the defendant, the balance of the profits of the partnership to be shared equally between the partners. There were other provisions in the partnership contract relative to sharing expenses thereof which are not in dispute and which we think have no particular bearing upon a determination of this case.

Upon appeal the defendant urges the following reasons for a reversal of the judgment of the lower court:

1. That certain findings of the trial court are conclusions, and do not support the judgment based thereon.

2. The contract of partnership was illegal because it contemplated a violation of the California insurance law, as contained in the pertinent portions of the Political Code which were in effect at the time the partnership was formed, and as carried forward with some changes in the Insurance Code. Being an illegal contract, the defendant should not be required to account to the plaintiff for any part of the partnership profits which the defendant may have secured at the expense of the plaintiff.

3. A proper construction of the contract required a finding by the trial court that the defendant have judgment against the plaintiff for $11,385.99 instead of the plaintiff having judgment against the defendant for $9,783.53. This for the reason that the contract should be construed to mean that the parties agreed that the defendant was entitled to all of the partnership profits arising out of the controlled business, and that then the partners should share equally in the profits from the other business of the concern. That by so construing the contract it would square the findings with the defendant's theory that the contract was made with due regard to the insurance law of our state.

[1] 1. The findings under attack are:

(1.) That the parties formed a co-partnership for the purpose of conducting an insurance brokerage business, and entered into and conducted said business.

(2.) A finding as to the agreement of co-partnership and the division of the profits and expenses thereof.

(3.) That the defendant applied $9,783.53 of the receipts and profits of the business to his own use, and by reason thereof has become indebted to the plaintiff in that amount.

(4.) That the defendant has neglected and refused and still neglects and refuses to account therefor.

After reviewing these particular findings, and the findings as a whole, we think they are sufficient to sustain the conclusions of law and judgment based thereon.

[2] 2. The assertion of illegality of the contract of co-partnership has been earnestly argued by appellant. This argument is based upon an elementary rule in the law of contracts that any contract which has for its object an illegal purpose will not be enforced, either in law or in equity. As was said in Industrial D. & L. Co. v. Goldschmidt, 56 Cal.App. 507, 509, 206 P. 134, 135: "A contract which contemplates the doing of a thing which is unlawful at the time of the making thereof is void."

But the trial court found the contract to have been made with a legal object in view, and we think there is substantial evidence in the record to support this finding. Neither at the time the partnership was formed, nor at any time during its existence, did the insurance law of this state forbid persons to contract to carry on a brokerage business which included controlled business such as we are here considering. The laws that were in effect during the life of the co-partnership forbade any broker to have more than a certain percentage of such controlled business, and for a violation prescribed the penalty of misdemeanor.

Section 633a20, Political Code; Section 760, Insurance Code, adopted in 1935, St. 1935, p. 517, and as amended in 1937, St. 1937, p. 1789; Section 633a20 of the Political Code, in effect when the partnership was formed, provided that commissions on insurance written for a broker's employer must equal commissions on insurance for persons other than broker's employer, and that the receipt of such commissions on the excess prohibited by the statute would be unlawful.

[3-6] As defendant argues in his own brief, it is the duty of the court to give to every contract such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating

the intention of the parties. Civ.Code, § 1643. An interpretation which gives effect to a contract is preferred to one which makes it void. Civ.Code, § 3541. The California courts have applied the above rule of construction to a variety of situations. Supported by many authorities, the rule is stated as followed in 6 Cal.Jur. 268, section 168:

"As between two permissible constructions, that which establishes a valid contract is preferred to that which does not, since it is reasonable to suppose that the parties meant something by their agreement and were not engaged in an attempt to do a vain and meaningless thing. The parties are deemed to have intended a lawful, rather than an unlawful act, and their agreement is to be construed, if possible, as intending something for which they had the power to contract. All intendments being against fraud and in favor of fair dealing, it will not be presumed against a writing that it contemplated a violation of the law unless the conclusion becomes irresistible from the very reading of the instrument." Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42 at page 58; Boland v. Boland, 7 Cal.App.2d 401, 46 P. 2d 238; Entremont v. Whitsell, 13 Cal.2d 290, 89 P.2d 392; General Paint Corp. v. Seymour, 124 Cal.App. 611, 12 P.2d 990; Schroeder v. Wheeler, 126 Cal.App. 367, 14 P.2d 903; White v. Cascade Oil Co., 14 Cal.App.2d 695, 58 P.2d 994; Smith v. Luning Company, 111 Cal. 308, 43 P. 967; Maguire v. Reardon, 41 Cal.App. 596, 183 P. 303; Brown v. Kling, 101 Cal. 295, 35 P. 995.

[7] Therefore, it is apparent to us that the trial court applied these well known and understood principles in the law of contracts to the problem before him, and gave to the plaintiff the presumption which our law required him to give—that the transaction in question was fair and regular and that the law was obeyed.

Subdivisions 19 and 33, section 1963, Code of Civil Procedure.

It is not disputed that as time went on 90 per cent of the insurance business of the partnership was controlled business. We have not analyzed the controlled business to ascertain what part of it came within the statutory inhibition, because there is evidence in the record from which the court could, and did draw the conclusion that, in its inception, this partnership contract contemplated soliciting the general public for business, and that the contracting parties contemplated that business obtained from the public generally would amount to more than the percentages of controlled business permitted by the insurance code. We think that the conclusion of the trial court was the proper one.

[8] 3. What we have just said relative to the finding of the trial court of the legality of the contract of partnership applies with equal force to the third reason of appeal presented by the defendant. There was nothing in the law which made it necessary for the parties to contract as to any special allocation of profits from the controlled business. This being so, the construction contended for by the defendant was not required of the trial court as a matter of law. Therefore, the finding being based upon a matter of fact, the record contains ample evidence to sustain it.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 234

LIND v. BAKER et al. (two cases).

Civ. 2944.

District Court of Appeal, Fourth District, California.

Dec. 2, 1941.

1. Judgment ⇐191

The decision of the court, when filed, amounts in law to "rendition of judgment", though it is not the "judgment" itself, and the written findings and conclusions constitute the "decision". Code Civ.Proc. § 632.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision", "Judgment", and "Rendition of Judgment".

2. Judgment ⇐270

A judgment prepared and signed by judge is not effective until filed with the clerk, and until then it is but a purpose of judge which can be changed as he may determine, and is not a "record" in the case

and hence not a "judgment". Code Civ.Proc. §§ 632, 664.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

3. Judgment ⇐272

Where judgment, though erroneously given a date prior to date of findings, was not actually filed until after findings were filed, it was not invalid as premature. Code Civ.Proc. §§ 632, 664.

4. Specific performance ⇐8

Refusal to enter a default judgment for specific performance as against defendants who had failed to plead to cross-complaint was not error, in view of court's discretion in awarding specific performance. Code Civ. Proc. §§ 578, 579, 585.

5. Specific performance ⇐8

The remedy of specific performance is not a matter of absolute right but is within court's sound discretion, to be exercised in accordance with established principles of equity with reference to facts of particular case. Code Civ.Proc. §§ 578, 579, 585.

6. Specific performance ⇐8

A contract may be valid in law and not subject to cancellation in equity, and yet terms thereof and attendant circumstances may require court to deny its specific performance. Code Civ.Proc. §§ 578, 579, 585.

7. Specific performance ⇐6

Specific performance of a contract will not be granted when it is not mutually enforceable and the one seeking its enforcement could not be compelled to perform.

8. Specific performance ⇐6, 75

A provision in contract for purchase of mining claims, whereby purchaser could be required to continue mining operations for 20 years or more, could not be enforced by specific performance, and hence purchaser could not herself compel specific performance, in view of lack of mutuality. Civ. Code, §§ 3386, 3390–3392, 3394.

9. Specific performance ⇐105(3)

Purchaser of mining claims was "estopped" from enforcing specific performance of the purchase contract, on ground of "laches" or "abandonment", in view of her three years' delay after knowing that vendor did not intend to perform.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment", "Estop", and "Laches".

10. Equity ⇐84

There is no artificial rule as to the lapse of time or circumstances which will justify application of the doctrine of "laches", but each case, as it arises, must be determined by its own circumstances.

11. Contracts ⇐256

Failure to take action to enforce equitable rights within a reasonable time after notice that other party will not perform, ordinarily, indicates that dilatory party is exercising his option to consider the contract abandoned by reason of the other's default or rescission.

12. Appeal and error ⇐949
Equity ⇐67

The question of laches or abandonment is usually directed to trial court's sound discretion, and, in absence of sufficient showing of abuse of such discretion, court's finding thereon will not be disturbed on appeal.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by H. B. Lind against Annie M. Baker and others, to quiet title to mining claims, wherein Helen E. Lind filed cross-complaint seeking specific performance of contract for sale of claims. From an adverse judgment, the cross-complainant appeals.

Affirmed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

Harry H. Parsons, of San Bernardino, and Sharpless Walker, of Santa Ana, for cross-defendants and respondents.

Victor J. Hayek, of Los Angeles, for cross-defendant C. C. Darling.

Le Roy French, of Los Angeles, for plaintiff H. B. Lind.

GRIFFIN, Justice.

This is an action in equity to specifically enforce a purported contract for the sale of four mining claims located in San Bernardino county. The issues were presented on a cross-complaint filed by Helen E. Lind, appellant herein. A trial was first had on the complaint in this action, and after judgment thereon, a trial was had on appellant's cross-complaint.

On the 20th day of June, 1934, H. B. Lind filed an action to quiet title to several mining claims in San Bernardino county.

Four of the claims included in the complaint are the subject-matter of appellant's cross-complaint. H. B. Lind shall hereafter be referred to as "plaintiff". Plaintiff claimed title to the claims on the basis of locations made by him on July 1, 1931. The four claims in question on this appeal had prior to July 1, 1931, been located in the name of cross-defendant and respondent Annie M. Baker. There were numerous defendants in the principal action claiming interests upon different grounds. All of the defendants in the principal action were also named as cross-defendants in appellant's cross-complaint. As will subsequently appear, the rights of certain of these cross-defendants are not in issue on this appeal.

Appellant's claim is based upon a purported contract of sale made in 1930 between appellant and the respondent Annie M. Baker. It was only enforceable, if at all, in the event the claims had not been lost by her or her successors in interest, due to the subsequent locations by plaintiff. It was agreed by all parties that a trial should be first had on the issues of the complaint and, if the plaintiff prevailed thereon, the cross-complaint of appellant would necessarily fail. It was also agreed that in the event the plaintiff did not prevail upon his complaint, then a trial would be had on the cross-complaint of the appellant. The parties proceeded to trial on the complaint. Findings of fact and a judgment were entered in favor of the defendants and against the plaintiff. This judgment was entered in March, 1937, and considered on appeal in the case of Lind v. Baker, 31 Cal.App.2d 631, 88 P.2d 777, wherein many facts pertinent to this appeal are set forth. By the judgment it was held that the plaintiff had no right or interest in the four claims in issue on this appeal. After the judgment on the complaint had been entered the appellant proceeded to trial on her cross-complaint. The cross-complaint included a cause of action for an accounting. Appellant at the trial abandoned this cause of action. After trial a judgment was rendered against the appellant and in favor of all the cross-defendants. Appellant now appeals from that judgment.

Prior to 1928, Charles A. Bell and his wife, Sarah Bell, occupied and worked certain mining claims in San Bernardino county. The four claims which are the subject matter of appellant's claimed contract were among the claims owned by Mr. and Mrs. Bell. In January of 1928, Mrs. Bell separated from her husband but he stayed on the property until his death in June of 1932 and continued to work some of the claims. In July, 1929, Bell relocated the four claims in question in the name of his sister, Annie M. Baker, one of the cross-defendants and respondents herein. About October 31, 1931, Annie M. Baker conveyed all her rights to the claims to her children, the cross-defendants and respondents Bayard T. Baker, Verne A. Baker and Elizabeth Henderson Baker. Charles Bell died in June, 1932, and Sarah Bell died in August, 1932. Both died intestate. The cross-defendants and respondents Helen J. Duncan, Ethel A. Golway, Lena Maxson, and Eva Willerford are the heirs of Sarah Bell. The claim of the Bell heirs is based upon the community interest, if any, acquired by Sarah Bell in the locations made by Charles Bell in the name of his sister, Annie M. Baker. It has been adjudicated in the main action that Annie M. Baker had legal title to the claims.

It is contended by appellant that the Bell heirs may have some interest in the money to be paid under the claimed contract, but that this in no way interferes with the right of appellant to have her contract specifically enforced.

On the 27th day of September, 1930, Annie M. Baker executed an offer in writing to appellant whereby she offered to sell certain named mining claims to appellant. Portions of this written offer are as follows:

"To H. E. Lind, * * *

"In the matter of my lode mining claims named respectively the Gold Bullion (nee Gold Bronze), Paymaster, Coyote, Badger and Copper King, * * * I * * * submit to you the following proposal:

"That I will sell to you all of said lode mining claims, * * * for * * * $25,000, payable * * * $1,000 on or before the twentieth day of January, 1931, and the remainder thereof—$24,000—by and through the payment to me until such time as the full purchase price herein named shall have been liquidated, of a royalty of one-tenth part of the gross proceeds derived by you or by your successors or assigns from the sale or shipment or milling of ore mined and sold or shipped from any of said lode mining claims; it being understood that such royalty shall be paid to me whether mined and sold or

shipped or milled by you or by anyone * * * or by your successors or assigns: And with reference to such royalty I here stipulate that, beginning with the twentieth day of July, 1931, and each and every month thereafter until full liquidation shall have been had you shall pay me no less than one hundred dollars per month as royalty—part royalty—hereby waiving payment of no part of the monthly royalty earnings earned in excess of said $100 per month and which may accrue to me by reason of your mining operations on any of said lode claims.

"All royalties shall be paid to me on or before the twentieth day of each and every month, beginning with the month of July, 1931, immediately succeeding the month in which such royalties are earned. * * *

"Failure on your part * * * to faithfully observe and perform all the terms and conditions and to promptly make the initial and royalty payments as in this proposal provided may, if I so elect, work a forfeiture of all rights conferred upon you. * * *

"I hereby further stipulate that you shall have until the 20th day of December, 1930, in which to make full examination and tests of said lode claims, and to that end you shall have the right, on your acceptance of this proposal, to take full possession of said lode claims, * * * so long as you * * * shall fulfill all the conditions in this proposal expressed; it being provided, however, that having examined said lode claims and having tested its ores, should you then fail to approve the same, you shall at time of such disapproval be immediately released from all liability or obligation attaching to you by reason of your acceptance of this my proposal, * * *

"I also stipulate * * * that you shall have twenty days from and after this 27th day of September, 1930, in which to accept or reject this my proposal, your acceptance hereof to be in writing as shall also your disapproval of said lode claims in the event you disapprove or reject them. * * *

"In the latter event this agreement between you and me shall be deemed null and void and of no further effect and, in the event of forfeiture hereunder it shall likewise be deemed null and void and of no further effect. * * *

"(Signed) Annie M. Baker."

The written acceptance was in this form:

"To Annie M. Baker, * * *

"In the matter of your above proposal please be advised that I accept the same and that I hereby agree to abide by all its terms and conditions, and that I reserve the right to approve or disapprove and reject said lode claims on or before the 20th day of December, 1930.

"Dated Los Angeles, California, first day of October, 1930.

"(Signed) H. E. Lind."

This acceptance was acknowledged before a notary public and duly recorded on October 16, 1930. On October 28, 1930, an additional written acceptance was sent to Annie M. Baker reading in part as follows:

"With reference to your proposal to me of date September 27th, 1930, proposing sale to me of your group of lode mining claims named * * * please be advised that I * * * hereby approve and accept said lode claims at the price and on the terms in your said proposal contained. * * *

"(Signed) H. E. Lind."

On November 12, 1930, Annie M. Baker notified H. E. Lind in writing in part as follows:

"In the matter of my proposal to you * * * and your acceptance * * * which, * * * stipulates that you shall, on or before the twentieth day of January, 1931, pay me * * * $1,000, and also begin payment of certain royalties on the twentieth day of July, 1931, please be advised that, beginning with the twentieth day of October, 1930, all time lost to you and your associates by reason of your failure not to gain possession of the premises in said proposal named pursuant to the terms of my said proposal, a failure which I acknowledge and which has been occasioned by my brother, Charles A. Bell, now in the unlawful possession of said premises, refusing to vacate said premises, I will for all such time or period lost to you in the matter of obtaining possession of said premises extend for you—defer for you—the date for the making of said payment of one thousand dollars on or before the twentieth day of January, 1931, and also the dates for paying and continuing paying the royalties of which payment begin with the twentieth day of July, 1931."

On May 14, 1931, Annie M. Baker again notified Mr. Lind as follows:

"I received *you* letter of the 9 and will say the *lese* is up on the 27 May, 1931 and I do not wish to extend it, you can write my son Vern Baker and he will write to you the same from

"Annie M. Baker."

On July 17, 1931, Annie M. Baker notified H. E. Lind and H. B. Lind in part as follows:

"* * * you are in unlawful possession of the claims and property of Mrs. Annie M. Baker. * * *

"We demand that you vacate said premises at once, * * *

"Mrs. Baker has appointed C. A. Bell her agent to act for her in protecting her property as above described, and in seeing that nothing is taken therefrom or any further damage done to said property.

"Annie M. Baker.

"Clara R. Cushman,
"Attorney."

The fifth claim, "Copper King", was included in the written offer. It was subsequently discovered that Annie M. Baker did not own this claim. Appellant seeks only to enforce the contract as to the claims determined to have been owned by her under the decision in Lind v. Baker, supra.

It is now argued by appellant that under the terms of the offer she was permitted to go upon the claims and examine them and make tests; that she had until December 20, 1930, to conduct these tests and could elect to proceed on or before that date; that in the event the tests were not satisfactory to her she was released from all liability; that if she elected to proceed after the tests had been made she was to pay $1,000 to Annie M. Baker on or before January 20, 1931; that on October 1, 1930, in writing, she advised Annie M. Baker that she was going to make the examinations and tests and approve or disapprove the claims on or before December 20, 1930; that an examination of the claims was made and on October 28, 1930, she in writing notified her that she approved the claims and accepted them at the price and under the terms proposed; that under the offer of September 27, 1930, Annie M. Baker promised to allow appellant to have possession of the claims in the event she elected to accept the offer; that Bell was in possession of the claims and refused to surrender possession to appellant or her agents; that because of this fact Annie M. Baker, on November 12, 1930, in writing, advised appellant that since appellant had not been able to gain possession of the claims the due date of the payment of the $1,000 would be deferred to such time as appellant could gain peaceful possession of the premises; that Annie M. Baker was never able to deliver possession to appellant; that on May 14, 1931, Annie M. Baker sent a communication to appellant's father, who was attorney-in-fact for appellant, advising that the "lese" (evidently meaning the offer and acceptance) would be terminated on May 27, 1931, and that it would not be extended; that no offer was made to deliver possession to appellant; that appellant did not at any time gain possession of the claims; that appellant did not accept the letter of May 14, 1931, nor the notice of July 17, 1931, as a rescission of the contract; that appellant was at all times ready, able and willing to take possession and pay the $1,000 when Annie M. Baker could deliver possession to her; that since the offer and acceptance was recorded on October 16, 1930, a lease, with an option to purchase, was entered into on August 30, 1932, by the Bakers with cross-defendants and respondents H. C. Ferris, Fred Sifford and W. L. Marsh; and that these cross-defendants had actual notice and knowledge of appellant's contract and took subject thereto.

It should be noted that after the plaintiff had filed and served his complaint a joint answer was filed by the Baker group and H. C. Ferris and Jane Doe Ferris. These defendants appeared through their own attorneys. Subsequently, and on August 22, 1934, the appellant filed her answer and cross-complaint in the action. The above-named defendants were also named cross-defendants in the cross-complaint. They were served with a copy of the cross-complaint on September 24, 1934, by serving their attorneys of record. They did not plead to appellant's cross-complaint. On February 13, 1936, an order to enter the defaults of these cross-defendants was filed by the appellant. Subsequently, and on February 14, 1936, the defaults of these cross-defendants were entered by the clerk. No attempt was made by any of these cross-defendants to set aside these defaults. On July 14, 1936, a joint and separate answer of W. L. Marsh, H. C. Ferris and Fred Sifford was served and filed through their attorney, Harry H. Parsons, denying that appellant had any rights in the lode claims.

It alleges that Helen E. Lind is not the real party in interest in the cross-complaint but is a co-conspirator with H. B. Lind, her father, in obtaining title to the claims; that the Baker group were at all times since the 1st day of August, 1932, the owners and in possession of the claims; that while the cross-defendants Baker group were in possession and full ownership of the claims, the answering cross-defendants on August 30, 1932, entered into a written contract of sale of the claims, together with the machinery and equipment thereon for the sum of $30,000; that the contract was recorded on March 13, 1933; that on June 1, 1934, this contract was merged into a final written contract between these same parties under the same conditions except as to amounts due on the balance of the purchase price; that the answering cross-defendants entered into possession of the claim, placed machinery thereon, developed the property, and expended sums of money thereon in excess of $17,500, up to the time this litigation started; that these expenditures were made in good faith for a valuable consideration and without notice of cross-complainant's claim or right to purchase or possess these claims; that the offer and acceptance and extension set forth in the cross-complaint have been repudiated and abandoned by the cross-complainant and the real party in interest, H. B. Lind, her co-conspirator, and have not been in force, effect, or validity at all in any particular since July 16, 1931; that the cross-defendants Baker group and answering cross-defendants' interests and claims are one and the same; that appellant knew that the answering cross-defendants had made the contract, entered into possession, and were making the improvements and expenditures, and designedly and silently permitted the same to be done and made until the development was arrived at and the properties became paying and valuable properties, without making any claim and without notice of any claimed right they had to possession or title to the claims, and that appellant should be estopped to insist on the claimed right asserted in her cross-complaint; that cross-defendants Baker group and the answering defendants were entitled to the possession of and are the sole owners of the claims save as to the paramount title in the United States; and that cross-complainant does not come into court and seek equity with clean hands. Dismissal of the cross-complaint and judgment for defendants was sought by the answers.

At the trial on appellant's cross-complaint counsel for appellant, after offering certain evidence, moved the court to enter judgment against the defaulting cross-defendants. The court refused to grant the motion. The court then allowed counsel for respondents Marsh and Sifford to cross-examine appellant. After the evidence for all parties was submitted to the court appellant renewed her motion to enter judgment against the defaulting defendants. The court then ruled that it would "leave that under submission along with the other matters".

After the trial the entire matter was taken under submission by the court and subsequently the court found that the "second aspect of the case, by agreement of the respective parties in open court, was duly tried and submitted to the court * * * upon the cross-complaint of Helen E. Lind and the answers thereto of the above-named defendants and all of the defendants. And after hearing all of the testimony and evidence of all of the respective parties the cause was submitted to the court for findings, conclusions and decree." It then also found: "That all of the allegations and averments of the cross-complaint of Helen E. Lind are untrue and wholly unproven, and that the allegations and denials of the defendants above named in their answers and cross-complaints are true and wholly proven. That it is not true that the cross-complainant Helen E. Lind was ever ready, able and willing to pay the $1,000 in cash mentioned in her alleged option or contract to purchase; that it is not true that defendant Annie M. Baker ever refused to surrender possession of the mining claims to Helen E. Lind; that it is not true that defendants Sifford, Marsh and Ferris were wrongfully in possession thereof; that it is not true that Helen E. Lind is entitled to the possession of the mining claims or any part of them; and that it is not true that any of the defendants Baker group ever breached any contract with Helen E. Lind; that Helen E. Lind has failed to make out a case for any relief; that the property and lode claims are the property of the Baker group; and that Helen E. Lind has no right of possession or title under the alleged contract or otherwise; that Helen E. Lind take nothing and that her cross-complaint be dismissed"; and that "judgment is hereby ordered to be entered accordingly. Dated March 2nd, 1940." Judgment was thereafter entered and filed April 10, 1940. A discrepancy, for some unexplained reason,

exists as to the date preceding the signature of the judge on the signed judgment. It recites: "Dated this 10th day of January, 1940." This date was previous to the date of the signing of the findings. This was obviously an error as to the actual date on which the judgment was signed.

Appellant now, as her first point, seeks to take advantage of this error and contends that the court committed error in rendering the judgment two months prior to the time it made its findings of fact and conclusions of law, and that accordingly under the decision of Easterly v. Cook, 140 Cal. App. 115, 35 P.2d 164, the judgment was premature and void for the reason that the decision and findings had not been rendered in writing or signed by the judge as required by section 632 of the Code of Civil Procedure.

[1-3] Under that section, whenever findings are required there can be no rendition of judgment until they are made and filed with the clerk. The decision of the court, referred to in section 632, when filed, amounts in law to rendition of judgment, though it is not the judgment itself. It is the written findings and conclusions which constitute the decision of the court. Fuhrman v. Superior Court, 2 Cal.2d 250, 39 P. 2d 802; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357. A judgment prepared and signed by the judge is not effective until it is filed with the clerk. Until then it is but a purpose in the breast of the judge which can be changed as he may determine. Until it is filed it does not become a record in the case and consequently it is not a judgment. Broder v. Conklin, 98 Cal. 360, 33 P. 211. Under section 664 of the Code of Civil Procedure, "If the trial, in a superior or municipal court, has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision; * * *. In no case is a judgment effectual for any purpose until entered." Regardless of the date the judgment was signed in the instant case, it was filed with the clerk and entered subsequent to the signing and filing of the findings. It was therefore not effective until it was thus filed and entered. In the case relied on by appellant, the judgment was *filed* before the findings and decision had been signed by the judge. The facts are not similar. There is no merit to this contention.

[4-6] The second point presented which is untenable, is that the court erred in refusing to enter a default judgment as and when demanded. Even though the contract between appellant and Annie M. Baker may be a valid contract, the remedy of specific performance is within the sound discretion of the court and is not a matter of absolute right. The enforcement of a contract by a decree for its specific performance rests in the sound discretion of the court, a judicial discretion to be exercised in accordance with established principles of equity with reference to the facts of the particular case. The contract may be valid in law and not subject to cancellation in equity and yet the terms thereof and the attendant circumstances may be such as to require the court to deny its specific performance. Hershey v. Los Angeles Pacific Co., 171 Cal. 353, 153 P. 230; Stiles v. Cain, 134 Cal. 170, 171, 66 P. 231; O'Hara v. Wattson, 172 Cal. 525, 157 P. 608; Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662; Goodyear Tire & Rubber Co. v. Miller, D.C., 14 F.2d 776, 778; secs. 578, 579 and 585, Code Civ.Proc.

[7] The third point deserves more consideration and, in effect, is determinative of the previous and remaining points. It is contended that the contract between appellant and Annie M. Baker was a valid and enforceable agreement and that the court erred in not specifically enforcing it. It is respondents' contention that specific performance of a contract will not be granted when its nature is such that it is not mutually enforceable and the one seeking its enforcement could not be compelled to perform. This general rule needs little citation. Wheat v. Thomas, 209 Cal. 306, 314, 287 P. 102; sec. 3386, Civ.Code; O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861. The question then presented is this: Is the contract one coming within the rule and enforceable under sections 3390, 3391, 3392 and 3394 of the Civil Code?

Under section 3390, supra, an obligation cannot be specifically enforced to render personal service or an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Under section 3391, supra, it cannot be enforced against a party if he has not received an adequate consideration for the contract or if it is not, as to him, just and reasonable. Under section 3392, supra, it cannot be enforced in favor of a party who has not fully and fairly performed all of the conditions precedent on his part to the obligation of the other party, with cer-

tain exceptions. The terms of the contract sought to be enforced herein may have been reasonably interpreted by the trial court to require that the appellant and cross-complainant, or her successors or assigns, after the payment of $1,000 in cash on or before January 20, 1931, or within the time as extended, pay a balance of $24,000 out of "a royalty of one-tenth part of the gross proceeds derived by you or by your successors or assigns from the sale or shipment or milling of ore mined and sold or shipped from any of said lode mining claims". There is no provision for any payments to be made except out of royalties, but there is a requirement that the minimum royalty to be paid shall not be less than $100 per month. It is obvious that the appellant or her successors or assigns, under the terms of the contract are required to mine and mill or ship ore from the mining claims, and under its terms these mining operations may be required to continue for a period of twenty years or more, during all of which time it would be essential that the appellant mine and mill or ship ore from the mining claims and operate the site, improvements, buildings, hoists and equipment. In Hupp v. Lawler, 106 Cal.App. 121, 288 P. 801, 802, the court said: "It is well to keep in mind that the controlling consideration and ultimate purpose governing and actuating the respondent was *the development of the quarry, and profitable sale of the product therefrom.* * * *"

After stating the rule that the remedy of specific performance must be mutual and that the test of mutuality is whether the agreement is of such a character that at the suit of either, a court of equity would decree specific performance against the other, and after citing a number of cases, the court said (page 125 of 106 Cal.App., page 803 of 288 P.):

"Innumerable cases could be cited to the same effect. Many of these authorities cite Pomeroy on Contracts, § 312, where it is said:

" 'Finally, contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction, with the exercise of special knowledge, skill and judgment in such oversight—such as agreements to repair or build, to construct works, to build or carry on railways, mines, quarries, and other analogous undertakings —are not as a general rule specifically enforced.' "

See, also, Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L.R.A. 334.

[8] It has been held that where the liability of a person is limited to payment from a particular and special fund, if such fund does not exist, no payment can be enforced. Bagley v. Cohen, 5 Cal. Unrep. 783, 50 P. 4. Under the authorities cited and the possible interpretation of the contract, the appellant cannot be compelled by specific performance to conduct the mining operations and to mine and mill or ship the ores as required by the contract. For the reason that the contract is lacking in mutuality of enforcement and being manifestly unenforceable as to the appellant, she may not enforce it as to the respondents. The trial court therefore committed no error in refusing to find in favor of appellant.

[9] The evidence indicates that appellant was never in possession of the mining properties. Appellant knew, on July 17, 1931, that respondent Annie M. Baker did not intend to carry out the purported contract. She delayed taking any action in relation thereto until she filed her cross-complaint on August 22, 1934, more than three years later. During all of this time she knowingly stood by and allowed the interests of other respondents to intervene, enlarge and mature. They expended approximately $20,000 in labor and money on the claims involved. The trial court found that appellant was estopped from enforcing the contract, apparently on the ground of laches or abandonment. This finding is supported by the evidence.

[10, 11] In Gatley v. Shockley, 215 Cal. 604, 12 P.2d 436, which is factually similar to the instant case, the court held that the defendant was guilty of laches where she remained inactive for approximately three years and failed to satisfactorily explain her inaction where, in the meantime, the plaintiff had re-leased the property to others. See, also, Akley v. Bassett, 189 Cal. 625, 647, 209 P. 576. As has been often said, there is no artificial rule as to the lapse of time or circumstances which will justify the application of the doctrine of laches. Each case, as it arises, must necessarily be determined by its own circumstances. Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2. When a dilatory party fails to take action to enforce his equitable rights within a reason-

able time under all the circumstances after he is on notice that the other party will not perform, such failure would ordinarily indicate that the dilatory party is thereafter in fact exercising his option to consider the contract abandoned by reason of the default or rescission of the other party. De Huy v. Osborne, 96 Fla. 435, 118 So. 161.

[12] In Morrow v. Coast Land Co., 29 Cal.App.2d 92, 84 P.2d 301, this court held that where it appeared that plaintiffs and their predecessors stood idly by without asserting any rights while defendants expended huge sums of money in developing the land to the point of oil discovery, a finding that plaintiffs and their predecessors were guilty of laches had sufficient evidentiary support. See, also, Lohn v. Fletcher Oil Co., Inc., 38 Cal.App.2d 26, 100 P.2d 505. The question of laches or abandonment is one usually directed to the sound discretion of the trial court and in the absence of a sufficient showing of an abuse of such discretion, the court's finding thereon will not be disturbed on appeal. Lohn v. Fletcher Oil Co., Inc., supra, 38 Cal.App.2d page 32, 100 P.2d 505. No abuse of discretion appears.

The court also found that appellant failed to tender the initial payment of $1,000 before filing her cross-complaint for specific performance.

There is some merit to this contention but in view of the determination of the previous points discussed it becomes unnecessary to determine this question. Other points raised, technical in character, are without merit. The trial court was justified in denying appellant specific performance of the claimed contract and leaving her to her remedy, if any, at law.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

19 Cal.2d 162

CHICAGO BRIDGE & IRON CO. v. JOHNSON.

Sac. 5416.

Supreme Court of California.

Dec. 15, 1941.

1. Statutes ⇐245

The purpose sought to be accomplished by a statute relating to taxation is important in construing such statute and in determining the scope of its application.

2. Licenses ⇐15(1)

One of the purposes of the Use Tax Act is to make the coverage of the tax complete to the end that the Retail Sales Tax Act will not result in an unfair burden being placed upon the local retailer engaged solely in intrastate commerce as compared with the case where the property is purchased for use or storage in California and is used or stored in the state. St.1933, p. 2599; St. 1935, p. 1297.

3. Licenses ⇐15(1)

The Retail Sales Tax Act and the Use Tax Act are complemental to each other with the aim of placing the local retailers and their out-of-state competitors on an equal footing. St.1933, p. 2599; St.1935, p. 1297.

4. Licenses ⇐15(1)

Before a storage, use, or other consumption of goods comes within the Use Tax Act, tangible personalty stored or used must be purchased by the storer or user, the purchase must have been made from a retailer, the purchase must have been made on or after July 1, 1935, the property must have been purchased for use or storage in California, and the property must have been used or stored in California. St.1935, p. 1297.

5. Licenses ⇐15(1)

Where Illinois corporation qualified to do business in California purchased raw materials outside of California and manufactured the same into completed tanks at plant outside California and sold tanks to customers, and the "knocked down" tanks were shipped in interstate commerce to corporation's representatives in California and were assembled and installed by crews of workmen which the corporation sent from state to state for that purpose, the corporation was properly required to pay use tax. St. 1935, pp. 1297, 1298, §§ 2(a–c, f), 3.

6. Commerce ⇐63

Where Illinois corporation qualified to do business in California purchased raw materials outside of California and manufactured the same into completed tanks at plant outside California and sold tanks to customers, and the "knocked down" tanks were shipped in interstate commerce to corporation's representatives in California and were assembled and installed by crews of workmen which the corporation sent from state to state for that purpose, the Use Tax Act as applied to the corporation did not impose a prohibited regulation or burden upon "interstate commerce" in view of fact that the Use Tax Act is complemental to the Sales Tax Act and the two give a complete, uniform, and equal coverage. St.1933, p. 2599; St.1935, p. 1297; U.S.C.A.Const. art. 1, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

7. Commerce ⇐63

It is only when a tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred on Congress that the tax exceeds constitutional limitations. U.S. C.A.Const. art. 1, § 8.

8. Commerce ⇐63

It is not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. U.S.C.A. Const. art. 1, § 8.

9. Commerce ⇐63

The tax imposed by the California Use Tax Act is not a regulation of "interstate commerce" although it may incidentally affect it, but is merely a tax on an event occurring in the state which does not burden interstate commerce nor place it at a disadvantage in view of fact that it is complemental to the Sales Tax Act and the two give a complete, uniform, and equal coverage which endeavors to place intrastate commerce on a fair and equal basis with interstate commerce. St.1933, p. 2599; St.1935, p. 1297; U.S.C.A.Const. art. 1, § 8.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Chicago Bridge & Iron Company against Charles G. Johnson to recover money paid under protest for use tax. From a judgment for plaintiff, defendant appeals.

Reversed.

Earl Warren, Atty. Gen., and H. H. Linney and Adrian A. Kragen, Deputy Attys. Gen. (F. S. Wahrhaftig, of Sacramento, of counsel), for appellant.

Pillsbury, Madison & Sutro, of San Francisco, Devlin, Devlin & Diepenbrock, of Sacramento, Chritton, Wiles, Davies, Hirschl & Dawson, of Chicago, Ill., S. Nielson, of San Francisco, and Walker B. Davis, of Chicago, Ill., for respondent.

PER CURIAM.

The controversy presented by this appeal involves the liability of plaintiff for the payment of the use tax levied under the California Use Tax Act of 1935. Stats. 1935, p. 1297; Deering's Gen.Laws, Act No. 8495a. Plaintiff paid the tax under protest and then obtained judgment in the court below for the refund thereof; the defendant, Treasurer of the State of California, prosecutes this appeal from that judgment.

Plaintiff is a corporation organized and existing under the laws of Illinois with its principal offices in Chicago, Illinois. It has qualified to do business in California and maintains sales offices and places of business at San Francisco and Los Angeles, California. Plaintiff is primarily a manufacturer of tanks. It purchases the raw materials, such as steel, outside of California, and manufactures the same into completed tanks at one of its plants, also outside of California. It sells those tanks to its customers in many parts of the United States. The tanks are of such size that they cannot be transported in a single unit, and for that reason, they are shipped "knocked down" and assembled and installed at their destination. Due to the nature of the business and other factors, the plaintiff finds it necessary in making a sale of a tank to include the assembly of the completed parts and the installation thereof on the customer's premises. As expressed in the stipulation of the parties, "the requirement of each * * * contract (for a tank) that (plaintiff) assemble and install the tank described in that contract * * * was relevant and appropriate to and essentially connected with the subject matter of that contract and inhered, and was properly made to inhere, in the duty of performing the contract". The "knocked down" tanks are shipped in interstate commerce to plaintiff's representatives in California, and are assembled and installed by crews of skilled workmen which plaintiff sends from state to state for that purpose. Under the typical contract between plaintiff and one of its patrons the tanks are to be assembled and attached to the buyer's real property and title to the tank and all parts thereof remain in the plaintiff until the contract price is paid; the last payment on the price is to be made when the tank has been completely installed and tested. The tanks are manufactured by plaintiff pursuant to the special order of plaintiff's customers.

Some of the raw materials purchased by plaintiff for the manufacture of the tanks is purchased for use in the performance of a particular contract or order for a tank and some for stocks maintained at plaintiff's plant for subsequent use in the course of its business operations and for installation at such places as its business may require. The tanks, or rather the completed and component parts thereof, after being shipped to a place at or near where they are to be installed on the customer's premises, are there held by plaintiff for a period of time in the form of tangible personal property, such period being no longer than necessary for the assembly and attachment of the same to the customer's property.

From July 1, 1935, to December 31, 1937, plaintiff was engaged in the performance of contracts for tanks with purchasers in California. Raw materials costing about $161,000 were purchased by plaintiff outside of California expressly for manufacturing tanks to be erected in this state, and materials costing about $70,00, which had likewise been purchased by plaintiff outside this state and were placed in plaintiff's stock at its plants to be used as its business might require but not intended for use in the performance of any particular contract, were used in the manufacture of tanks at its plants and the "knocked down" tanks shipped to and erected in California in the customary manner. On the basis of those figures the state board of equalization determined the tax here involved to be payable by plaintiff.

Plaintiff urges that the judgment here appealed from may be supported on the theories that the Use Tax Act is not by its terms applicable to the tanks under

the circumstances here involved and that it is not and cannot constitutionally be made applicable to the storage or use of said tanks in the course of their installation because all such storage or use was in interstate commerce.

[1-3] In approaching this problem it is first necessary to consider the purpose and object of the use tax. It cannot be doubted that the purpose sought to be accomplished by a statute relating to taxation is important in construing such statute and in determining the scope of its application. City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595. One of these purposes is to make the coverage of the tax complete to the end that the retail sales tax (Stats.1933, p. 2599) will not result in an unfair burden being placed upon the local retailer engaged solely in intrastate commerce as compared with the case where the property is purchased for use or storage in California and is used or stored in this state. The two taxes are complemental to each other with the aim of placing the local retailers and their out-of-state competitors on an equal footing. The fundamental principles to be considered in applying such an act are expressed in the case of Southern Pacific Company v. Gallagher, 306 U.S. 167, 171, 59 S.Ct. 389, 390, 83 L.Ed. 586, as follows: "The Use Tax Act is complemental to the California Retail Sales Tax Act of 1933. The latter levies a tax upon the gross receipts of California retailers from sales of tangible personal property; the former imposes an excise on the consumer at the same rate for the storage, use or other consumption in the state of such property when purchased from any retailer. As property covered by the sales tax is exempt under the use tax, all tangible personalty sold or utilized in California is taxed once for the support of the state government. Definitions in the Use Tax Act of taxpayer, retailer, storage and use are designed to make the coverage complete. A retailer is 'every person engaged in the business of making sales for storage, use or other consumption'; use is the exercise of any right or power incident to ownership, except sale in the regular course of business; storage is any 'keeping or retention' with a similiar exemption; and a taxpayer includes everyone 'storing, using or otherwise consuming' the property subject to the use tax."

With these thoughts in mind we turn to the particular case before us. The Use Tax Act provides as follows: "An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property." Stats.1935, pp. 1297, 1298, sec. 3. The words used in the clause imposing the tax are defined in the act as follows:

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

"(c) 'Purchase' means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a purchase. * * *

"(f) 'Retailer' means and includes every person engaged in the business of making sales for storage, use or other consumption; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act." Section 2.

The tax imposed in the instant case must necessarily be based upon the storage or use by plaintiff of tangible personal property between the time it arrives in California at the place at or near which it is to be assembled and erected and the completion of the erection and fixation thereof to the real property of the purchaser thereof.

[4] It is conceded by defendant before a storage, use or other consumption comes within the terms of the act and is thereby taxable, five conditions must be met: (1) The tangible personal property stored or used must be purchased by the storer or user. (2) The purchase must have been made from a retailer. (3) The purchase must have been made on or after July 1, 1935. (4) The property must have been purchased for use or storage in this state. (5) The property must have been used or stored in this state. There is no question that the second, third and fifth conditions have been satisfied in this case. The retention of the "knocked down" tanks in this state pending their installation and the installation thereof would constitute the necessary storage and use. Plaintiff asserts, however, that the tangible personal property (the tanks), the storage or use of which was taxed, was not purchased by it, but on the contrary was manufactured by it. The fallacy of that argument lies chiefly in its inaccurate assumption with respect to the property used or stored and thereby taxed. It is quite true that the tanks, or the completed but unassembled parts, which were shipped to this state were not purchased by the plaintiff in that form; they were manufactured by it. It acquired the raw materials out of which it manufactured or fabricated those completed parts, and it is the storage and use of those materials upon which the tax is based. The tax was computed upon the cost, that is, the sales price of these materials to plaintiff, and that is the price which it paid for them. The fabrication and construction of these materials into the completed articles undoubtedly enhanced their value, but the tax is not calculated on that value. It is based on the sales price to plaintiff of the materials which were used to fabricate the finished product which materials were undeniably purchased by plaintiff. The sales to plaintiff of the materials were not made for resale in California; rather they were sold to it to be fabricated by it and stored and used in this state. It was selling the completed tanks erected on the purchaser's premises, not the materials it had purchased for fabrication. It would appear that if the materials were purchased in California and used in a plant maintained here for the manufacture of tanks, the sale of the materials to it would be subject to the California sales tax. If the complete coverage and complementary nature of the sales tax and the use tax are to be preserved, it must be true that the materials are subject to the use tax when purchased and fabricated elsewhere even though their form may be altered by the reason of the fabrication.

It cannot be doubted that those materials which were purchased by plaintiff to fabricate tanks specifically to fulfill contracts or orders for tanks in California, were purchased for use, storage or other consumption in this state. Those materials were designed for the purpose of being used by plaintiff to erect tanks on its customer's premises in California in compliance with its contractual obligation. To say that in ascertaining whether the tax applies, one may not look through the fabrication or manufacture to the purchase of materials used in that process and conclude that such purchase was for storage or use in California, is to sacrifice substance for form. The true reason and purpose for purchasing the materials was not merely the fabrication thereof into tanks. Plaintiff did not intend to stop there. It purchased those materials for use and did use them in this state.

In regard to the portion of materials purchased by plaintiff and retained as stock in its plants outside this state to be used in the construction of tanks as its business might require, it is clear that in order that the object and purpose of the Use Tax Act may not be frustrated, it must be concluded that they were subject to the use tax. Those materials were purchased for use, storage or other consumption in this state. While it is true that they were not acquired with the express purpose of performing any specified contract or order, plaintiff was engaged in the business of selling and constructing tanks in California. In the course of its business those materials might be used in California or elsewhere. It cannot be said therefore that they were not purchased for use here. They were purchased for use in California if and when the business required their use here to fill an order. The requirement arose and they were used in this state. It follows that those particular materials were purchased for use in California. The materials being used here following the intent to use them here upon a certain contingency, it objectively follows that they were acquired for use here.

[5] We conclude therefore that the materials were purchased for use in California, and were stored by plaintiff when they were in this state on or near the customer's premises awaiting installation, and were used by plaintiff here while they were being installed in the tanks erected for said customers.

[6] Plaintiff also urges in support of the judgment that the Use Tax Act cannot apply to the property here involved because the storage and use thereof is in interstate commerce, that is, to so apply the act would be in violation of the interstate commerce clause of the Constitution of the United States. U.S.Const., art. I, sec. 8. And further that the act itself exempts "property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America * * *". Stats. 1935, pp. 1297, 1299, sec. 4. Those propositions will not support the judgment. The use tax as applied to plaintiff does not impose a prohibited regulation or burden upon interstate commerce. The cases of Southern Pacific Co. v. Gallagher, supra, and Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182, 59 S.Ct. 396, 83 L.Ed. 595, are decisive of the question. In the first Gallagher case above cited, the tangible personal property, the storage and use of which was held subject to the Use Tax Act, included materials for repairs and replacement of the tracks on railroad lines in this state which lines carried the company's interstate business, and office equipment used in its interstate activities; the materials were purchased outside this state by the company for that use in this state and were shipped here. The storage was "merely incidental to protection until use, as office supplies in a closet or an extra frog at a section tool house". "To avoid delay and cost the movement from loading to final placement is as nearly continuous as managerial efficiency can contrive." "All purchases may be said to be dedicated to consumption in the interstate transportation business" of the company. "Subsequent to repairing and reconditioning, rolling stock moves again in interstate transportation, as do cars after being stocked with supplies." The Supreme Court of the United States, after stating the rules that, "The principle illustrated in the Helson case [Helson and Randolph v. Kentucky, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683] forbids a tax upon commerce or consumption in commerce. The Wallace case [Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730, 87 A.L.R. 1191], and precedents analogous to it, permit state taxation of events preliminary to interstate commerce", holds the use tax as applied to the storage and use of such railroad supplies and equipment valid in the following language, at page 176 of 306 U.S., at page 393 of 59 S.Ct., 83 L.Ed. 586: "In the present case some of the articles were *ordered out of the state under specification suitable only for utilization in the transportation facilities and installed immediately on arrival at the California destination.* If articles so handled are deemed to have reached the *end of their interstate transit* upon 'use or storage,' no further inquiry is necessary as to the rest of the articles which are subjected to a retention, by comparison, farther removed from interstate commerce. We think *there was a taxable moment when the former* had reached the end of their interstate transportation and had not *begun to be consumed in interstate operation.* At that moment, the tax on storage and use —retention and exercise of a right of ownership, respectively—was effective. The interstate movement was complete. The interstate consumption had not begun." (Emphasis added.) Pacific Telephone & Telegraph Co. v. Gallagher, supra, is to the same effect.

In the instant case the tax was levied on the storage and use of the materials which were purchased and fabricated into the tank parts, that storage and use consisting of the time after the materials had arrived and while they were awaiting assembly and erection by plaintiff, and the subsequent installation and erection thereof. The interstate transit had ended when the tank parts arrived at their destination near and /or adjoining the customer's premises and awaited assembly in so far as their being subject to the tax was concerned. That was the commencement of the taxable moment; that was the taxable intrastate event which occurred after the interstate transit had ceased.

Plaintiff endeavors to distinguish the Gallagher cases on several grounds. It asserts that in those cases the purchaser installed the equipment for itself, not as a part of a transaction with another as in the case at bar. But as we have pointed out

the plaintiff did install the equipment for itself, that is, the erection of the tank which was in compliance with its contractual obligation so to do. We see no valid distinction between the case at bar and the Gallagher cases where the installation by the Southern Pacific Company of the equipment was made immediately upon its arrival in interstate commerce and immediately upon such installation was used in its interstate activities. Nor does the claim that there were two transactions in the Gallagher cases, namely, the shipment in interstate commerce of the equipment into California followed by its installation and consumption in interstate commerce, while in the case at bar there is only one continuous transaction, namely, the fulfillment of an order for a tank including its final erection. The interstate shipment had come to an end no less in the case at bar than it had in the Gallagher cases. While it is true that it was stipulated that the requirement in plaintiff's contracts for tanks that they be assembled and installed was essentially connected with the contract and inhered in it, the purchase out of California and the shipment here of equipment and the consumption thereof in interstate commerce in the Gallagher cases was no less a continuing and closely integrated operation. The consumption of the equipment in interstate commerce was an essential and necessary part of and inhered in the entire transaction. The whole plan of the shipment of the equipment was that it be immediately consumed in interstate commerce. No shipment would have been made unless it was to be used in interstate commerce.

Even if it be said that the tax here may have affected some event in interstate commerce, it still would not be prohibited by the commerce clause of the Constitution of the United States. The basic reasoning with respect to the conflict between state taxation and that clause is developed in McGoldrick v. Berwind-White Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876. The fundamental test is whether there has been in reality an interference with interstate commerce. In the McGoldrick case a sales tax was imposed upon a buyer for consumption of personal property in the state of New York; the seller was obligated to collect the tax from the buyer and to pay it if the latter failed to do so. The particular transaction involved was one in which a corporation outside of New York filled an order for coal in New York. The court stated at page 45 of 309 U.S., at page 391 of 60 S.Ct., 84 L.Ed. 565, 128 A.L.R. 876:

[7] "In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to *regulate commerce* between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. * * * Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.

[8] "But *it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business,* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823, 115 A.L.R. 944. *Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress.* A tax may be levied on net income wholly derived from interstate commerce. Nondiscriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded. Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. Western Live Stock v. Bureau of Revenue, supra, 303 U.S. page 253, 58 S.Ct. 547, 82 L.Ed. 823, 115 A.L.R. 944 and cases cited." (Emphasis added.)

And again at page 49 of 309 U.S., at page 394 of 60 S.Ct., 84 L.Ed. 565, 128 A.L.R. 876: "If, as guides to decision we look to the *purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action,* and at the same time to the purpose of the *state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens,* and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids. This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods in several instances in the 'original package', effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale, Woodruff v. Parham, supra [8 Wall. 123, 19 L.Ed. 382]; Hinson v. Lott, 8 Wall. 148, 19 L.Ed. 387; Banker Bros. Co. v. Pennsylvania, supra [222 U.S. 210, 32 S.Ct. 38, 56 L.Ed. 168]; Wiloil Corp. v. Pennsylvania, supra [294 U.S. 169, 55 S.Ct. 358, 79 L.Ed. 838]; Graybar Electric Co. v. Curry, 308 U.S. 513, 60 S.Ct. 139, 84 L.Ed. 437; Id., 238 Ala. 116, 189 So. 186, and when the extra-state seller has shipped them into the taxing state for sale there. Hinson v. Lott, supra; Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S. Ct. 643, 67 L.Ed. 1095. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale." And in regard to the delivery of the coal to the buyer pursuant to the order therefor as being an inseparable part of the interstate transaction (similar to plaintiff's contention that the retention of the tanks after arrival and the installation thereof was an integral and indispensable part of its contract to supply the tank), the court said at page 53 of 309 U.S., at page 396 of 60 S.Ct., 84 L.Ed. 565, 128 A. L.R. 876:

"Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise has crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state. Only the sales in the state of destination in the latter class of cases, it is said, are protected from taxation by the commerce clause, a qualification which respondent concedes is a salutary limitation upon the reach of the clause since its use is thus precluded as a means of avoiding state taxation of merchandise transported to the state in advance of the purchase order or contract of sale.

"But we think this distinction is without the support of reason or authority. A very large part, if not most of the merchandise sold in New York City, is shipped interstate to that market. In the case of products like cotton, citrus fruits and coal, not to mention many others which are consumed there in vast quantities, all have crossed the state line to seek a market, whether in fulfillment of a contract or not. That is equally the case with other goods sent from without the state to the New York market, whether they are brought into competition with like goods produced within the state or not. We are unable to say that the present tax, laid generally upon all sales to consumers within the state, subjects the commerce involved where the goods sold are brought from other states, to any greater burden or affects it more, in any economic or practical way, whether the purchase order or contract precedes or follows the interstate shipment. Since the tax applies only if a sale is made, and in either case the object of interstate shipment is a sale at destination, the deterrent effect of the tax would seem to be the same on both. Restriction of the scope of the commerce clause so as to prevent recourse to it as a means of curtailing state taxing power seems as salutary in the one case as in the other.

"True, the distinction has the support of a statement obiter in Sonneborn Bros. v. Cureton, supra, 262 U.S. page 515, 43 S.Ct. 646, 67 L.Ed. 1095, and seems to have been tacitly recognized in Ware & Leland v. Mobile County, 209 U.S. 405, 412, 28 S.Ct. 526, 528, 52 L.Ed. 855, 14 Ann. Cas. 1031, and Banker Bros. Co. v. Pennsylvania, supra, although in each case a tax on the sale of goods brought into the state for sale was upheld. But we have sustained the tax where the course of business and the agreement for sale plainly contemplated the shipment interstate in fulfilment of the

contract. Wiloil Corporation v. Pennsylvania, supra, 294 U.S. page 173, 55 S.Ct. page 359, 79 L.Ed. 838; Graybar Electric Co. v. Curry, supra. In the same circumstances the Court has upheld a property tax on the merchandise transported, American Steel & Wire Co. v. Speed, supra [192 U.S. 500, 24 S.Ct. 365, 48 L.Ed. 538]; General Oil Co. v. Crain, supra [209 U.S. 211, 28 S.Ct. 475, 52 L.Ed. 754]; see Bacon v. [People of] Illinois, supra, 227 U.S. [504] page 515, 516, 33 S.Ct. [299] page 303, 57 L.Ed. 615; upon its use, Monamotor Oil Co. v. Johnson, supra [292 U.S. 86, 54 S. Ct. 575, 78 L.Ed. 1141]; Felt & Tarrant Co. v. Gallagher, supra [306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488], and upon its storage; cf. Gregg Dyeing Co. v. Query, supra [286 U.S. 472, 52 S.Ct. 631, 76 L.Ed. 1232, 84 A.L.R. 831]; Nashville, C. & St. L. Ry. Co. v. Wallace, supra. Taxation of property or the exercise of a power over it immediately preceding its previously contemplated shipment interstate has been similarly sustained. Coe v. [Town of] Errol, supra [116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715]; Bacon v. [People of] Illinois, supra; Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S. Ct. 267, 78 L. Ed. 622. For reasons already indicated all such taxes upon property or the exercise of the powers of ownership stand in no different relation to interstate commerce and have no different effect upon it than has the present sales tax upon goods whose shipment interstate into the taxing state was contemplated when the contract was entered into."

[9] While the facts in the McGoldrick case may be distinguished from the case at bar the principles there enumerated are clearly applicable. The tax as applied in the instant case does not discriminate against interstate commerce, or constitute a prohibited regulation or interference therewith. As we have seen it is complemental to the sales tax, and the two give a complete, uniform and equal coverage which, rather than discriminating against interstate commerce, endeavors to place intrastate commerce on a fair and equal basis therewith. The tax is not a regulation of interstate commerce although it may incidentally affect it. It is merely a tax on an event occurring in this state which does not burden interstate commerce nor place it at a disadvantage.

Plaintiff cites cases dealing with the general subject of the tests applicable to a determination of the existence of interstate commerce. It would serve no useful purpose to discuss them inasmuch as we are convinced that the most recent expressions of the Supreme Court of the United States as evidenced by the above-entitled cases are conclusive on the issue.

The judgment is reversed.



48 Cal.App.2d 565

PEOPLE v. BARTON et al.

Cr. 3488.

District Court of Appeal, Second District, Division 1, California.

Dec. 19, 1941.

Hearing Denied Jan. 15, 1942.

1. Criminal law ⇐15

Where offense consisting of possession of opium was committed on a date prior to repeal and re-enactment of statute providing that no person shall possess a narcotic except upon a written prescription, repeal of statute did not bar prosecution for offense. St.1939, p. 756, § 11036; Pol.Code, § 329.

2. Poisons ⇐4

Under statute providing that no person shall transport, sell or have in possession any narcotics "except as provided in this division" and statute providing that no person shall transport or sell a narcotic except upon written prescription, the latter statute prohibits possession of narcotics and possession is unlawful at outset, unless it can be shown to be otherwise under some exception in "this division." St.1939, pp. 756, 758, 760, §§ 11036, 11160, 11176.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Harry L. Barton was convicted for possession of a narcotic in violation of St. 1939, p. 756, § 11036, and he appeals.

Affirmed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant and his co-defendant Florence George were jointly charged by an information with a violation of section 11036 of the Health and Safety Code of California, St.1939, p. 756, to-wit: possession of opium, a felony. A jury trial was waived; appellant offered no evidence and the cause was submitted to the trial court upon the transcript of the preliminary hearing. The charge against defendant George was dismissed in the interest of justice and appellant was convicted of the illegal possession of a narcotic, as charged in the information. His motion in arrest of judgment was denied, whereupon appellant was sentenced to one year in the county jail. This appeal is prosecuted from the judgment of conviction upon the grounds: (1) The statute does not forbid and punish mere possession of a narcotic; (2) The information fails to state a public offense; (3) The statute is void for uncertainty.

The record reveals that shortly after his arrest, appellant accompanied the arresting officers to his apartment where he turned over to them an eight-ounce bottle half full of opium solution, and also a small bottle of opium solution which was standing on his dressing table. Some time later, officers examined appellant's automobile and found therein a can of opium secreted in a built-in compartment under the back seat. The opium contained in the can was in gum form and was estimated to be approximately five ounces.

[1] Respondent calls attention to the fact that "Section 11036 of the Health and Safety Code of the State of California, under which appellant was charged in the instant case, was repealed by Statutes of 1940, Ex.Sess., Chapter 9, p. 18, Section 7, which went into effect March 6, 1941, the date on which the information in the instant case was filed. The offense charged in the instant case that of possession of a narcotic, was re-enacted by the Statutes of 1940, Chapter 9, p. 18, Section 11160, as follows: '* * * Except as otherwise provided in this division, no person shall possess * * * a narcotic except upon * * * written prescription. * * *'"; and that since the offense charged was committed on or about the 18th of February, 1941, a date prior to said repeal and re-enactment, the situation falls directly within the provisions of section 329 of the Political Code, to the effect that a repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the repealed law.

The pertinent sections of the Health and Safety Code in effect on the date the charged offense was committed are:

"§ 11036. *Limitations on right to handle narcotics.* No person shall transport, sell, furnish, administer, or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport, or have in possession any narcotics except as provided in this division."

"§ 11160. *Necessity for prescription.* No person shall transport, sell, furnish, administer, or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, or veterinarian licensed to practice in this State."

Appellant urges that a comparison of the two sections, above quoted, "reveals that a prescription is required for every act named in section 11036 *except the possession* of any narcotic", and that "nowhere in Chapter 3 is 'possession of a narcotic' mentioned until we reach section 11176", to-wit:

"No person shall obtain or possess a narcotic obtained by a prescription that does not comply with this division"; it being further urged by appellant that the language of this section simply "denounces the possession of a narcotic obtained by a prescription which 'does not comply with this division'. It does not purport to make it unlawful to possess a narcotic obtained otherwise than by a prescription."

[2] Section 11160, supra, *does* expressly prohibit the possession of narcotics, because section 11036, supra, provides, as above noted, that no person shall *"have in possession any narcotics except as provided in this division"*. Manifestly, then, the possession is unlawful at the outset and in any case, unless it can be shown to be otherwise under and by virtue of

some exception contained in "this division". In other words, lawful possession is the exception. (Emphasis added.)

The judgment is affirmed.

DORAN and WHITE, JJ., concurred.



48 Cal.App.2d 381

TURNEY et al. v. COLLINS.

SAME v. SECURITY TITLE INS. & GUARANTY CO.

Civ. 13385.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1941.

1. Vendor and purchaser ⇐77

A vendor's authorization and acceptance of partial payments of monthly installments due on purchase-money note did not deprive her of right to accelerate due date of unpaid portion of installments.

2. Vendor and purchaser ⇐101

The rule prohibiting vendor's forfeiture without prior notice of contract for sale of realty because of partial default in payment of past due purchase-money installments after vendor's authorization or acceptance of late payments is inapplicable to contract permitting acceleration of due date of unpaid portion of installments partially paid.

3. Vendor and purchaser ⇐77

Vendor's possession of realty under agreement, made with purchasers after their partial default in payment of certain purchase-money installments, did not bar acceleration of due date of unpaid portion of installments for nonpayment of subsequent installments.

4. Courts ⇐91(1)

A Supreme Court judge's concurring opinion is not court's decision, but mere concurrence with its decision by judge writing such opinion, which therefore is not binding on District Court of Appeal as precedent in subsequent case.

5. Pleading ⇐15

A pleading may incorporate therein by reference only an exhibit or allegation found in previous pleading in same case, though such pleading has been superseded by later pleading.

6. Pleading ⇐307, 311

If it is important for any good reason that exhibit be annexed to, rather than incorporated by reference in, pleading, the matter of ordering that which should be done under circumstances should be left to trial court's discretion.

7. Pleading ⇐15

In joint tenants' action to recover possession of realty, with damages for its detention, and enjoin sale thereof under trust deed, incorporation of copies of such deed and note secured thereby in amended answer and counterclaim merely by reference to original answer was not error rendering such instruments inadmissible in evidence.

8. Pleading ⇐428(3)

In action for possession of realty, with damages for its detention, and injunction against sale thereof under trust deed securing plaintiffs' purchase-money note, where plaintiffs did not proceed by demurrer or motion to require defendant to eliminate uncertainty as to rental value of property because of defendant's failure to insert amount claimed to be reasonable rental value in blank following dollar sign in copy of amended answer served on plaintiffs, trial court properly received evidence of such value.

9. Vendor and purchaser ⇐85

A document, signed by two husbands and beneficiary of trust deed, executed by such husbands and their wives to secure their note for price of realty purchased by spouses, and embodying escrow instructions obligating husbands to vest complete legal title to property in beneficiary as consideration for her release of spouses' obligation and payment into escrow of stated sum to spouses' credit, *held* binding executory contract between parties thereto.

10. Landlord and tenant ⇐118(1)
Licenses ⇐44(2)

A vendee, let into possession of realty pending confirmation of contract for sale thereof, is a "tenant at will", not mere "licensee".

See Words and Phrases, Permanent Edition, for all other definitions of "Licensee" and "Tenant at Will".

11. Vendor and purchaser ⇐191

If executory contract for sale of realty contains no express or implied provision respecting right to possession thereof, abstract principle that possession follows legal title will be followed, but if there is implication or inference under particular circumstances that vendee, rather than vendor, is to have possession, vendee's possession will be sustained.

12. Vendor and purchaser ⇐296

A vendor, actually placing vendee in possession of realty sold, may not oust vendee from such possession before default, unless contract expressly provides otherwise.

13. Appeal and error ⇐761

The District Court of Appeal is not called on to discuss previous court cases respecting which no citation or argument has been made on appeal.

14. Vendor and purchaser ⇐85

Where two husbands, joining with their wives in contract to purchase realty, subsequently entered into binding executory contract to vest complete legal title to realty in vendor in consideration of her release of their obligation to her under sale contract, plus payment into escrow of stated sum to spouses' credit, any additional consideration required to procure wives' signatures to necessary documents was payable by husbands, not by vendor.

15. Vendor and purchaser ⇐191

Where vendor of realty purchased by two men and their wives was not in default under husbands' subsequent executory contract to vest complete legal title to realty in vendor in consideration of her release of their obligation under sale contract and payment into escrow of stated sum to spouses' credit, and husbands, with one of wives, put vendor into possession of property, spouses had no standing to demand possession thereof from vendor.

16. Landlord and tenant ⇐118(1), 119(1)

A vendee in executory land contract is strictly a "tenant at will", not a "tenant at sufferance", independently of contract stipulations.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant at Sufferance".

17. Landlord and tenant ⇐118(1), 120(2)

A vendor, placed in possession of realty by three of four purchasers thereof, was "tenant at will" as to such three purchasers, and such tenancy could be terminated only by service of statutory 30 days' notice on vendor. Civ.Code, § 789; Code Civ.Proc. § 1162.

18. Landlord and tenant ⇐120(2)

The common-law rule, which does not require notice to quit, where tenancy is for definite term or where one enters on land by owner's permission under void parol contract or void lease contract, has been changed by statute, under which a tenancy or other estate at will, however created, may be terminated by landlord's giving of written notice to tenant to remove from leased premises within 30 days specified in notice. Civ.Code, § 789; Code Civ.Proc. § 1162.

19. Vendor and purchaser ⇐191

A notice by purchasers of realty to vendor in possession thereof to remove therefrom "forthwith" or to pay purchasers specific sum, if vendor continues in possession, was wholly ineffective. Civ.Code, § 789; Code Civ.Proc. § 1162.

20. Mortgages ⇐338
Vendor and purchaser ⇐191

Where notice from two husbands and their wives, purchasing realty, to vendor in possession thereof, demanded vendor's removal therefrom forthwith or payment of specific sum to purchasers, if vendor continued in possession, and hence was ineffective, and one of wives did not sign contract under which vendor took possession, nor request merely her own interest in possession by such notice, she had no foundation for cause of action against vendor to recover possession of property, with damages for its detention, and enjoin sale thereof under trust deed, of which vendor was beneficiary. Civ.Code, § 789; Code Civ.Proc. § 1162.

21. Vendor and purchaser ⇐191

The right, if any, of one of several joint tenants of realty purchased by them to possession thereof after cotenants let vendor into possession, was that of a "tenant in common" with vendor, and neither could oust the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant in Common".

22. Landlord and tenant ⇐118(1)
Mortgages ⇐191
Vendor and purchaser ⇐191

A vendor, let into possession of realty by purchasers thereof after their default, was a "tenant at will" in possession and so

continued as against purchasers, in absence of effective notice to remove from premises, and when she gave purchasers notice of her election to declare entire unpaid principal of their indebtedness, with interest, due and payable, she properly tacked such possession to superior right of possession, granted her by trust deed and chattel mortgage securing purchasers' note for price, and was entitled thereafter to rest on such superior right, with obligation only to account as any mortgagee in possession must.

23. Appeal and error ⇐656(3)

Where error, if any, in superior court's fact finding is immaterial, District Court of Appeal need not correct finding, as it has power to do.

24. Vendor and purchaser ⇐186

A vendor's election to take possession of realty sold, as authorized by trust deed securing purchase-money note, did not defeat her right to payment of monthly purchase-money installments during period of her possession.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Dail E. Turney and others against Margaret B. Collins and the Security Title Insurance & Guaranty Company, respectively, to recover possession of certain real and personal property, with damages for its detention, from defendant Collins, and to enjoin sale of property under a trust deed of which defendant Collins was beneficiary. Judgments for defendants, and plaintiffs appeal.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellants.

M. R. Van Wormer, of San Luis Obispo, and Lawton D. Champion, of Paso Robles, for respondent.

HANSON, Justice pro tem.

These two cases were brought by the appellants, all four of whom were joint tenants of certain real and personal property, to recover, in the one case, the possession of the property, together with damages for its detention by respondent, and, in the other case, to enjoin the trustee from selling the property, under a trust deed of which respondent was the beneficiary.

The trial court granted a preliminary injunction, restraining the sale of the property under the trust deed, but, on the trial, discharged the injunction and entered judgment in both cases in favor of the respondent.

The property involved is the Santa Marguerita Inn and Auto Court. It was held in joint tenancy by appellants Turney and Minton and their wives, subject to both a trust deed and a chattel mortgage, securing a note in the principal sum of $22,000, held by the respondent. By the terms of the note, executed on March 14, 1939, the appellants were obligated to pay to respondent, at the San Luis Obispo branch of Bank of America, the sum of $250 on the 15th day of each month.

Pursuant to a prior request of one of the debtors, respondent, under date of May 30, 1939, wrote to the manager of the bank, where the monthly installments of her note were payable, that she was agreeable to permitting her debtors to pay thereon monthly an amount not less than $150, as they had requested. Beginning with November 15, 1939, and on the 15th of each month thereafter, to and including June 15, 1940, the debtors paid $150 monthly, except that on April 15, 1940, they paid $250. Evidently, the latter payment was occasioned by a letter respondent wrote appellant Turney, under date of April 2, 1940, wherein she stated she needed the $500, which was then past due, and requested that it be paid on April 15, 1940, and also that "full payment" be then made of the installment which would fall due on that date. As her request for payment of the past due installment of $500, and her further implied request that the appellant should thereafter make payment in accordance with the terms of the note were not complied with, respondent went to Santa Marguerita on July 1, 1940, to confer with her debtors. As a result of several conferences held on that and the succeeding day, between respondent and her counsel, and appellants, Mr. and Mrs. Minton and Mr. Turney and their counsel, written escrow instructions were entered into and signed by respondent and the husbands, Turney and Minton. These instructions obligated the husbands to vest complete legal title to the property described in the trust deed and chattel mortgage in the respondent, in return for her complete release of their obligation to her, plus a payment into the escrow of $2,500 to the credit of Mr. and Mrs. Turney and Mr. and Mrs. Minton.

Other provisions of the escrow instructions are not of sufficient materiality to be stated, except we should here note that the instructions recited they were to be binding on the parties thereto for 30 days, with no right in the parties to withdraw therefrom in that period. Although Mrs. Minton was present, she did not sign the instructions, nor did they recite that she was a party thereto. Respondent having paid the escrow holder the sum of $2,500, as required by the instructions, the parties returned to the inn, and there Mr. Turney and Mr. Minton, in the presence of Mrs. Minton, placed respondent in possession of the property.

On July 7, 1940, Mrs. Turney, who had been absent in Los Angeles, returned to the property and removed her personal belongings. On the following day, Mrs. Turney and Mrs. Minton directed a letter to the escrow holder, stating that they would not sign or execute the necessary documents to conclude the escrow. The reason given was that the consideration named in the escrow instruction was not sufficient, and that they would not execute any conveyance until a reasonable sum, which was satisfactory to them, was deposited in the escrow. This letter, signed by the wives, had appended thereto the following: "For the above reasons, the undersigned likewise request that the said escrow be stopped." Signed: "Dale C. Turney, Ray Minton."

That the appellants were completely dissatisfied with the sum of money they were to receive in the transaction, would seem to be abundantly shown by the fact that the husbands and the wives caused a further notice to be served on respondent, Mrs. Collins, demanding that she yield possession of the property to them at once, and that if she did not do so, she would be required to pay as rental therefor $4,500 a month for each month during which she retained possession, or at the rate of $150 per day, payable daily. Additionally, the notice advised that, if appellants should find it necessary to sue for the rental demanded, they would demand in such suit treble rents from her.

The trial judge found that a reasonable monthly rental of the property would not exceed $250 per month. We are not inclined to offer any adverse comment on the fact that he seems to have been wholly unimpressed by the mere size of the claim made by the appellants, when he determined what rent was reasonable. In that connection, we might observe that a quick calculation indicates that rents trebled would amount to $450 per day, or a total of $13,500 per month, and, if collectible, for default of respondent, would have enabled the appellants, within a period of less than two months, to pay their debt in full and to have the property involved as well.

The respondent failed to comply with the demand of appellants. Instead, on July 24, 1940, she essayed to test her opponents' armor, by serving a notice on them, declaring the note due for default in payment of the installments thereof along with a demand that appellants perform the terms of the chattel mortgage, and, for failure so to do, that she would sell the property covered thereby. This initial onslaught on her part she carried forward in a few days when on August 28, 1940, she caused the trustee in the trust deed to file notice of default for breach of the terms thereof.

The trial court found, in substance, that the respondent went into possession of the property on July 2, 1940, with the consent of all the plaintiffs; that, on July 8, 1940, she was served with the notice mentioned; that the plaintiffs refused to proceed under the terms of the escrow, signed by the husbands; that, at and prior to July 8, 1940, the appellants were delinquent in their payments; that the reasonable rental value of the premises between July 2, 1940, to and including October 1, 1940, was at the rate of $200 per month, and, from that date onwards, at the rate of $250 per month; that the appellants were entitled to rental at said rates from July 2, 1940, to the date of the judgment, to be applied as a credit on the amounts due from them to the respondent; that the appellants were not entitled to a continuance of the injunction, which they had obtained, and that the respondent was entitled to have a sale of all the property to make the amount due to her.

It will be noted that the facts are simple, and we think the law applicable equally so. Nevertheless, we shall first state and discuss certain preliminary contentions made by appellants before reaching their main contention.

[1, 2] Appellants first contention is that respondent, as a matter of law, was without right to accelerate the due date of the note. This contention is based upon the claim that as respondent not only had au-

thorized, but had accepted, partial payment of the installment due on June 15, 1940, as well as a series of partial installments before that date, there could be no acceleration for the unpaid portion of these installments. There is no merit in the contention. The rule applied in vendor and purchaser contracts, which under certain circumstances prohibits a forfeiture without giving prior notice, for a partial default in the payment of past due installments, or for failure to pay a current installment promptly when the vendor has either authorized or accepted late payments, has no application to the provisions of a contract of the character here, permitting acceleration. Righetti v. Monroe, etc., 109 Cal.App. 333, 293 P. 114.

[3] The further claim that there could be no acceleration for non-payment of the July 15, 1940, installments, based on the ground that respondent was in possession and was not entitled to both possession and payment, is equally without merit.

[4-7] Appellants next contention is that the court erred in permitting the introduction of evidence of the note and trust deed. This contention is predicated upon the fact that the amended answer and counterclaim, instead of setting forth therein copies of these instruments, merely by reference to the original answer, incorporated therein copies thereof. In support of their contention that this was error and that the instruments accordingly could not be introduced into evidence, appellants rely on a concurring opinion in Ralphs v. Hensler, 97 Cal. 296, 32 P. 243, and the case of People v. Jose De La Guerra, 24 Cal. 73. In the first case cited, the concurring opinion directly holds, as appellants contend, that one cannot, in an amended pleading, incorporate therein by reference an exhibit set forth in an earlier pleading in the case. The concurring opinion is not the decision of the court, but a mere concurrence with that decision by the writer of the concurring opinion. Accordingly, the view there expressed is not binding upon us. The case of People v. Jose De La Guerra involved the question whether an exhibit set forth in the pleadings in a *wholly separate case* could by reference be incorporated in a pleading in another case. Accordingly, the case is not here in point. As the question here presented to us is open, we are of the opinion that there is not the slightest reason for holding that a pleading may not by reference incorporate an exhibit or allegation found in another pleading in the same case, even though the pleading has been superseded by such later pleading. Except in a case where a complaint has been filed and not served, or a new party is brought into the case after pleadings have been filed and served, the opposing parties have copies of the prior pleadings, and so have no need to be supplied again, either with allegations or exhibits set forth in earlier pleadings in the same case. Such a requirement would simply involve needless additional expense to a party, and moreover, it unduly encumbers the record. The need for obviating such a requirement is illustrated, by the well known fact that many trust deeds, such as those executed by large industrial, transportation and utility corporations are so detailed, and in bulk so large, that they are printed and oftentimes are the size of a large book. To require that such an instrument should be annexed to a pleading every time it supersedes an earlier pleading, to which the instrument is attached, is both needless and unreasonable. In the federal courts, from their very inception, it has been sufficient to file an exhibit with the clerk, and by reference to incorporate the exhibit in any pleading filed in the case. That is a rule of common sense. If, for any good reason, it is important that an exhibit should be annexed to a pleading, rather than incorporated therein by reference, the matter should be left to the discretion of the trial court to order that which under the circumstances should be done. The trial court in the instant case was satisfied to read the exhibit by reference. We, too, are likewise satisfied with his ruling.

[8] The appellants next contend that the court erred in receiving evidence of the rental value of the property involved, because in the copy of the amended answer, which was served upon them, counsel for respondent neglected to set forth in a blank following a dollar sign, the amount respondent claimed was the reasonable rental, even though the blank was filled out in the original pleading filed with the clerk. Shortly stated, the claim here is that the appellants were entitled to rely upon the correctness of the answer which was served upon them, and to assume that the uncertainties therein—caused by a failure to fill out the number of dollars—required that they do nothing, much less assume that in the pleading as filed that possibly some few dollars might be claimed. Accordingly, they contend not

only that they were entitled to rely on the answer as served, but were not required to anticipate that an issue would or could be raised in the trial court as to the reasonable value of the rental. This claim they make in the face of the prayer of the amended answer, which definitely indicates that the issue would be made on the trial. In that connection it should be observed that appellants further contend they were unduly harmed, in that the trial court permitted evidence on the point, and they, relying on the pleading, were not prepared to meet it. The allegation containing the phrase "$——— per month" made it clear that a rental of some amount would be claimed. What that amount would be was definitely uncertain. But demurrer and motion are procedural methods available for clarifying uncertainties. Having failed to proceed, as they might have by demurrer or motion to require the defendant to eliminate the uncertainty, the trial court rightly received the evidence.

[9] In the instant case, a signed document embodied the "escrow instructions" and the respective agreements of the parties thereto. It was signed by the two husbands and the respondent, and contrary to the contention of the appellants, the document was a binding, executory contract between the parties thereto. Tuso v. Green, 194 Cal. 574, 229 P. 327. By the terms of the writing, the husbands undertook not to convey the real and personal property, if their wives, who were joint tenants with them, refused to join in the deeds, but, on the contrary, they obligated themselves to supply the documents necessary to vest the fee simple title in respondent, upon condition that she satisfy her trust deed and chattel mortgage.

[10] Under the terms of the executory contract, the husbands were not obligated to place the respondent in possession. In view of that circumstance appellants contend that even though possession was given by three of the four joint-tenants, or even if all four had placed respondent in possession, appellants had the right to possession and that it should have been sustained. To support their contention they rely not only on the abstract principle, that pending performance the right of possession is in the vendor, but on that line of cases of which Burnett v. Caldwell, 9 Wall. 290, 19 L.Ed. 712, is typical, which hold that where the vendee is let into possession pending consummation of the contract he is a licensee. The rule announced in those cases is not the rule in this state. Here the vendee is classed as being a tenant at will and not a mere licensee. Hall v. Wallace, 88 Cal. 434, 26 P. 360.

[11-13] In this state the rule is well established that in determining where the right of possession rests the courts will not be guided alone by the abstract principle that possession follows the legal title. If the executory contract of sale contains no express or implied provision relative to the right of possession, the abstract principle will be followed. But if under the particular circumstances existing there is an implication or inference that the vendee rather than the vendor is to have possession, then such possession will be sustained. An apt illustration of a case where possession is determined to be in the vendee is where the vendee purchases on contract a home on comparatively small monthly installment payments and is obligated to pay the taxes. Moreover, where the vendor actually places the vendee in possession of the property, the well-recognized rule of this state is that the vendor may not oust him from his possession where he is not in default unless the contract expressly provides otherwise. Andrews v. Karl, 42 Cal.App. 513, 183 P. 838; see, also, Whittier v. Stege, 61 Cal. 238; Mayer v. West, 96 Cal.App. 31, 273 P. 849; 66 C.J., p. 1036; Barrell v. Britton, 244 Mass. 273, 138 N.E. 579, 28 A.L.R. 1069. Questions as to the right of possession in cases where the vendor is wholly unable to convey title, as was the case in Garvey v. Lashells, 151 Cal. 526, 91 P. 498, we have no occasion to consider. We have no such case here. Moreover, no citation or argument with reference to that line of cases has been made, so we are not called upon to discuss them.

[14] It is entirely apparent from the notice which was given to the escrow holder by the wives, and also signed by the husbands, that conveyance could and would be made by the wives upon receipt of a sufficient consideration. As the husbands were already bound to the respondent any additional consideration required to procure the signature of the wives to any necessary documents was payable by the husbands and not by the respondent. In any event, the procedure taken by the appellants toward procuring possession was in law wholly abortive.

[15, 16] As has been noted in the statement of the facts, the respondent was not in default under the executory contracts

made by the husbands, and as they, together with Mrs. Minton, put respondent into possession of the property, they had no standing to demand the possession from her. Independent of contract stipulations, the vendee in an executory land contract is strictly a tenant at will and not at sufferance, as appellants contend. Hall v. Wallace, 88 Cal. 434, 26 P. 360; Carteri v. Roberts, 140 Cal. 164, 73 P. 818; Tracy v. Donovan, 37 Cal. App. 350, 174 P. 113 (notice of hearing denied by the Supreme Court). Even if the contract here involved had been void, as appellants incorrectly state, the rule is the same in this state. In Hall v. Wallace, supra [88 Cal. 434, 26 P. 361], it is said "the entry and holding of the defendant under a void agreement constituted him a tenant at will".

[17-21] Irrespective of respondent's right to rely upon her superior possession, given to her by the terms of the instruments which secured her note, she was placed in possession by the husband and Mrs. Minton, and so, as to them, was a tenant at will, which tenancy under the statute could only be terminated by the service of a thirty days' notice upon her. Carteri v. Roberts, supra. The common law rule which does not require a notice to quit, where a tenancy is for a definite term, or where one enters upon land by the permission of the owner under a void parol contract, or under a void lease contract, has been changed by statute in this state. As was said in Tracy v. Donovan, supra [37 Cal.App. 350, 174 P. 113]: "'A tenancy or other estate at will, *however created,* may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than thirty days, *to be specified in the notice.*' Civ.Code, § 789." The notice here specified a removal "forthwith" and so was wholly ineffective; it was as though it had never been made or given. Moreover, the notice cancelled itself out when, on the one hand, it purported to demand possession and, on the other hand, demanded a specific sum if the respondent continued in possession. Cf. Colyear v. Tobriner, 7 Cal.2d 735, 62 P.2d 741, 109 A.L.R. 191. For this reason, and the further reason that Mrs. Turney did not by the notice request merely her own interest in the possession, she had no foundation for her alleged cause of action, even if we assume that no act of her co-tenant or any conduct on her part divested her of a possession in the premises measured by her interest therein. If Mrs. Turney had a right of possession after her co-tenants had let the respondent into possession, such right was that of a tenant in common with the respondent, where neither could oust the other.

[22] As the respondent must thus be deemed to be a tenant at will in possession, she so continued thereafter as against all the appellants, for want of an effective notice served upon her. When, then, respondent on July 24, 1940, gave appellants notice of her election to declare the entire unpaid principal, with interest due and payable for appellants' default, she tacked, as she had a right to do, her then possession to her superior right of possession granted to her by the terms of her trust deed and chattel mortgage. From that time forward she was entitled to rest on this superior right of possession with an obligation only to account, as any mortgagee in possession is required to account, to a mortgagor. The rule as to superior possession is succinctly set forth in the Restatement, Property, section 22, where it is also pointed out that there is no estate of sufferance, where the possession is taken and held, as it is here.

[23, 24] Appellants' criticism of the finding that the respondent went into possession "with the consent of all of the plaintiffs" is based on the thought that Mrs. Turney did not consent. The error, if error there be, is of no materiality in the view we take of the case. As it cannot affect the result we need not correct it, as we are empowered to do. Appellants further claim that respondent having elected to take possession under her security she was not entitled during the period of her possession to payment of the monthly installments, which would have been payable to her, had there been no acceleration. This contention is so wholly unsound that it calls for neither discussion nor citation of authority. For the reasons indicated, the judgment in the action for possession and for damages should be affirmed.

We come now to the further action for injunction. We think that what we have said about the possessory action makes it plain that there is nothing that needs to be said about the judgment in the injunctive action, other than to say that it, too, should be affirmed. For the reasons stated, the judgments in both actions are affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

48 Cal.App.2d 209

In re STARK'S ESTATE.

BOWER et al. v. DOCKWEILER et al.

Civ. 13377.

District Court of Appeal, Second District, Division 2, California.

Dec. 2, 1941.

Hearing Denied Jan. 29, 1942.

1. Evidence ⇐174

Where counsel sought to have witness read data from a record, which was not an original record, objection was properly sustained on ground that record was secondary.

2. Appeal and error ⇐205

Offer to prove by witness several separate matters embodied in written record presented no question as to the correctness of the ruling on the offer, where no questions were asked to elicit such matters, since the proper procedure to prove such matters was by propounding pertinent questions to the witness.

3. Statutes ⇐225

Statutes making all marriages of white persons and negroes or mulattoes void, and prohibiting a black or mulatto from testifying for or against a white person or, in a case where a white person is a party, defining a mulatto as a person having one-eighth part or more of negro blood, are in "pari materia" and are to be read and considered together. St.1849–50, c. 99, § 14; c. 140; c. 142, § 306.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

4. Marriage ⇐8

A marriage between a white person and a mulatto having one-eighth part or more of negro blood is void. Civ.Code § 60.

5. Marriage ⇐8

The statute declaring that all marriages between white persons and negroes or mulattoes are void means marriage, not only by solemnization, but "marriage by consent", that is, a common law marriage, at time when such marriage was recognized. Civ. Code, § 60.

See Words and Phrases, Permanent Edition, for all other definitions of "Marriage by Consent".

6. Marriage ⇐8

The disputable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage, being disputed by substantive law itself, may not be invoked to operate as a presumption if one of the parties is in fact a mulatto. Civ.Code, § 60.

7. Bastards ⇐11

The statute providing that the issue of all marriages null in law are legitimate did not at or prior to the time of death of white man in 1870, include a child which he had by an alleged mulatto, since the statute does not embrace children of void marriage, such as a marriage between a white and a negro or mulatto. Civ.Code, § 85.

8. Bastards ⇐13

The fact that father of child by mother who was allegedly a mulatto, on three or four occasions, took the child and the mother to the home of one of his white daughters, was not a "public acknowledgment and recognition" of the child by the father as his legitimate child within meaning of statute. Civ.Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Acknowledgment and Recognition".

9. Wills ⇐312

If an issue is made as to the right of an objector as plaintiff to contest a will, that question on issue joined is to be determined by the court before the issue as to the validity is tried before a jury, where a jury has been demanded.

10. Wills ⇐288(1)

On a trial to the court, involving only the right of a plaintiff, as an interested party, under statute, to contest the validity of a will, the burden of proof is on such plaintiff to prove by a preponderance of the evidence that he has the interest requisite under the statute to maintain the contest. Probate Code, § 370.

11. Trial ⇐139(1)

If a prima facie case is made by plaintiff on all the essential allegations necessary to state a cause of action, a case is nevertheless not made, if evidence comes in, voluntarily or involuntarily, while plaintiff is putting on his case, which is sufficient to divest the plaintiff of a right to judgment.

12. Negligence ⇐119(1)

A plaintiff who alleges that a defendant was negligent, and proves the fact by a preponderance of the evidence, is entitled to have a jury pass on his case without alleging or proving his want of contributory negligence.

13. Negligence ⇐136(14, 26)

If a plaintiff makes a prima facie case on his claim of a defendant's negligence, a nonsuit may not be granted against the plaintiff, but if it be shown, on the plaintiff's own case that as a matter of law, the plaintiff was contributorily negligent, then a nonsuit must be directed against him, on motion therefor, even though he was not required to negative by his pleading, his freedom from contributory negligence nor to adduce evidence on the point.

14. Bastards ⇐4

Where it appeared in will contest that testatrix, whose heirs at law the contestants claimed to be, was a child of a white man and a woman who was allegedly a mulatto, the contestants then had the burden to show either that both parents of the testatrix were mulattoes or negroes or that one was a mulatto and the other a negro, or that both were white. Civ.Code, § 60.

15. Bastards ⇐6

In will contest by those claiming to be heirs of testatrix where it appeared that testatrix was the child of a white man and a woman who claimed to be a mulatto, and that hence testatrix was illegitimate, evidence of contestants was not sufficient to meet their burden in order to take as heirs of testatrix, of showing that either or both parents of testatrix were mulattoes or negroes or that one was a mulatto and the other a negro, or that both were white so as to legitimate the testatrix. Civ.Code, § 60.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Proceeding in the matter of the estate of Abagail Stark, deceased. From a judgment determining that Walter V. Bower, and others, contestants of the will of Abagail Stark, deceased, were not her heirs at law and not entitled to maintain their contest against the validity of her will, contestants, opposed by George A. Dockweiler, executor, A. G. Clark, and others, appeal.

Judgment affirmed.

Shaw, Bailey & Poe, of Los Angeles, for appellants.

Joseph Musgrove and Thomas H. Cannan, both of Los Angeles, for respondents Roland Cummings and others.

Freston & Files, Sydney Wetzler, and Paul E. Younkin, all of Los Angeles, for respondents A. C. Clark and another.

Dockweiler & Dockweiler, of Los Angeles, for respondents George A. Dockweiler and others.

Macbeth & Macbeth, of Los Angeles, for respondent Charles Williams.

HANSON, Justice pro tem.

This is an appeal by the contestants of the will of Abagail Stark from a judgment determining that they were not her heirs at law and as a consequence not entitled to maintain their contest against the validity of her will. The vital and only controlling question upon which our decision must turn is whether Abagail Stark was or was not the legitimate or legitimated child of Robert Stark. If she was his legitimate child, or a natural child legitimated either by his own public acts or conduct or by virtue of law, the decision below was erroneous; otherwise not.

The trial court found that while Abagail Stark was the issue of Robert Stark, a white man, and Catherine Stark, a mulatto, her parents had never married, and that Abagail had never been legitimated by any act of public acknowledgment by Robert Stark or by virtue of the provisions of any statute; and as a consequence the court held that the contestants, who are the descendants of Robert Stark by his marriage to Mary Virginia Elizabeth Stark, a white woman, were as a matter of law not Abagail Stark's heirs at law.

As the errors assigned deal wholly with the claim that the evidence was either contradictory to or insufficient to sustain the findings, we set forth only the competent evidence which favors the findings.

As has been indicated, Robert Stark originally married a white woman named Mary Virginia Elizabeth Stark, by whom he had four children. The contestants here are either children or grandchildren of these four children of Robert and Mary Stark. Mary Stark died some time prior to 1853, and thereafter Robert Stark, with his four children and his slave Catherine, emigrated by wagon train from his home in Kentucky to California, stopping seemingly for a

short period, while on the way, in the state of Texas. Prior to the time Robert Stark left Kentucky he had a child by his slave Catherine, which died during infancy. In 1859, Catherine while living with Robert Stark gave birth to a second child. This was Abagail, whose will is here involved. In 1869 or 1870 Robert Stark, Catherine Stark and Abagail left Saugus, California, where Robert and Catherine Stark had resided since they came to California in 1853, and moved into a home in Los Angeles. It appears from the evidence that one Brophy held title to the Los Angeles property, and by his deed, executed February 5, 1870, conveyed it to Catherine Stark, and that thereafter Brophy resided on the Saugus property where Robert, Catherine and Abagail Stark had formerly lived. There is a want of testimony as to whether Robert or Catherine, or both, had been the title holders of the Saugus property.

There is no evidence in the record that Robert and Catherine Stark ever went through any ceremony of marriage. Neither is there any evidence of declaration or admission, direct or indirect, by either that they were ever married except that years after the death of Robert, when Abagail made a quitclaim deed to her mother for the purpose of removing any cloud on her mother's title to the Los Angeles property, Catherine, over her signature by her mark, certified that "the grantor in the foregoing deed named, viz., Abagail Stark, is the sole living issue of myself and my deceased husband, Robert Stark." There was competent testimony of declarations made by both Catherine and her daughter Abagail, after the death of Robert Stark, that Catherine was never married. Likewise, declarations were shown to have been made by Catherine that she was "of the Indian and negro races" and that Abagail "could not marry a colored man because she had so much more white that colored blood". Moreover, it was shown that Abagail had declared that she was of the "negro race"; and that she had "some negro blood"; that her mother had been a "negro slave". Additional testimony bearing on the fact that Catherine was a negro or mulatto is the testimony that she had declared she had no living relations. There was no testimony as to the percentage of negro blood that flowed in the veins of Catherine or Abagail.

The only evidence in the record which affirmatively indicates that Robert Stark was a white man were the declarations of Abagail to that effect. No issue was made in the trial below that he was not white; the issue there on the question of race being only as to whether Catherine and Abagail were white persons.

The only evidence that bore on the question of legitimacy of Abagail by reason of any acts or conduct by Robert Stark, other than the fact that she lived from the time she was born until the death of Robert Stark with him and her mother, is the testimony of a single witness that on some three or four occasions after their removal to Los Angeles she saw Catherine and Abagail riding with Stark in a buckboard, and that on one of these occasions they were driving to the home of one of Stark's daughters in the neighborhood of Saugus.

[1, 2] Under their first specification of error appellants contend that six rulings by the court on evidence were erroneous. For failure to comply with our rules the appellants are not entitled to a review of the alleged errors. Nevertheless we have examined the rulings and we find that all of them are indubitably correct. With respect to the ruling on appellants' offer of proof we should perhaps say a word to clear up what seems to be a rather too general misapprehension as to the function of an offer of proof. Counsel for appellants sought to have a witness read data from a record, which was not an original record. Objection having been properly sustained on the ground the record was secondary, counsel made an offer to prove by the witness some half dozen or more separate matters embodied in the written record. If counsel intended by his offer to prove these several matters by having the witness read them from the secondary record, the ruling was obviously correct. If, however, he intended to prove by the witness these various matters through the personal knowledge of the witness, without reference to the record, he did not by the offer of proof achieve error in the ruling on the offer. The proper procedure in that situation would have been for counsel to propound the pertinent questions to the witness. He was not entitled to use an offer of proof, as a dragnet, to obviate asking the witness the particular questions to which he desired answers from the witness's own personal knowledge. Accordingly, even though the witness could have testified as of his own knowledge to every fact set forth on the secondary record, counsel foreclosed himself by his offer to prove, when instead he should have

asked direct questions of the witness. See Indianapolis, etc., Transit Co. v. Hall, 165 Ind. 557, 76 N.E. 242.

Contestants concede that the evidence established that Catherine Stark "had some colored blood", but they contend that there was no evidence to indicate that she had a sufficient percentage of negro blood so as to require that she be classified as a negro or mulatto. Accordingly, they contend that the statute of this state, which was in force from the time that Robert Stark arrived here in 1853 until his death in 1870, did not prohibit a marriage between him and Catherine; and, even if it did, they claim there was a valid common law marriage on the facts, because by our statute (Code Civ. Proc., § 1963, subd. 30) there is a presumption (disputable) "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage". Before proceeding to a discussion of these contentions it is important to observe that if any marriage by common law, or otherwise, actually took place it occurred in Kentucky, Texas or California. If by chance it occurred in some other state the point is of no materiality, as every state of the Union at the time prohibited a marriage between a white and a mulatto having one-eighth or more negro blood. As the laws of the states other than California were no more favorable, if as favorable, to the position of the contestants, we shall limit our discussion to the law of this state.

[3, 4] The controlling California statute (Statutes of 1849–1850, Chapter 140), enacted by the legislature in April, 1850 (now, with additions, Civ. Code, § 60), reads as follows: "All marriages of white persons and negroes or mulattoes are declared to be illegal and void." While this statute did not define a "mulatto", two other statutes enacted at the same time, which prohibited a "black or mulatto" from testifying for or against a white person, or in a case where a white person was a party, defined a "mulatto" as a person having "one-eighth part or more of negro blood". Statutes of California, 1849–1850, Chapter 99, § 14; Chapter 142, § 306. These are statutes in pari materia, to be read and considered together. So read and construed it is plain that under the statute a marriage between a white person and a mulatto having one-eighth part or more of negro blood was illegal and void. Whether, as has been held (Daniel v. Guy, 19 Ark. 121; State v. Hayes, 1 Bailey, S.C., 275; cf. People v. Hall, 4 Cal. 399), a marriage between a white person and a person with less than one-eighth part of negro blood may be classed as illegal and void on the theory that such person is a "mulatto" within the meaning of our statute (now Civ. Code, § 60), we are not, in view of the facts of this case, required to decide.

[5, 6] Our statute, which expressly declares marriages of the kind mentioned therein as being illegal and void, may not be interpreted to mean marriage by solemnization only, as it is not so limited. As marriage by consent only, usually denominated common law marriage, was permissible in California during the period here involved, such marriages must be deemed within the bar of the statute. That being true, it follows that the disputable presumption "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage", being disputed by the substantive law itself, may not be invoked to operate as a presumption if one of the parties is in fact a mulatto. Cf. Estate of Baldwin, 162 Cal. 471, 472, 123 P. 267. See Estate of Morgan, 203 Cal. 569, 575, 265 P. 241; Estate of Elliott, 165 Cal. 339, 343, 132 P. 439.

Contestants further contend that if in fact there was a marriage which was illegal and void because Catherine was a mulatto, Abagail was nevertheless legitimated under Civil Code, section 85, reading: "The issue of a marriage which is void or annulled or dissolved by divorce is legitimate"; and, moreover, they contend that Robert Stark so publicly acknowledged Abagail as his child that he legitimated her by the rule laid down in Civil Code, section 230. The answer to this contention, we think, is to be found in two decisions of our Supreme Court. In Estate of Shipp, 168 Cal. 640, 144 P. 143, the court in stating that while the statutes of this state since 1895 require a solemnization as an essential to a valid marriage, a child of such a marriage is by Civil Code, section 230, legitimate even though no marriage license was procured. In so holding the court construed the language of the then statute reading: "The issue of all marriages null in law * * * are legitimate" (Civ. Code, § 1387) as not being limited to marriage that might be annulled under the provisions of Civil Code, section 82. However, it went on to say: "There may be some question whether the enactment [legitimizing children of marriages

null in law] applies to the offspring of marriages which are declared by the Code to be 'illegal and void,' or 'void from the beginning,' such as incestuous marriages (section 59), marriages of whites with negroes (section 60), or (under certain conditions) marriages between persons one of whom is already married (section 61)." In Estate of Gregorson, 160 Cal. 21, 116 P. 60, L.R.A. 1916C, 697, Ann.Cas. 1912D, 1124, the Supreme Court held there could be no collateral attack, by third parties, of a marriage which it was claimed was an absolute nullity, because one of the parties was of unsound mind. In so holding, the court, in its analysis of the pertinent statutes, said there was a clear distinction drawn by the legislature between void marriages and marriages which might be annulled. It pointed out that while certain marriages, such as marriages of white persons with negroes or mulattoes, were illegal and void, and, by Civil Code, section 80, either party thereto could proceed by action to have the same so declared, yet that marriages which might be annulled, by Civil Code, section 82, did not include the so-called void marriages, such as one between a white person and a negro or mulatto, or any of the group of void marriages except in one instance—that of a marriage contracted by a person during the life of a former husband or wife. The reason for including the latter, it was pointed out, was due to the fact that by Civil Code, section 61, they were not in all cases void.

[7] The two cited cases, even though they do not squarely decide the question before us, as the particular issue which we have here was not there involved, are nevertheless signposts that leave no doubt as to the decision which must be here made. Accordingly we must, and do, hold that the statute applicable at the time here in question (Civil Code, section 1387, now section 85 with some change of verbiage), reading, "the issue of all marriages null in law * * * are legitimate", did not at or prior to the time of the death of Robert Stark embrace children of an illegal and void marriage, such as a marriage between a white and negro or mulatto.

[8] As this holding is clearly required to effectuate the policy laid down by our legislature in the period 1849 to 1870, it would seem to follow that we would not give effect to that policy if we were to hold that under chapter 385, section 9, Statutes of California, 1869-1870 (with variations now Civil Code, section 230), a white person could by public acknowledgment legitimate his or her natural child by a negro or mulatto. However, we are not required to decide this point, as the evidence was wholly insufficient to meet the requirements of that statute. The only evidence bearing at all on the question whether Robert Stark legitimated his natural child, if he could, comes from a single witness who testified that when she was a child of 14 years of age she saw, on some three or four occasions in 1869 or 1870, Robert Stark driving a buckboard accompanied by Catherine and Abagail, and that on one of these occasions he was driving from Los Angeles to the home of one of his daughters living near Saugus. This, under the decisions, falls far short of being a public acknowledgment and recognition of Abagail as his legitimate child. The claim is not aided by the fact that Abagail lived in the household where her mother lived both prior and subsequent to her birth. The witness was 84 when she testified. As there was evidence that Abagail had declared, when she came to make her will, that she had no living relatives, the trial court was justified in crediting the declaration of Abagail and disbelieving the witness. At all events, the testimony was not of a character sufficient to upset the trial court's finding that there had been no public acknowledgment by Robert Stark of the legitimacy of Abagail.

[9-11] Before proceeding to apply the controlling legal principles to the facts of this case it is necessary to discuss the earnest contention of contestants that the burden of proof as to the invalidity of the alleged marriage between Robert Stark and Catherine Stark rests with the proponents of the will rather than with the contestants. The contention is clearly without merit. Our Probate Code provides that only a "person interested" in the will may contest it. Prob. Code, § 370. Among those who are classed as being "persons interested" are the heirs at law. Estate of Land, 166 Cal. 538, 540, 137 P. 246. If a person claims that he is an "heir at law" and so entitled to contest the will before probate, he is required to file written grounds of opposition. Prob. Code, § 370. Having filed such grounds he is on the trial, by virtue of the provisions of the statute, classed as being a plaintiff and the petitioner as the defendant. Prob. Code, § 371. If an issue is made as to the right of the

objector as plaintiff to contest the will, that question, on issue joined, is to be determined by the court before the issue as to the validity is tried before a jury, where a jury has been demanded. Estate of Land, supra. On such a trial to the court, involving only the right of the plaintiff, as an "interested party" under the statute, to contest the validity of the will, the burden of proof is upon such plaintiff, as in every case where one is a plaintiff, to prove by a preponderance of the evidence that he has the interest requisite under the statute to maintain the contest. 18 C.J. 872, § 126; see, also, 38 C.J. 1321. That being true, it follows as a matter of course that the burden of proof rests upon him to prove, by a preponderance of the evidence, that he has the status of an "interested person" as that phrase is defined by the statute and the decisions. If the plaintiff by a preponderance of the evidence—of which he has the burden of proof—proves that he is an heir at law (if that be the issue), then he is entitled to contest; otherwise not. Whether one is an heir at law depends not on the sections of the Probate Code alone but upon all the statutes of the state that bear on the subject. Of necessity, then, the provisions of any statutes that deal with the substantive law of heirship must be met. In short, if a prima facie case is made by plaintiff upon all the essential allegations necessary to state a cause of action, a case is nevertheless not made if evidence comes in, voluntarily or involuntarily, while plaintiff is putting on his case, which is sufficient to divest the plaintiff of a right to judgment. 64 C.J. 474, note 17.

[12-15] One of the most familiar examples of this rule comes from negligence cases. Under the law of this state a plaintiff who alleges that the defendant was negligent, and proves the fact by a preponderance of the evidence, is entitled to have a jury pass on his case without alleging or proving his want of contributory negligence. In short, if he makes a prima facie case on his claim of defendant's negligence a nonsuit may not be granted against him. But if it be shown, on his own case, that as a matter of law he was contributorily negligent, then a nonsuit must be directed against him, upon motion therefor, even though he was not required to negative by his pleading his freedom from contributory negligence nor to adduce evidence on the point. Elliott v. Chicago, etc., Ry. Co., 150 U.S. 245, 14 S.Ct. 85, 37 L. Ed. 1068. So here it would seem it was not necessary, in the first instance, for the plaintiff to have averred and proved that the parties had the capacity to contract the marriage which they claim took place between Robert Stark and Catherine Stark. 38 C.J. 1326, note 74. So, too, apparently it would have been sufficient for them to have proved facts indicating a common law marriage, without introducing any evidence as to whether one was a negro or mulatto and the other a white, or that both were white, or both were negroes or mulattoes. But the moment that it appeared on their case, as it did, that one of the parties to the alleged marriage was a white and that the other had negro or mulatto blood, that evidence, regardless of the pleadings or the prima facie case made on the pleadings, increased their burden of proof, by virtue of substantive law, to show by competent evidence, before they could be entitled to a judgment, either that both the parties were mulattoes or negroes or one a mulatto and the other a negro, under the provisions of the substantive statutes applicable, or that both were under those statutes white. As appellants concede, there is no evidence that Catherine had less than one-eighth negro blood, they must fail because the burden was on them to prove she was not in the prohibited class. In short, on their own case evidence came in without objection that Catherine had some negro blood in her veins. That being true, it was for the plaintiffs, where they claimed, as they did below, that Robert Stark was white, to prove by a preponderance of the evidence that Catherine was not a mulatto within the purview of the statutes of this state which were in effect at the time of the claimed marriage. As this was not shown, the burden was not met. The statute, as has been seen, not only prohibited the marriage of a mulatto and a white, but it made such marriage illegal and void. Whether the marriage was ceremonial or by way of consent, so as normally to give rise to a common law marriage, is immaterial. Both types of marriage were interdicted by the statute, and hence on the evidence there could be no valid marriage. If there was the semblance of a marriage—no matter how achieved—it was under the statute for all intents and purposes illegal and void.

The plaintiffs then having failed—they having the burden of proof—to prove a marriage valid under the statute, they have

failed to prove that Abagail as a matter of law was legitimated, for the simple reason that the statute applies only to the issue of those who would, as we have already pointed out, have the capacity to marry under the law.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 855

PEOPLE v. McVEY et al.

Cr. 3517.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1941.

Criminal law ⇐1182

Where time for filing briefs elapsed, and order to show cause why appeal should not be dismissed for want of prosecution was issued, but there was no appearance for appellants, by brief or otherwise, on date to which the order to show cause was returnable, judgments were affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Proceeding between the People of the State of California and Edward Leroy McVey and others. From adverse judgments, McVey and others appeal.

Affirmed.

Appellants appearing in propria persona.

Earl Warren, Atty. Gen., for respondents.

PER CURIAM.

October 8, 1941, the transcripts on appeal were filed in this court. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued, returnable November 26, 1941. On the latter date there was no appearance on behalf of appellants, either by brief or otherwise.

Therefore, pursuant to the provisions of section 1253 of the Penal Code, the judgments of the trial court are, and each of them is, affirmed.



48 Cal.App.2d 355

BARDEEN v. COMMANDER OIL CO., Limited, et al.

Civ. 13273.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

Hearing Denied Feb. 5, 1942.

1. Appeal and error ⇐1071(6)

In action to quiet title to leasehold interest in oil property, and for accounting, wherein plaintiffs pleaded and defendants denied that parties to oil lease waived full production test and accepted a partial production test, failure of trial court to make a finding on issues of waiver and acceptance was prejudicial error.

2. Appeal and error ⇐1071(6)

It is prejudicial error for trial court to fail to make a finding upon a material issue presented by the pleadings, where record shows that there was substantial evidence upon such issue which would have sustained a finding in favor of appealing party.

3. Quieting title ⇐44(3), 47(2)

In action to quiet title to leasehold estate of oil property and for accounting, evidence supported a finding that parties to lease waived full production test and accepted partial production test, and hence trial court was required to make finding on such issue.

4. Appeal and error ⇐762

Generally, points raised for the first time in a reply brief will not be considered.

5. Appeal and error ⇐762

The reviewing court is at liberty to decide the case upon any point which proper disposition thereof may seem to require, whether brought to court's attention by counsel in the reply brief for the first time or not.

6. Appeal and error ⇐762

In action to quiet title to leasehold involving oil property and for accounting, where record on appeal from judgment for defendants showed that another case had been before reviewing court between the same parties, involving the same res and raising the same issues, reviewing court considered trial court's failure to make finding upon material issues, though the point was first raised in reply brief.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by H. A. Bardeen against the Commander Oil Company, Limited, and others, to quiet title to a leasehold estate and for an accounting. From a judgment for defendants, plaintiff appeals.

Reversed.

Oliver O. Clark, of Los Angeles, and Charles F. Gerard, of Ventura, for appellant.

Don S. Irwin and James Madden, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to quiet title to a leasehold estate and for an accounting, plaintiff appeals.

So far as material here, the essential facts are:

August 23, 1938, plaintiff commenced the present action, which is in three counts. The first is a simple cause of action to quiet title to a leasehold. The second is the same as the first, except that it alleges a number of defaults by defendants. The third is substantially a repetition of the second cause of action with the addition of paragraphs relative to a request for an accounting by reason of defendants' alleged unauthorized occupancy of the property involved. The master lease, which is the basis of the instant suit, contained the following provision: "* * * In the event said first well shall produce more than one hundred (100) barrels, and less than two hundred fifty (250) barrels per day over a period of the first thirty (30) days after production is reached, the party of the second part shall pay to the party of the first part the sum of Fifty Thousand and No/100 Dollars ($50,000.00) payable out of twenty-five per cent (25%) of the total amount of oil produced from the said well or other wells thereafter drilled."

Plaintiff in the instant suit pleaded a waiver by the interested parties of a full production test as required by the terms of the master lease and acceptance by the interested parties of their observations of a partial production test as being sufficient to mature the obligation contained in the master lease as set forth above. Defendants denied the allegations of waiver and acceptance. The trial court failed to find on either of such issues.

This is the sole question necessary for us to decide:

Was it prejudicial error for the trial court to fail to make a finding upon the issues of waiver and acceptance as pleaded supra *and denied by defendants?*

[1, 2] This question must be answered in the affirmative. The law is established in California that it is prejudicial error for the trial court to fail to make a finding upon a material issue presented by the pleadings, where it appears from the record that there was substantial evidence introduced upon such issue which would have sustained a finding in favor of the appealing party. (Tucker v. United Railroads, 171 Cal. 702, 704, 154 P. 835; see also 2 Cal.Jur.(1921) 1032, sec. 614).

[3-6] In view of our holding in Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 344, 104 P.2d 875, a companion case between the same parties involving the same issues, there can be no doubt that there was substantial evidence introduced to support a finding in plaintiff's favor upon the two issues in question. Had there been such a finding it would have supported a judgment in favor of plaintiff upon the obligation contained in the portion of the master lease above quoted. In the present case the failure of the trial court to make a finding upon material issues was first called to our attention by plaintiff in his reply brief. It is the general rule that points raised for the first time in a reply brief will not be considered by us (Lady v. Palen, 12 Cal. App.2d 3, 5, 54 P.2d 1134). It is also the rule that the court is at liberty to decide a case upon any point, which proper disposition thereof may seem to require, whether brought to the attention of the court by counsel in the reply brief for the first time or not (Burns v. Ross, 190 Cal. 269, 275, 212 P. 17). We have deemed it expedient

to apply the rule just stated in the present case, because from the record it appears that the present case is the second one that has been before this court between the same parties involving the same lease and raising the same issues. (See Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 104 P. 2d 875.)

It also appears from the record that there is another action (No. 435515, Records of Los Angeles Superior Court), which is now pending between the same parties involving the same lease and substantially the same issues, and that in addition other actions between the same parties and involving the same lease and raising similar issues are now also pending in the superior court.

The conclusions which we have reached render it unnecessary for us to pass upon other points raised by counsel. As the trial court in the instant case failed to make findings upon material issues, the judgment must be reversed, and it is recommended that upon a retrial of the present action the other actions above mentioned which are pending be consolidated for trial with the present case, so that all of the issues between the parties involving the same subject matter may be heard by the same trial judge and a proper disposition made thereof.

The judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 345

COMMANDER OIL CO., Limited, v. BARDEEN et al.

Civ. 12893.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

1. Appeal and error ⇐977(3)

In action for declaratory relief concerning obligations under oil lease, tried without a jury, evidence sustained a judgment for plaintiff, and hence reviewing court would not disturb order granting plaintiff's motion for new trial, made by a different judge than the judge who granted judgment for defendants.

2. Appeal and error ⇐979(2)

Where conflict in evidence upon material issues would have sustained a judgment in favor of party moving for new trial, order granting motion for new trial upon ground of insufficiency of evidence to sustain the judgment will not be disturbed.

3. Appeal and error ⇐979(2)

The rule that order granting new trial on ground of insufficiency of evidence will not be disturbed, where there is a conflict of evidence, is applicable though new trial is granted by another judge than the one who presided at the trial.

4. Appeal and error ⇐1176(1)

The reviewing court would not order judgment to be entered in conformity with facts as determined in prior decision of another action which determined some of the issues in favor of defendant in the case at bar, where there were several other actions pending between the same parties, raising the same issues and arising out of the same transaction, which should be tried before the same trial judge. Code Civ.Proc. § 427, subd. 8.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Commander Oil Company, Limited, against H. A. Bardeen and others, for declaratory relief concerning obligations under an oil lease. From an order granting plaintiff's motion for new trial, defendants appeal.

Affirmed.

See, also, 44 Cal.App.2d 796, 113 P.2d 266.

Oliver O. Clark, of Los Angeles, for appellants.

Don S. Irwin and James Madden, both of Los Angeles, for respondent.

McCOMB, Justice.

From an order granting plaintiff's motion for a new trial, defendants appeal. The action is one for declaratory relief involving obligations relative to an oil lease, and was tried before the court without a jury. The present action is between the same parties and the pleadings raise the same issues as those involved in the

case of Bardeen v. Commander Oil Co., 119 P.2d 967, which we have this day decided. The instant case was tried with the case just mentioned. Thereafter the trial judge denied a motion for a new trial in action No. 13273, supra. After denying a motion for a new trial in the present case (action No. 12893), the trial judge became incapacitated and a motion for a new trial in the instant case was heard before a different judge of the superior court, who granted the motion for a new trial on the ground, among others, of the "insufficiency of the evidence to justify the decision of the court."

These are the questions necessary for us to determine:

First: Was the order of the trial court erroneous?

Second: Assuming that the order of the trial court was correct, in view of our decision in Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 104 P.2d 875, *which determines some of the issues raised by the pleadings in the present action in favor of the present defendant, should this court reverse the order of the trial court granting a motion for a new trial and order a judgment to be entered in conformity with the facts as determined in Bardeen v. Commander Oil Co.,* 40 Cal.App.2d 341, 104 P.2d 875.

[1, 2] The first question must be answered in the negative. The law is established that, where there is a conflict of evidence upon material issues, which would have sustained a judgment in favor of the moving party, an order granting a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the judgment theretofore entered by the trial court will not be disturbed upon appeal (Empire Investment Co. v. Mort, 109 Cal. 732, 736, 147 P. 960).

[3] It is likewise settled that the aforesaid rule of law is applicable, even though the motion for a new trial is granted by another judge than the one who presided at the trial of the action (Empire Investment Co. v. Mort, supra). An examination of the record in the instant case discloses substantial evidence to sustain a judgment in favor of plaintiff, should the trial court have chosen to believe it to the exclusion of the evidence offered by defendants. Therefore, the ruling of the trial court on the motion for a new trial will not be disturbed by us.

[4] The second question must be answered in the negative. In addition to the issues raised in Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 104 P.2d 875, the present action raises other issues necessary to be determined, and, as pointed out in Bardeen v. Commander Oil Co., our number 13273, 119 P.2d 967, this day decided, there are several other actions pending between the same parties raising the same issues and arising out of the same transaction. It is, therefore, proper that these various actions be tried before the same trial judge, pursuant to the provisions of section 427, subd. 8 of the Code of Civil Procedure, at which time the present defendants, if so advised, may by proper plea raise in the trial court the issue of res adjudicata predicated upon our decision in Bardeen v. Commander Oil Co., 40 Cal.App.2d 341, 104 P.2d 875. We refrain from expressing any opinion as to the merits of such a plea.

In view of our conclusions, it is unnecessary for us to discuss the other points urged by counsel.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 347

BROOKS v. BROOKS.

Civ. 13111.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

1. Courts ⇐122

Where a complaint alleges that certain sums are due and it seeks a total recovery in excess of the jurisdictional minimum of the superior court, such complaint states a cause of action within the jurisdiction of that court even though it may appear from the face of the complaint that some of the recovery sought may be defeated by application of the statute of limitations.

2. Courts ⇐122

Action to recover $3,630 paid at rate of $80 per month from September, 1936, to June, 1940, pursuant to terms of an alleged void contract, was within jurisdiction of superior court as against contention that the court did not have jurisdiction because it appeared from the face of the complaint that less than $2,000 could be recovered because balance was barred by statute of limitations.

3. Husband and wife ⇐5

In the absence of statute, a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status, since such contracts are against "public policy."

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Husband and wife ⇐5

Where nurse informed patient that nurse would immediately leave patient unless he married her but that if he would marry her all she would ask of him after marriage would be payment of $80 per month and room and board for herself and minor son, as long as he needed it, and that she would continue to render patient efficient services as nurse and housekeeper, and relying on such promises the patient agreed to compensate the nurse and married her, the agreement was void as contrary to "public policy." Civ.Code, § 159.

5. Money received ⇐6(4)

Where a party pays a consideration pursuant to the terms of a void agreement, he may immediately sue to recover the amount of such payment where the parties are not in pari delicto.

6. Husband and wife ⇐205(2)

Where nurse informed patient that nurse would immediately leave patient unless he married her but that if he would marry her, all she would ask of him after marriage would be payment of $80 per month and room and board for herself and minor son, as long as he needed it, and that she would continue to render patient, efficient services as nurse and housekeeper, and relying on such promises the patient agreed to compensate the nurse and married her, the husband was entitled to bring action to recover money paid the wife pursuant to the agreement, since it was void, and there was no "consideration" for the money paid. Civ.Code § 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by James Robert Brooks against Bessie Marie Brooks to recover consideration paid pursuant to an alleged void contract. From a judgment for defendant, plaintiff appeals.

Judgment reversed, with directions.

Newby & Newby, and Nathan Newby, all of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the sustaining of a demurrer to the complaint without leave to amend in an action to recover the consideration paid pursuant to the terms of an alleged void contract, plaintiff appeals.

The complaint alleges in substance the following:

On or about April 27, 1932, plaintiff who since 1895 had been completely paralyzed from his waist to and including his feet employed defendant as his nurse and agreed to pay her $80 per month for her services and to furnish board and room for herself and a minor son. Defendant continued as such nurse until September 23, 1936, when she told plaintiff that she would not continue longer in his services but would leave him immediately unless he married her. Defendant stated to plaintiff that, if he would marry her, all she would ask of him after marriage would be the payment of $80 per month and room and board for herself and her minor son as long as the son needed it and that she would continue to render to plaintiff efficient services as nurse and housekeeper. Plaintiff, relying upon her promises, agreed to compensate her in accordance with her request and married defendant on September 29, 1936. June 28, 1940, defendant voluntarily left plaintiff against his consent and has since lived separate and apart from him. From the period of her marriage until June 28, 1940, pursuant to their agreement, plaintiff paid defendant $3,630. The prayer of the complaint seeks to recover a judgment against defendant for the sum just mentioned.

For the purpose of this appeal we will assume that the facts well pleaded in the complaint are susceptible of proof.

These are the questions necessary for us to determine:

First: In view of the fact that it appears from the face of the complaint that certain sums which plaintiff seeks to recover are barred by the Statute of Limitations, leaving a balance of less than $2,000, did the superior court have jurisdiction of the action?

Second: Was the oral agreement set forth supra *between plaintiff and defendant contrary to public policy and, therefore, void?*

[1, 2] The first question must be answered in the affirmative. The law is established in California that, where a complaint alleges that certain sums are due and seeks a total recovery in excess of the jurisdictional minimum of the superior court, such complaint states a cause of action within the jurisdiction of that court, even though it may appear from the face of the complaint that some of the recovery sought may be defeated by application of the Statute of Limitations (Bank of America, etc., Ass'n v. Ames, 18 Cal.App.2d 311, 314, 63 P.2d 1208). The instant case falls clearly within the foregoing rule, in view of the fact that plaintiff sought to recover the total sum of $3,630.

[3, 4] The second question must likewise be answered in the affirmative. In the absence of statute it is the established rule that a married woman cannot contract with her husband with respect to domestic services which are incidental to her marital status, since such contracts are against public policy (Coleman v. Burr, 93 N.Y. 17, 45 Am.Rep. 160; see, also, Estate of Sonnicksen, 23 Cal.App.2d 475, 73 P.2d 643; Wren v. Wren, 100 Cal. 276, 280, 34 P. 775, 38 Am.St.Rep. 287).

The reason for the above-stated rule is clearly set forth in Coleman v. Burr, supra, by Mr. Justice Earl at page 25 of 93 N.Y., 45 Am.Rep. 160, as follows:

"Whatever services a wife renders in her home for her husband cannot be on her sole and separate account. They are rendered on her husband's account in the discharge of a duty which she owes him or his family, or in the discharge of a duty which he owes to the members of his household.

"It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in his home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations, and frauds upon creditors would be greatly facilitated, as the wife could frequently absorb all her husband's property in the payment of her services, rendered under such secret, unknown contracts."

In California there is no statute permitting a wife to contract with her husband relative to domestic services and services which are incidental to the marital status.

Section 159 of the Civil Code reads thus: "A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation."

It is obvious that housekeeping and nursing a sick or invalid spouse is an incident of the marital status and does not fall within the exceptions stated in the Civil Code section just quoted. Such services have no relation to the property of the husband or wife, and in the instant case, since there was no separation, the agreement did not fall within the exception which authorizes an agreement to provide for the support of either spouse or their children. (Brown v. Brown, 83 Cal.App. 74, 82, 256 P. 595).

[5] It is likewise settled that, where a party pays a consideration pursuant to the terms of a *void* agreement, he may immediately sue to recover the amount of such payments where, as in the instant case, the parties are not *in pari delicto* (Smith v. Bach, 53 Cal.App. 63, 64, 199 P. 1106; McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Restatement of the Law of Contracts (1932), vol. 2, p. 1120, sec. 604).

[6] Applying the foregoing rules to the facts alleged in the complaint in the instant case, it appears that defendant entered into an agreement to render services which she was bound to render as being incidental to her marital status with plaintiff and that the sums paid to her by plaintiff were for such services and that, since such an agree-

ment is void as against public policy, there was no consideration for the sums of money which plaintiff paid defendant and he was entitled to bring an action to recover them.

In view of the conclusions which we have reached, it is unnecessary to discuss the applicability of the Statute of Frauds (sec. 1624, Civ.Code) to the facts of the present case.

For the reasons above stated the judgment is reversed with directions to the trial court to permit defendant a reasonable time to answer if she be so advised.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 429

BOURDIEU v. SEABOARD OIL CORPORATION et al.

Civ. 2668.

District Court of Appeal, Fourth District, California.

Dec. 11, 1941.

Hearing Denied Feb. 5, 1942.

1. Appeal and error ⇐1099(6)

The decision on a prior appeal that complaint stated a cause of action for damages to plaintiff's homestead in public lands on ground that the use by lessee of mineral rights in the lands to handle oil and gas produced on other tracts of land constituted a continuing trespass, and that plaintiff could recover for such resulting damages as he had sustained within the three years next preceding filing of action, became the "law of the case".

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Mines and minerals ⇐5

In action by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of lands without homesteader's consent to handle oil and gas produced on other tracts, an exhibit showing total gas production from homesteader's land during three-year period prior to commencement of the action and the total gas compressed for use in compressor plant located on homesteader's land was admissible as bearing on extent of reasonable use of homesteader's land.

3. Mines and minerals ⇐5

In action by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of lands without homesteader's consent to handle oil and gas produced on other tracts, an exhibit showing that over one million barrels of oil were produced from land other than homesteader's land and stored in and shipped from and through tanks and shipping pump on homesteader's land during three-year period prior to bringing action was admissible as bearing on extent of reasonable use of homesteader's land.

4. Evidence ⇐155(6)

In action by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of land without homesteader's consent to handle oil and gas produced on other tracts, where superintendent of lessee testified that, if facilities used on the homestead were not employed in conjunction with facilities on other lands, it would cast a greater burden on homestead than at present, trial court erred in excluding testimony of an expert witness by which homesteader sought to show that homestead could have been operated by lessee as a separate unit instead of under the unit system.

5. Mines and minerals ⇐5

The right to use of homesteader's public lands by a lessee of mineral rights in same lands was restricted under federal statute to right to remove reserve deposits and to occupy so much of surface thereof as might be required for all purposes reasonably incident to mining and removal of minerals therefrom, and such right could not be enlarged by terms of the lease. Act Cong. July 17, 1914, 30 U.S.C.A. § 121 et seq.; Stock-Raising Homestead Act, 43 U.S.C.A. § 291 et seq.; Mineral Lands Leasing Act, 30 U.S.C.A. § 181 et seq.

6. Mines and minerals ⇐5

In action by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of lands without homesteader's consent to handle oil and gas produced on other tracts, where it appeared that if prof-

fered evidence, which was improperly excluded, had been placed before jury, there would have been sufficient evidence to submit to jury question of reasonable value of wrongful use of homesteader's property, trial court erred in directing a verdict for lessee.

7. Trespass ⇐51

The measure of damages for a continuing trespass is the worth of the use of the property, even though the occupation caused no damage and plaintiff would have made no use of the property. Civ.Code § 3334.

8. Mines and minerals ⇐5

In action by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of lands without homesteader's consent to handle oil and gas produced on other tracts, trial court erred in refusing to allow expert witnesses to testify, on behalf of homesteader, what, in their opinion, was reasonable rental value, or reasonable value of wrongful use of homestead for purposes for which it was wrongfully used by lessee during three-year period prior to bringing action, since such testimony was admissible as bearing on question of measure of damages. Civ.Code, § 3334.

9. Mines and minerals ⇐5

A bond given to United States by lessee of mineral rights in public lands, under provisions of Mineral Leasing Act, covers only damages to crops or tangible improvements of entryman or owner when rightfully used and occupied for all purposes reasonably incident to mining or removal of minerals, and does not cover use of entryman's land occasioned by a wrongful and continuous trespass. Mineral Lands Leasing Act, 30 U.S.C.A. § 181 et seq.

10. Mines and minerals ⇐5

A claim by homesteader of public lands against lessee of mineral rights in same lands for damages to homestead resulting from use of land without homesteader's consent to handle oil and gas produced on other tracts was one for a wrongful and continuous trespass, and homesteader's remedy was not by a suit on bond given to United States by lessee under provisions of Mineral Leasing Act. Mineral Lands Leasing Act, 30 U.S.C.A. § 181 et seq.

11. Appeal and error ⇐1171(1)

A reversal of judgment for defendant, based on directed verdict, would not be denied on ground that plaintiff at most was entitled to receive only nominal damages, where proof of amount of damages had been offered and erroneously excluded, and it could not be said as a matter of law under the evidence as proffered that plaintiff would be entitled only to nominal damages.

12. Appeal and error ⇐927(7)

Upon an appeal from a judgment for defendant, based on a directed verdict, plaintiff is entitled to have every legitimate inference drawn in his favor, and judgment must be reversed if it appears that the question, under the evidence and inferences to be drawn therefrom, is one of fact and not of law.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Jean Bourdieu against the Seaboard Oil Corporation, etc., Kettleman North Dome Association, and others, for damages to land held by plaintiff as a homesteader by defendants as lessees of mining rights of the land. All defendants were dismissed by nonsuit excepting the Kettleman North Dome Association. From a judgment for the defendant Kettleman North Dome Association, based on a directed verdict, the plaintiff appeals.

Judgment reversed and new trial ordered, with instructions.

Chandler & Wright, of Los Angeles, and Walter H. Stammer, of Fresno (Oliver S. Northcote, of Los Angeles, of counsel), for appellant.

George W. Nilsson, of Los Angeles, and Arthur C. Shepard, of Fresno (Monta W. Shirley, of Los Angeles, of counsel), for respondent.

GRIFFIN, Justice.

On a former appeal this case was presented for consideration of the pleadings and the controversy arising therefrom. Bourdieu v. Seaboard Oil Corporation, 38 Cal.App.2d 11, 100 P.2d 528, 533. The nature of the action is there fully set forth. As will be noticed, appellant is the owner of the surface rights to section 30, township 21 south, range 17 east, M. D. B. & M., Fresno county, in the North Dome of the Kettleman Hills oil fields. He acquired his rights to the north half of that section by virtue of making entry thereon in March, 1919, and to the south half of that section by entry and filing in September, 1919. He

secured his patent to the north half in October, 1925, and to the south half in January, 1926. After making entry appellant built his home on that section, farmed approximately 40 to 60 acres, put up corrals and fences and used the section as his home and headquarters for his sheep ranch. He continued to so use this land until September, 1931, at which time the respondent Kettleman North Dome Association, hereinafter referred to as K.N.D.A., by virtue of a federal oil and gas lease, entered upon section 30 and commenced the drilling of an oil well. Thereafter, it made further entries and drilled and completed fifteen additional wells on that section and completed an elaborate system of roads, fuel gas lines, wet gas lines, gas lift lines, water lines and oil lines, on section 30 and throughout the North Dome of Kettleman Hills, including many sections other than section 30. This system is not confined to section 30 nor is it confined to the operation of lands covered by the lease under which respondent operates section 30, but the system is connected with and operates as a part of the entire K.N.D.A. joint system for the Kettleman Hills North Dome, which covers an area 17 miles long and 1½ miles wide. Appellant also completed on section 30, in 1934, a large compressor plant and cooling tower, water tanks and smaller plants, as well as two 5,000-barrel oil storage tanks and certain shipping pumps, all of which were also connected with and made a part of the K.N.D.A. system during the three-year period from March 30, 1935, to March 30, 1938. During that period respondent used these plants, tanks, pumps, lines and roads on section 30 in handling oil and gas produced not only on section 30 but also from lands other than section 30, and during this time actually compressed in the large compressor plant located on section 30, according to the proffered proof, over 13,000,000,000 cubic feet of gas produced from lands other than section 30, which gas, after such compression, was used on lands other than section 30, and also stored, handled and shipped on and through section 30, over 1,000,000 barrels of oil which were produced on lands outside of section 30 and used otherwise than on that section.

Appellant's suit is for damages for respondent's continuing trespass and wrongful use of his homestead as set forth. It will be remembered that respondent, under its leasehold right, had not only the right to extract the oil and gas, but also the appurtenant right to enter and to use and occupy so much of the surface of the land as may be required for all purposes reasonably incident to the mining and removal of the oil and gas therefrom. This was determined by the former appeal. In addition to this determination this court also held on the previous appeal that the two causes of action there set forth in detail stated a cause of action, and that the entries made and the wrongful use and occupancy within three years prior to the filing of the action, were not barred by the statute of limitations. This court then said that: "The issue of how much of the surface is required for all purposes reasonably incident to the mining and removal of oil and gas or other minerals from the homesteader's land ordinarily would be a question of fact to be determined on trial."

Prior to the trial an amendment to the amended complaint above construed was filed by stipulation. This amendment apparently was filed due to the fact that the amended complaint did not clearly allege in detail the injury caused by the increased use of appellant's land by respondent, as pointed out in the previous opinion.

In reference to the two causes of action above mentioned, this court in the previous decision, Bourdieu v. Seaboard Oil Corporation, supra., 38 Cal.App.2d at page 23, 100 P.2d at page 535, summed up its ruling in the following language: "* * * we believe the judgment must be reversed for the reasons heretofore stated, namely,—that appellant can recover on his first cause of action for all damages caused by the *entries* upon the north half of appellant's land made by respondents within the statutory period; and also that the *use* and occupancy of both parcels of appellant's land by respondents to handle oil and gas produced on other tracts of land is in the nature of a continuing trespass, and appellant may recover for such resulting damages as he has sustained within the three years next preceding the filing of this action." (Italics ours.)

[1] This determination has become the law of the case. Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252. After the judgment became final on the former appeal each defendant, except K.N.D.A., denied they had made any entry or use of section 30 and alleged that all their rights acquired by leases from the federal

government had been transferred and assigned to the respondent K.N.D.A., under the unit agreement discussed in the previous opinion, Bourdieu v. Seaboard Oil Corporation, supra, 38 Cal.App.2d at page 22, 100 P.2d 528. When the case was called for trial, appellant introduced the unit agreement in evidence. All defendants were dismissed by nonsuit excepting the respondent K.N.D.A. No appeal has been taken from that judgment of nonsuit as to those defendants. The trial proceeded against the remaining defendant.

It is now appellant's contention that the trial court committed the following errors: (1) That it refused to allow the appellant to prove the *extent* of the wrongful use and occupancy of appellant's lands after he had proved, and it was admitted, that the respondent had, without appellant's consent, used facilities and structures on section 30 to handle oil and gas produced from tracts of land outside of section 30 during the three-year period preceding the filing of the complaint. (2) That the court erroneously struck appellant's exhibit 14 from the records. (3) That it refused to allow appellant's exhibit 14a to be introduced in evidence. (4) That it refused to allow expert witnesses to testify what, in their opinion, was the reasonable rental value, or the reasonable value of the wrongful use of section 30 for the purposes for which it was wrongfully used by the respondent during this period. (5) That it erroneously directed the jury to bring in a verdict for the respondent.

[2] The respondent's answer denied that any of the facilities installed by it were used in connection with respondent's operation of lands other than those covered by its lease, and denied that such facilities occupied any more of the surface of section 30 than were required for all purposes reasonably incident to the drilling of wells on section 30 and the removal of oil and gas therefrom, except certain oil lines, etc., "which were used to a slight degree in connection with some of the operations on other lands" covered by its lease. Exhibit 14, above mentioned, stipulated to be a correct compilation of gas and oil handled on section 30 during the three-year period in question, was by the court first admitted in evidence and later ordered stricken from the record. This exhibit shows the total gas production from section 30 during this period to be 19,173,881,000 cubic feet; that the total gas compressed in the plant thereon during this period was 33,371,439,000 cubic feet, and that the total gas compressed for use on section 30 was 20,017,824,000 cubic feet, thus showing that 13,353,615,000 cubic feet of gas, or approximately 40 per cent, was brought onto section 30 from other lands, treated in the compressor plant, and shipped off of section 30 to be used elsewhere by the respondent during the three-year period. This evidence was admissible as bearing on the extent of the reasonable use of appellant's lands appertaining to the compressor plant and should have been allowed to remain in evidence.

[3] Exhibit 14a (being a page from Exhibit 14) showed that 1,003,215 barrels of oil were produced from lands other than section 30 and stored in and shipped from and through tanks and shipping pump on section 30 during this three-year period. This exhibit should have been allowed to remain in evidence for the same reason. Counsel for appellant on many occasions endeavored to re-offer testimony and evidence on this subject for the purpose of ascertaining the "amount of, and the extent of the unlawful user", as a foundation for proof of damages. The trial court sustained objections to such evidence and refused to allow appellant's expert witness to testify in reference to the reasonable value of that unauthorized use. It was stipulated by counsel for respondent that "* * * the oil produced from well No. 8 on section 20-J went across to the tank on the northeast quarter of 30-J * * *". The evidence establishes that many wells, sumps, roads, water lines, gas and fuel lines, trap and flow lines were either commenced or completed between March 30, 1935, and March 30, 1938, on the north half of section 30. Appellant testified that he could no longer make use of this property except "part of it and the west end of section 30", because the "land was already all tore up by oil wells and roads and my sheep was disturbed by all the compressors and trucks and cars".

[4] The superintendent of K.N.D.A., called under section 2055 of the Code of Civil Procedure, testified generally as to the use made of section 30 in conjunction with the wells located on other sections, and when examined by counsel for respondent, by consent, he testified that if the facilities used on section 30 were not employed in conjunction with the facilities on the other sections and the K.N.D.A. was obliged to operate section 30 as a separate

unit, it would cast a greater and additional burden on the property than at present.

Appellant called an expert witness who duly qualified as such and testified that "* * * there are more facilities on section 30 than are reasonably necessary for handling the production from section 30". Certain of these items were pointed out to the jury by the witness from an exhibit showing all of the facilities on section 30. The witness was asked if section 30 could not have been operated as a separate unit instead of being operated under the unit system. Objection to this line of testimony was sustained by the trial court. It was clearly admissible at least for the purpose of contradicting the evidence brought out by respondent, and if admitted would no doubt create a conflict in the evidence, which conflict would be a matter for the determination of the jury. This witness was also prepared to testify as to the reasonable value of the use and occupation or the reasonable rental value of the use of the north half of section 30 for the handling of oil produced on lands other than section 30 during the three years in question. The court refused such testimony on the ground that "It does not tend to prove or disprove any issue involved in this case". After considerable argument with the court, counsel for appellant rested his case. Thereupon, the trial court instructed the jury that "under the law there is absolutely no evidence before you upon which to base any matter of damages, so * * * retire and return a verdict into this court in favor of the defendant." From the verdict thus returned plaintiff appeals, as well as from the judgment entered upon it.

From an examination of the proffered evidence, the questions presented on appeal and the final conclusion reached in appellant's brief, it appears that he is now only seeking to recover under the second cause of action for the reasonable value of the beneficial use wrongfully made by respondent of appellant's lands during the three-year period, which wrongful use has been described as in the nature of a continuing trespass.

Respondent first contends that pursuant to and notwithstanding the limitations of respondent's rights under the Agricultural Entry Act of July 17, 1914 (U.S.C.A., Title 30, § 121 et seq.), and the Stock-Raising Homestead Act of December 29, 1916 (U. S.C.A., Title 43, § 291, et seq.), under its lease from the United States by virtue of the Mineral Lands Leasing Act of February 25, 1920 (U.S.C.A., Title 30, § 181 et seq.) of 2,560 acres, including all of sections 20, 28 and 30, and three-fourths of section 18, and the northeast quarter of section 32, it was authorized to erect and maintain on appellant's property any and all facilities necessary to the full enjoyment of the entire lease.

[5] From an examination of the acts above cited, the right to the unrestricted use of appellant's section 30 is not conferred or authorized. The Agricultural Entry Act, supra, section 122, provides that "any person who has acquired from the United States the * * * right to * * * remove the reserved deposits * * * may * * * occupy so much of the surface thereof as may be required for all purposes *reasonably incident* to the mining and removal of the minerals *therefrom.*" This right could not be and is not enlarged by the terms of the lease. It should also be pointed out that oil and gas from other sections not mentioned in the lease are conveyed through the loop system. As pointed out by appellant, if respondent's contention were correct, then it could continue to use the surface of section 30 for handling the production of oil and gas from lands other than appellant's homestead long after the wells on that section had become exhausted and no gas was being produced from them.

[6] We are convinced that if the proffered evidence is properly placed before the jury there will be sufficient evidence to submit to the jury the question of the reasonable value of the wrongful use and occupation of appellant's property by respondent. The trial court therefore erred in directing a verdict for the respondent under the circumstances.

[7] There was considerable argument and the question arose as to the measure of damages allowable under the facts related. On this subject, section 3334 of the Civil Code is applicable. It provides: "Wrongful occupation of real property. The detriment caused by the wrongful occupation of real property * * * is deemed to be the value of the use of the property for the time of such occupation, * * *."

In Lindberg v. Linder, 133 Cal.App. 213, at page 218, 23 P.2d 842, at page 844, in regard to the measure of damages for

a continuing trespass, the court said: "That a reasonable rental value affords a proper measure of damages in a case of trespass appears in Salmond on Torts (7th Ed. 1928), p. 246: 'When a trespass consists in some beneficial use wrongfully made of the plaintiff's land even if it causes no damage, the plaintiff is entitled to claim by way of damages a reasonable remuneration for the use as if it had been under agreement. * * * The same principle applies to the unlawful use of a way over another's land; even though no harm has been done to the land, a reasonable rent for such a way may be recovered as damages.' See, also, Tome Inst. v. Crothers, 87 Md. 569, 40 A. 261, 267, and 38 Cyc. 1129."

38 Cyc. 1129, above cited, reads in part: "The measure of damages for an appropriation of the use of the land by a continuing trespass is the worth of the use of the property * * *." See, also, United States v. Bernard, 9 Cir., 1913, 202 F. 728, 731, in which case it is said: "The fact that a plaintiff in an action for continued trespass would have made no use of the land which the defendant has wrongfully used to his advantage and profit will not prevent the plaintiff from recovering the actual value of that which has been so used and acquired by the defendant. The measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property." (Citing cases.)

[8] It therefore appears that the evidence offered by appellant bearing on this question was admissible.

[9, 10] Respondent next contends that appellant's only remedy for the claimed trespass on the south half of section 30 was by a suit on the bond given to the United States under its lease. In connection with that lease a bond was given under the provisions of the Mineral Leasing Act, supra, to the United States "for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond * * * against the principal and sureties thereon * * *." It is apparent that the bond only covers such damages to crops or tangible improvements of the entryman or owner when rightfully used and occupied for all purposes reasonably incident to the mining or removal of the coal or other minerals therefrom, and does not cover the reasonable use and occupation of the entryman's land occasioned by a wrongful and continuous trespass. In other words, the bond provided by the statute was to cover damages which might be caused by what we may refer to as the "lawful use of the premises", i. e., the entry and use thereof in connection with the production of oil and gas therefrom. Therefore, in view of the fact that appellant now concedes that "the evidence offered in the trial court was not offered against the original entry of the defendant or for damages sustained to crops or improvements" and that "the evidence that was offered concerned the defendant's *wrongful use* of plaintiff's homestead, which use is a continuing trespass", there appears to be no merit to respondent's contention as to the claimed cause of action on the bond.

[11] The last question presented is this: Respondent contends that, at most, appellant was entitled to receive only nominal damages and that a judgment in favor of this defendant should not be reversed by the appellate court merely to allow the plaintiff to recover nominal damages, citing Gray v. Southern Pacific Co. et al., 21 Cal. App.2d 240, 68 P.2d 1011. It cannot be said as a matter of law under the evidence as proffered that appellant would be entitled only to nominal damages. The main issue involved on this appeal is the measure and amount of damage. Proof of the amount of damage was offered through the questions sought to be asked of appellant's expert witness. Without such testimony, no court or jury could properly determine that amount.

[12] Upon an appeal after a verdict for the defendant brought in under the trial court's instruction, the plaintiff is entitled to have every legitimate inference drawn in his favor, and the judgment must be reversed if it appears that the question, under the evidence and the inferences to be drawn therefrom, is one of fact and not of law. Erickson v. Vogt, 27 Cal.App.2d 77, 80 P.2d 533.

For the reasons expressed, the judgment of the trial court is reversed and a new trial ordered, with instructions to the trial court to permit the appellant to present evidence showing the extent of the claimed unlawful use by respondent of appellant's lands during the three years next preceding the filing of the complaint, and with the fur-

ther instruction to the trial court to permit appellant to introduce as the proper measure of damages for such unlawful use, evidence of the reasonable value of the land for such use for the period and for the purposes for which respondent used appellant's land during this period in excess of the rightful use thereof allowed under the Agricultural Entry Act and the Stock-Raising Homestead Act above mentioned. The attempted appeal from the verdict is dismissed.

BARNARD, P. J., and MARKS, J., concurred.



48 Cal.App.2d 446

SCHWARTZ v. FAY.

Civ. 12642.

District Court of Appeal, Second District, Division 1, California.

Dec. 12, 1941.

1. Appeal and error ⇐1008(1)

In attorney's action to recover fees for legal services performed, whether attorney was entitled to a credit of $1,000 for a cashier's check given by attorney to defendant was for the trial court under the evidence.

2. Appeal and error ⇐762

A point raised in an appealing defendant's opening brief but abandoned in his reply brief and in his argument need not be considered by the reviewing court.

3. Evidence ⇐354(24)

In attorney's action to recover for legal services performed, the trial court did not err in refusing to admit in evidence on behalf of defendant date books from which memorandum of time spent by attorney in performing services was chiefly compiled, where books had apparently been in court since attorney first referred to them during cross-examination, and defendant had an opportunity to examine them and to question attorney regarding matters appearing on memorandum.

4. Appeal and error ⇐205, 692(1)

Defendant appealing from judgment for attorney in action to recover for legal services performed could not complain of ruling excluding from evidence date books from which memorandum of time spent by attorney in performing services was chiefly compiled where books had been open to inspection but defendant made no offer of proof in connection with his offer of books, and record did not disclose what evidence material and beneficial to him defendant expected to produce from books.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Hy Schwartz against Frank Fay to recover attorneys' fees. From a judgment for plaintiff, defendant appeals.

Affirmed.

Emmett E. Doherty, of Los Angeles (Philip M. Stein and Pauline Weinstein, both of Los Angeles, of counsel), for appellant.

Maurice Blumenthal and T. G. Dalton, both of Los Angeles, for respondent.

SHAW, Justice pro tem.

Plaintiff, who is a duly licensed attorney at law, brought this action to recover fees for legal services performed by him for defendant. From a judgment in plaintiff's favor, defendant appeals.

At the trial it appeared that plaintiff, in addition to performing legal services for defendant, had received considerable sums of money from defendant, and from others for his benefit, and had paid other sums to defendant or for his account. Plaintiff had rendered to defendant a statement of account covering these matters, as well as his fees, and the trial resolved itself, to a large extent, into an inquiry into the correctness of this account. The trial court made findings disallowing a few of plaintiff's items of expenditure, fixing plaintiff's fees at sums materially less than those claimed by him, and approving this account in all other respects, and gave judgment accordingly.

[1] Defendant's first point is that one of the items allowed is not supported by the evidence. This is a credit of $1,000 claimed by plaintiff, under date of August 16, 1938, for "cashier's check" given by plaintiff to defendant. A like item under

date of August 8, 1938, is conceded to be proper. Regarding the disputed item plaintiff testified several times, on direct and cross-examination, that on August 16, 1938, he gave a cashier's check for $1,000 to defendant. This check was not produced, but no objection was made to secondary evidence of its contents. Plaintiff was uncertain from what bank this check was obtained, and named four banks, any one of which, he said might have issued it. Defendant denied receipt of this check and also produced from officers and records of the bank issuing the check which defendant admitted receiving on August 8, 1938, evidence tending to show that that bank had issued to plaintiff no other cashier's check which came into defendant's hands. Nothing was shown about the other three banks mentioned by plaintiff. All this does not, against the trial court's finding, "prove the falsity" of plaintiff's testimony, although defendant claims that effect for it. It merely raises a question of veracity, which the trial court resolved against the defendant. With that decision we cannot interfere.

[2] A second point raised in defendant's opening brief was abandoned in his reply brief and in his argument, and need not be considered.

[3, 4] The only other reason advanced by defendant for a reversal is that the court erred in refusing to admit in evidence records kept in plaintiff's office. Plaintiff testified to amounts of time spent by him in the performance of various legal services, and during his cross-examination he referred to a memorandum in regard to them which he and his secretary testified was made by the secretary from date books which were kept in his office and partly, also, from the secretary's stenographic notes of matter dictated to her. Near the conclusion of the trial this memorandum was offered in evidence by defendant and received as Exhibit Y. Prior to the reception of this memorandum, defendant offered in evidence the date books from which Exhibit Y was mainly compiled. That offer was refused and this is the ruling of which defendant now complains. We find no prejudicial error therein. The date books had apparently been in court since plaintiff first referred to them and defendant had the opportunity to examine them. Plaintiff referred to and testified from them on cross-examination regarding some matters, appearing on Exhibit Y, and could have been questioned regarding others had defendant so desired. Moreover, although these books had been open to his inspection, defendant made no offer of proof in connection with his offer of the books, nor does the record otherwise disclose what evidence material and beneficial to him defendant expected to produce from the books. He is therefore in no position to complain here of the ruling excluding them. Travelers Fire Ins. Co. v. Brock & Co., 1938, 30 Cal.App.2d 115, 117, 85 P.2d 904.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.



48 Cal.App.2d 291

REPLOGLE et al. v. RAY.

Civ. 11356.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1941.

Rehearing Denied Jan. 3, 1942.

Hearing Denied Feb. 2, 1942.

1. Appeal and error ⇐113(5)

Where plaintiffs appealed generally from original judgment and from "corrected judgment" entered three days later, which was obviously intended to supersede the original judgment in its entirety, and none of the parties challenged power of trial court to enter corrected judgment, appeal from the original judgment would be dismissed.

2. Joint adventures ⇐1

That details of joint venture agreement were not reduced to writing, and were shown by indefinite and uncertain testimony, did not preclude finding that a joint venture existed, with the necessary incidental findings of its scope and duration.

3. Joint adventures ⇐1

The law requires little formality in creation of a joint adventure, and agreement therefor is not invalid because of indefiniteness in details.

4. Joint adventures ⇐1
Partnership ⇐46

In considering whether a relationship such as that of joint adventurers or partners has been created, courts are guided by

the acts as well as the words of the contracting parties.

5. Joint adventures ⇐5(2)

In action by joint adventurer and partial assignee of his interest against other joint adventurer's assignee to recover royalties from patents involved in the joint venture, evidence authorized findings that defendant's assignor had a one-third interest in all the patents.

6. Appeal and error ⇐877(6)

In action by joint adventurer and partial assignee of his interest against other joint adventurer's assignee to recover royalties from patents involved in the joint venture, plaintiff assignee, who did not prosecute separate appeal from the judgment, making other plaintiff a respondent, could not, on joint appeal by both plaintiffs, question trial court's findings concerning rights as between the two plaintiffs.

7. Appeal and error ⇐1011(1)

Conflict in evidence did not justify reviewing court in disturbing findings, sustained by substantial evidence, concerning interest of party's assignor in foreign patents.

8. Patents ⇐202(1)

An assignment of interest in tent rights could not give assignee any greater rights than those of her assignor.

9. Joint adventures ⇐5(2)

In action by joint adventurer and partial assignee of his interest against other joint adventurer's assignee to recover royalties from patents involved in the joint venture, evidence sustained refusal to allow plaintiffs to recover money allegedly spent for other joint adventurer's benefit in litigation concerning the patents.

10. Joint adventures ⇐5(2)

In action by joint adventurer and partial assignee of his interest against the other joint adventurer's assignee to recover royalties from patents involved in the joint venture, evidence sustained allowance to defendant for losses sustained as result of plaintiff's unauthorized grant of foreign license to use patents.

11. Joint adventures ⇐4(2)

A loss sustained as result of acts of one co-adventurer outside the scope of the joint venture and in violation of the agreement of joint venture must be borne by the party responsible therefor.

12. Joint adventures ⇐5(1)

The party guilty of breach of agreement of joint venture may not defend upon ground of alleged good faith, lack of negligence, or advice of counsel.

13. Joint adventures ⇐5(1)

Payment to third parties by joint adventurer's assignee of a share of loss sustained in litigation resulting from other joint adventurer's conduct in breach of the agreement of joint venture, even if voluntary as to the person receiving the payment, was not "voluntary" as between such assignee and other joint adventurer so as to bar recovery by such assignee from other joint adventurer.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary".

14. Joint adventures ⇐5(1)

Where there was an agreement between joint adventurers, at time of payment to third parties of loss resulting from one joint adventurer's breach of the joint venture agreement, that rights between the joint adventurers would be reserved for future settlement, right to recover any sums due from joint adventurer breaching the agreement was expressly reserved, and the doctrine of "voluntary payment" was inapplicable.

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Payment".

15. Joint adventures ⇐5(1)

A joint adventurer's failure to assert that he would hold other joint adventurer liable for loss resulting from other adventurer's incautious action in granting licenses for use of foreign patents to third parties was not ground for denying recovery from such other adventurer for the resulting loss, where such failure was directly due to advice given by other adventurer as attorney.

16. Joint adventures ⇐5(2)

In action by joint adventurer and partial assignee of his interest against other joint adventurer's assignee, evidence sustained findings that other joint adventurer did not actually consent to plaintiff adventurer's grant of licenses for use of foreign patents to third parties, as grounds for denying recovery by defendant on her cross-complaint for resulting loss.

17. Appeal and error ⇐1122(3)

Where there was substantial evidence to support material findings of trial court, and

upon the findings properly made award should have been made to defendant on part of cross-complaint, an appropriate case for making of different findings by reviewing court was not presented, and judgment was reversed with directions to make an award.

18. Appeal and error ⇐1122(1)

A party seeking to have appellate court make additional findings should make such request at the earliest opportunity, in order that the opposing party may have the fullest opportunity to present arguments in opposition, and such request should ordinarily be denied when made for the first time in reply brief. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

19. Appeal and error ⇐1122(2)

The appellate court should exercise sound discretion in making additional findings. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

20. Appeal and error ⇐1122(1)

Where trial court made no finding as to additional amount claimed by defendant on part of cross-complaint, and defendant requested reviewing court to make additional findings with respect thereto for the first time in her reply brief, such request was denied in exercise of discretion. Code Civ. Proc. § 956a; Const. art. 6, § 4¾.

Appeals from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by D. Ben Peplogle and another against Agnes Ray for declaratory relief and a money judgment for share in alleged profits of joint venture, wherein defendant filed cross-complaint. From the original judgment, plaintiffs appeal, and, from a corrected judgment, plaintiffs appeal and the defendant cross-appeals.

Appeal from original judgment dismissed, and corrected judgment affirmed in part and reversed with directions in part.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for plaintiffs.

Pillsbury, Madison & Sutro, of San Francisco (Eugene M. Prince, Frederick H. Hawkins, and Eugene D. Bennett, all of San Francisco, of counsel), for defendant.

SPENCE, Justice.

Plaintiffs sought declaratory relief and a money judgment against defendant. Defendant filed an answer and a cross-complaint seeking declaratory relief and a money judgment against plaintiffs. The complaint was in five counts. The cross-complaint was in four counts. The cause was tried by the court sitting without a jury and most of the issues were decided in favor of defendant. A judgment was entered on September 19, 1939, and thereafter, on September 22, 1939, a second judgment, denominated "Corrected Judgment", was entered. Plaintiffs have appealed generally from both judgments. Defendant has appealed from the portion of the corrected judgment of September 22, 1939, which denied defendant any relief on her fourth cause of cross-complaint.

[1] The corrected judgment of September 22, 1939, was obviously intended to supersede the judgment of September 19, 1939, in its entirety. None of the parties challenges the power of the trial court to enter said corrected judgment under the circumstances presented by the record before us. We therefore deem it appropriate to dismiss the appeal from the judgment of September 19, 1939, and to discuss only the appeals of the respective parties from the judgment of September 22, 1939.

These appeals are presented on a typewritten record containing over 1600 pages. In addition thereto over 150 exhibits have been brought up with said record. Plaintiffs' opening brief on their appeal alone consists of 336 pages and is largely devoted to the claim that the evidence was insufficient to sustain certain findings of the trial court. Plaintiffs have quoted freely from the record which covered the dealings of plaintiff D. Ben Replogle and F. M. Ray, now deceased, over a period of approximately thirty years. Defendant's opening brief on her appeal purports to present only a question of law, it being claimed that, upon the findings made by the trial court, a money judgment should have been awarded to defendant on her fourth cause of cross-complaint. Plaintiffs' reply to this claim is based in part upon the ground that this court should make other and different findings. Plaintiffs' reply brief on this last mentioned appeal alone consists of 171 pages. The pleadings, the testimony and the briefs before us are voluminous and it becomes apparent that

this court can only briefly summarize the cause as presented on this appeal if the opinion herein is to be kept within reasonable bounds.

The interesting story presented by the evidence is one covering the trials and tribulations, the successes and failures and the disappointments and disagreements of two men who embarked upon a joint venture which continued over a long period of years. These two men were plaintiff D. Ben Replogle, who was an attorney at law and inventor, and F. M. Ray, the deceased husband and assignor of defendant, who associated himself with said plaintiff in the joint venture and furnished said plaintiff with financial assistance. It was conceded by all that there was an agreement of joint venture by which said parties were to share in the proportions of two-thirds to said Replogle and one-third to said Ray, but the other details of said agreement relating to the scope and duration of said joint venture were not conceded but were put in issue in this litigation. Admittedly, at least two original patents covering improvements to vacuum cleaners were involved in the joint venture. These two original patents are referred to as the suction handle patent and the cord reel patent. Plaintiffs claimed that these two original patents and no others were involved, while defendant claimed that said two patents and all other patents, domestic and foreign, which related to vacuum cleaners and were obtained by said plaintiff in the subsequent years, were involved in the joint venture. The issues thus made were the main issues before the trial court and, as above indicated, the trial court decided these issues in favor of defendant. Before passing to a consideration of plaintiffs' contentions on their appeal we will attempt to summarize briefly the facts appearing in the record. Neither the name of plaintiff Belle Trumbull Replogle nor the name of defendant Agnes Ray will appear in this statement, except as it may become necessary to mention them, as said plaintiff was joined with her husband as the subsequent assignee of an undivided interest of her husband and defendant Agnes Ray was made defendant as the subsequent assignee of the entire interest of her husband, F. M. Ray, deceased. We will refer to plaintiff D. Ben Replogle, as "Replogle" and to F. M. Ray as "Ray".

[2-4] Preliminarily, it may be stated that there was never any formal written agreement between the parties defining precisely their respective rights and duties in their joint venture. Mr. Ray died in 1936 and before the termination of the Air Way litigation to which reference will be hereinafter made. The present action was commenced in 1938, and of course, the trial court did not have the benefit of the testimony of Mr. Ray. Mr. Replogle testified at great length and a large amount of correspondence was introduced. The conduct of the two men over the years was also in evidence. As the details of the agreement of joint venture had not been reduced to writing, it was necessary for the trial court to determine the question of the scope and duration of the joint venture from the above mentioned testimony and the inferences which might properly be drawn therefrom. Even the testimony of Replogle on the details of the arrangements between these men was not very definite and certain. He used such expressions as "The arrangement as near as I can define it was * * *", and "the arrangement was something like this * * *". But these considerations are not fatal to the finding of the existence of a joint venture with the necessary incidental findings of the scope and duration thereof. As was said in Andrews v. Bush, 109 Cal.App. 511, at page 517, 293 P. 152, 154: "The law requires little formality in the creation of a joint adventure. Anderson v. Blair, 202 Ala. 209, 80 So. 31, 35. Such an agreement is not invalid because of indefiniteness in respect to its details. 33 C.J. 848. * * * In considering whether or not a relationship such as that of joint adventurers or partners has been created, the courts are guided, not only by the spoken or written words of the contracting parties, but also by their acts."

Replogle was a lawyer who had engaged in general practice but whose practice had turned almost exclusively into the field of patent work. He came to California and tried to continue in this field but soon gave it up. He started selling waterwheel governors and, in 1905, he met Ray, who was then selling water power machinery. The friendship thereafter developed. In 1908, Replogle was unemployed, and with Ray's promise to "back" him, Replogle built a vacuum cleaner driven by water power. Ray paid the costs of this experiment but the project was abandoned. Replogle then started selling electrically powered cleaners and continued to experiment. Ray contributed to the expenses of these experiments.

In 1911, Replogle applied for a patent, hereinbefore termed the suction handle patent. This patent was not issued until 1916, but both before and after the issuance thereof, Replogle executed a written assignment of a one-third interest to Ray. The second patent, hereinabove termed the cord reel patent, was applied for in 1914 and Replogle again executed a written assignment of a one-third interest to Ray.

The years from 1911 to 1918 were years of difficulty and discouragement for the two men. Numerous attempts were made by them to interest various manufacturers in these patents or to manufacture the cleaners themselves. Replogle acted as manager of the joint venture while Ray continued with his own business and furnished the necessary funds to Replogle. Some of the cleaners embodying these patents were manufactured either by other manufacturers or by themselves, but loss rather than profit resulted from these ventures. During this period, Replogle continued his experiments and engaged in several patent proceedings. Throughout this period, Ray furnished certain necessary money to Replogle, which Replogle testified was sent him "to use for any purpose I thought proper". He did in fact use the money advanced by Ray for labor, experimentation, filing fees, interference and contest expense and other things incidental to patent proceedings. It also appears that during part of this period, Ray contributed to the living expenses of Replogle's family and paid the taxes on their property. During all of that time, Replogle kept Ray advised concerning his progress with new experiments and with patent applications, using the terms "we" and "our" in his letters to Ray with respect to these matters. From the correspondence and the testimony of Replogle, it appears that Ray advanced to Replogle sums totalling in excess of $11,000 during that period, receiving at most but a few hundred dollars in return. The relationship between the men remained most friendly throughout that period and Replogle did not hesitate to express his appreciation for Ray's continued backing. As late as 1917, he wrote to Ray, "It is long drawn out but I see you are faithful to keeping my family off the rocks. God bless you!"

The year 1918 was the turning point. Early in that year, Replogle gave an option to Edison Electric Appliance Company to purchase for $50,000 all patents and applications for patents, together with all materials and tools. Ray's name did not appear in the option but Replogle testified that he had wired Ray telling him of the proposal and asking Ray "whether it would be agreeable if I sold out, and he got the third of that". This option was not exercised and is mentioned only to show one of numerous instances in which it appears from the evidence that the parties acted upon the assumption that Ray had a one-third interest in all patents and patent applications relating to cleaners.

In December, 1918, the parties entered into what is termed the "Air Way" contract with an Ohio corporation. This was an agreement between the two men, as first parties, and The Air Way Company of Toledo, hereinafter called Air Way, as second party. It was signed by Replogle for himself and as attorney for Ray. This agreement was modified by two supplemental agreements, one made in 1922 and the other made in 1927, but the terms of the supplemental agreements are not material for the purpose of the present discussion. It was this Air Way contract of 1918 which resulted in the receipt by the two men of large sums of money by way of royalties thereunder for many years and it is the determination of the respective rights of the parties to certain accruing royalties from Air Way under such agreement which is one of the subjects of this litigation. Following the execution of this Air Way contract, Replogle took certain actions with respect to foreign patents and foreign licenses on cleaners which precipitated prolonged litigation with Air Way commencing in 1931 and ending in 1937. It was the alleged damage resulting to Ray and to defendant, as the assignee of Ray, from these actions of Replogle that is the subject of defendant's fourth cause of cross-complaint in this action.

Briefly stated, the Air Way contract gave to Air Way an exclusive license to manufacture and sell cleaners under the suction handle and cord reel patents and under other patents and applications which were described by number and which included every patent which had been issued and every application which had been filed up to the time of the execution of said contract. But the agreement also provided that it extended to "all further patents which may be granted to first parties or either of them upon, relating or pertaining to any of the subjects included in the patents and applications for patent specified in paragraph 1 hereof". It provided

that the term of the contract was the life of all patents involved and that the royalties were to be paid upon all machines using any of the patents. It further provided that "all royalty payments shall be made by check payable to the order of first parties". It did not however purport to specify the proportions in which said royalty payments were to be divided between Replogle and Ray. Nevertheless, the numerous royalty payments received under the contract over a period of approximately twenty years were divided two-thirds to Replogle and one-third to Ray.

The contract further provided that all patents, whether issued before or after the date of the contract, should be transferred to a named bank as trustee and that in the event the company failed to comply with the terms of the contract, "said patents and applications for patents shall be reassigned, retransferred, and reconveyed by the trustee to the first parties". It also provided for the taking out of foreign patents by Replogle and Ray upon request of the company and the granting by them to the company of an exclusive license to manufacture and sell under such foreign patents without additional expense except as to royalties accruing from such manufacture and sale. Provisions were also included for the forfeiture by the company of such foreign rights under certain conditions.

Shortly before Replogle executed the Air Way contract on behalf of himself and as attorney for Ray, he wrote Ray as follows, "The contract is extensible so long as I take out cleaner patents, so it ought to serve us for the balance of our natural lives, even though we get pretty old * * *". Thereafter, the contract was executed and the patents and applications were transferred to the trustee as agreed.

The period from 1918 to 1931 was an era of prosperity for all concerned. While further money was advanced by Ray so that his total advances admittedly amounted to a sum in excess of $21,500, it appears that the royalties under the Air Way contract flowed in regularly during the years last mentioned. Ray's one-third interest resulted in his receiving a total sum in excess of $180,000 during that period. But even that period was not free from difficulties for the two men. There was a proceeding called the Kirby interference involving the patent on the vacuum cleaner dust bag. See Replogle v. Kirby, 50 App. D.C. 210, 269 F. 862; Kirby v. Replogle, 50 App.D.C. 212, 269 F. 864. Replogle handled this proceeding but Ray paid the expenses. Ray also paid certain additional patent expenses during this period. In 1919, English patents were taken out at the request of Air Way and at Air Way's expense pursuant to the contract but Replogle claimed as early as 1922, that Air Way had forfeited its rights to an exclusive license under the foreign patents. Air Way denied that any forfeiture had taken place and thereafter claimed that the supplemental agreement of 1927 contained a waiver of any claim of forfeiture. Replogle also asserted a claim that Ray had no interest in any of the foreign patents. This claim was disputed by Ray and it remained a subject of controversy for some time.

In 1930, Replogle granted a license to Pneumode, Limited, an English corporation, to manufacture and sell cleaners under the foreign patents. In so doing, he acted solely in his own name and claimed that he had the right to do so without violating any of the rights of Air Way, on the one hand, or of Ray, on the other hand. He so advised Ray and consistently adhered to that position. He further informed Ray as late as 1931 and shortly before Air Way commenced its suit in Ohio that Ray did not need independent legal advice. It was this action of Replogle in granting the license to Pneumode which precipitated the Air Way litigation. Replogle retained the entire sum of $1,500 which he received at the time of granting said license.

Air Way filed its action in Ohio in 1931 against Replogle and Ray seeking to enjoin the granting of foreign licenses, to compel the cancellation of the Pneumode license and to recover damages. From that time until the termination of the litigation in 1937, Air Way paid the accruing royalties to a Toledo bank, which acted as trustee under the Air Way contract. Air Way also placed an attachment on the money so paid and neither of the men received any of said accruing royalties until the termination of the litigation in 1937. Ray died in the meantime in 1936 and defendant was thereafter substituted as his assignee.

The failure of the two men to receive the accruing royalties regularly during the depression years following the filing of the Air Way suit in 1931, led again to financial difficulties. Ray was in great financial distress. While prior to the filing of the

action, he had asserted his claim against Replogle to an interest in the foreign patents, Replogle, as Ray's attorney and advisor, had advised him that he had no such interest. The correspondence and other evidence shows that it was frequently discussed over a period of time. Ray questioned Replogle's right, not only as to himself but also as to Air Way, to make the Pneumode contract. In this connection Replogle testified as follows:

"Q. Didn't you tell him that you considered you had the legal right so far as any contract with Air Way was concerned to make the agreement with Pneumode? A. I got him to where he was satisfied that I had such legal right and was not criticizing me."

After the money had been attached in the Air Way litigation, Ray sought to have his share of the royalties released in order to relieve his financial condition. He was unsuccessful but in his attempt to obtain the release of the attachment and during the trial of the case, he took the position that he had nothing to do with the granting of the foreign license to Pneumode and that he had no interest in the foreign patents. We will discuss this position later but we mention it here as plaintiffs lay great stress upon it to support their claim that Ray had no interest in the foreign patents.

The Air Way litigation was tried in Ohio and resulted in a judgment in favor of Air Way and against defendants Replogle and Ray. The judgment was affirmed on appeal in 1933 and by said judgment it was decreed that the granting of the Pneumode license was a breach of the Air Way contract. An injunction was granted against both Replogle and Ray and the cause was remanded for a jury trial on the issue of damage. There was delay in reaching trial on this issue and by 1937, the accumulated royalty payments, held in Toledo banks under court order, had reached a total sum in excess of $170,000. Ray had died in the meantime. Upon the assumption that the cause would be tried on the issue of damage in March, 1937, Replogle and defendant's attorney went to Toledo to confer with the Ohio attorneys, who had represented both Replogle and Ray, and to prepare for the trial. After it was learned that the case could not be tried for at least another year, a settlement was finally made with Air Way but it was understood that the settlement was not intended to settle the rights and obligations between Replogle and defendant. Pursuant to the settlement agreement one-half of accrued royalties were paid to Air Way. The sum of $45,000 was paid to the Ohio attorneys and the remaining balance of the accrued royalties was divided between Replogle and defendant in the proportion of two-thirds and one-third.

Shortly thereafter, Replogle notified Air Way that each further payment of royalties should be made by a single check in favor of himself and defendant and that the check should be delivered to Replogle. This was contrary to the practice which had been adopted by agreement between Replogle and Ray of having individual checks sent for their respective shares, but the request was in accordance with the terms of the Air Way contract. Air Way therefore complied with the request and thereafter delivered the royalty checks to Replogle.

Controversies arose between Replogle and defendant and between Replogle and defendant's attorney and no settlement was made between the parties after Replogle's return from Ohio following the settlement with Air Way. The uncashed royalty checks accumulated in Replogle's hands but he was unable to cash them as they were made out jointly to himself and defendant. Defendant finally filed an action against Replogle seeking among other things to recover the loss sustained by reason of the Air Way litigation. Thereafter plaintiffs filed this action and all of the issues between the parties were brought before the trial court in this action by the pleadings to which reference has been made.

We may summarize the pleadings and plaintiffs' position on the main issues by saying that plaintiffs claimed in the trial court that neither Ray, nor defendant as his assignee, had any interest in any patents, domestic or foreign, other than the original suction handle and cord reel patents and that the rights of Ray and his assignee to royalties under the Air Way contract terminated at the expiration of the life of said two original patents in 1933. We may summarize defendant's position by saying that defendant claimed that Ray, and defendant as Ray's assignee, had a one-third interest in all of patents issued and applications filed on vacuum cleaners at any time and that their rights to royalties under the Air Way contract continued during the entire life of said contract and did not terminate in 1933. The findings

and judgment of the trial court sustained the claims of defendant and awarded to defendant one-third of the accrued royalties.

Plaintiffs' Appeal.

[5] Plaintiffs' appeal from the judgment is based mainly upon their several contentions that the findings of the trial court which are contrary to the claims of plaintiffs as above set forth are not sustained by the evidence. We find no merit in this contention. On the contrary, we believe that there was ample evidence to sustain all of the material findings of the trial court on these main issues. Perhaps this conclusion might rest on the evidence already mentioned, but it appears appropriate that there be some further discussion of the situation presented to the trial court.

It being admitted by all that Replogle and Ray had engaged in a joint venture, it was necessary for the trial court to determine the scope and duration of that venture. That question had not been determined in the Air Way litigation as the only questions there determined were those concerning the rights and obligations as between Replogle and Ray, as the first parties, and Air Way, as the second party, under the Air Way contract. Nor had that question been determined at the time of the settlement with Air Way in Ohio as Replogle and defendant's attorney had agreed at that time that the settlement of all matters between Replogle and defendant should await their return to California. The trial court was called upon to determine the question of the scope and duration of the joint venture from all the facts and circumstances in evidence which tended to show the agreement, express or implied, between Replogle and Ray regarding such scope and duration.

Some of those facts and circumstances have been heretofore mentioned. Plaintiffs lay great stress upon the fact that the only written assignments to Ray of any interest in the patents were the written assignments of a one-third interest in the two original patents. This fact cannot be treated as controlling in the light of the great volume of evidence tending to show that the agreement of joint venture gave to Ray a one-third interest in all patents, domestic and foreign, and gave to Ray the right to one-third of the royalties under the Air Way contract for the life of that contract.

While the Air Way contract did not purport to define the rights as between Replogle and Ray, the very fact that said contract was executed by Replogle and that it contained the terms above set forth had some tendency to support the trial court's findings on the main issues now in controversy. It is significant also to note that Replogle did not take the position that Ray had no interest in the foreign patents until shortly before Replogle granted the license to Pneumode in 1930 and that he did not take the position that Ray's right to royalties under the Air Way contract terminated in 1933 until some time in 1938, being two years after Ray's death. During the earlier years, practically every act of both Replogle and Ray tended to show that they had expressly or impliedly agreed that Ray was to have a one-third interest in all of said patents and in all of said royalties as found by the trial court.

We quote but a few additional facts and circumstances among the many which appear in the record. As late as 1931, and while the controversy with Air Way was developing, Replogle wrote a letter in which he used the following ambiguous language in reference to the arrangement between them: "In the first clause of our agreement 'Exhibit A', 'The first parties are owners of two United States Patents'. The first words of our contract are the basis of your connection with it, but outside of that contract, I have given you from time to time, my word of my moral obligation to you that this entire contract and all the patents mentioned in Paragraph I thereof are to be shared by you as producing one-third the royalties for your benefit." In the Air Way litigation, Replogle testified:

"A. Well, I understand it he has an equitable interest, always treated it so, in the patents licensed to the Air Way Corporation in the United States.

"Q. In all patents licensed to the Air Way in the United States? A. Yes."

In 1932, Replogle wrote the trustee under the Air Way contract claiming that Air Way had breached the royalty contract and requesting the trustee to reassign all patents to "Daniel B. Replogle and Belle T. Replogle; two-thirds in their own right and one-third in trust for the equitable interest of F. M. Ray". And again in 1934, Replogle wrote to the Canadian Department of National Revenue as follows: "Mr. F.

M. Ray has also a one-third interest in all of the contract, so that my part is divided into the other two-thirds, my wife holding one-third and myself one-third of the entire right and title to royalties in the Canadian contract." It thus appears that Replogle conceded in a letter to Ray the existence of at least a "moral obligation" on his part toward Ray with respect to all patents and conceded at other times that Ray owned at least an "equitable interest" in all patents.

It is entirely possible that the parties may never have expressly agreed upon the scope and duration of their joint venture, but it is a reasonable inference from all of the testimony, including their acts over the long period of years, that they had impliedly agreed as found by the trial court. In fact, it appears difficult to justify any other inference after reviewing the testimony.

[6] In connection with the foreign patents, plaintiffs lay great stress upon the position taken by Ray during his efforts to obtain the release of the Air Way attachment and in his testimony on the trial of the Air Way case. As above stated, Ray had previously insisted that he had an interest in the foreign patents and had maintained that Replogle was acting in violation of Ray's rights and in violation of the Air Way contract in granting the license to Pneumode. He was advised by Replogle, his coadventurer and attorney, that such was not the case. It was but natural when the controversy with Air Way arose and Ray's royalties were threatened, that Ray should yield to that advice and seek to protect his interests in the royalties. At most, Ray's position at that time was but some evidence tending to show that he had no interest in the foreign patents, and, to that extent, it created a conflict with the other evidence before the trial court. But there was substantial evidence to sustain the trial court's findings with respect to Ray's interest in the foreign patents and the fact that there may have been a conflict, does not justify this court in disturbing said findings.

[7-9] Plaintiffs further contend that the trial court erred in its findings with respect to the alleged interest of plaintiff Belle Turnbull Replogle. Plaintiffs alleged that plaintiff D. Ben Replogle has assigned to plaintiff Belle Turnbull Replogle a one-half interest in the royalty payments under the Air Way contract. This allegation was denied. The parties are not agreed with respect to the effect of the findings of the trial court on this issue. Obviously, however, the alleged assignment from plaintiff D. Ben Replogle could not give to plaintiff Belle Turnbull Replogle any greater rights than those of her assignor. As between both plaintiffs and the defendant, the findings above referred to are controlling. If plaintiff Belle Turnbull Replogle considered herself aggrieved by any alleged failure of the trial court to determine properly the respective rights of the individual plaintiffs, she should have prosecuted a separate appeal and should have made the other plaintiff a respondent on that appeal. She did not do so and she may not raise the question on this joint appeal. De Bairos v. Barlin, 46 Cal.App. 665, 673, 190 P. 188.

Plaintiffs further contend that the trial court erred in failing to allow to plaintiffs a recovery of $3,333.33, which they claimed as alleged moneys expended for defendant's benefit in connection with the payment of attorney's fees in the Air Way litigation. We find no error in the trial court's ruling on this subject. The claims of the parties arising out of the Air Way litigation will be discussed when considering defendant's appeal. In passing, we may state, however, that plaintiffs' complaint included two common counts in each of which the plaintiffs sought to recover a money judgment against defendant amounting to $103,782.93. Defendant duly demanded a bill of particulars but plaintiffs failed to file such bill. Plaintiffs concede that the above mentioned item of $3,333.33 is the only item which they attempted to prove under those counts.

Defendant's Appeal.

This appeal is directed at paragraph 6 of the judgment providing that: "Defendant and cross-complainant take nothing by reason of her fourth cause of cross-complaint." It was the theory of defendant in said fourth cause of cross-complaint that the acts of plaintiff D. Ben Replogle which precipitated the Air Way litigation constituted a violation of the agreement of joint venture and that defendant was entitled to recover from plaintiff D. Ben Replogle the sums which were paid out of her share of the accrued royalties in settling that litigation. On this cause of cross-complaint the trial court made certain findings in favor of defendant but it

made other findings upon which it based its denial of the recovery sought.

To summarize some of the material findings favorable to defendant on her fourth cause of cross-complaint, it may be stated that the trial court found that in December, 1930, Replogle, acting in violation of the agreement of joint venture and outside of the scope thereof, and also acting in violation of the contract granting the above mentioned exclusive license to Air Way, granted to Pneumode a license to manufacture and sell vacuum cleaners in countries other than the United States; that in so doing, Replogle acted for his sole gain and advantage and independently of Ray; that the consideration received for the granting of said license to Pneumode was retained by Replogle; that the Air Way litigation resulted from said acts of Replogle and that after the determination of the Ohio court that both Replogle and Ray were liable in damages to Air Way by reason of the aforesaid breach of the Air Way contract and pending the trial to determine the amount thereof, the parties settled the Air Way litigation in order to avoid the possibility of a heavy damage award and to prevent the further impounding of royalties which were accruing under the Air Way contract; that the settlement with Air Way involved the payment by the parties to Air Way of the sum of $88,600 out of the impounded royalties and also involved the payment of $45,000 to Ohio attorneys who represented the parties in said litigation; that in effecting said settlement, $29,533.33 was withdrawn from defendant's share of the impounded royalties to pay Air Way and $11,666 was withdrawn from defendant's share of the impounded royalties to pay said attorneys' fees; that neither Ray nor defendant participated in or was in any way responsible for the acts of Replogle which constituted the basis for Air Way's action; that defendant would not have been deprived of her share of the impounded royalties nor would she have suffered any loss or expense by reason of said litigation had it not been for said acts of Replogle; that it was agreed between the parties at the time of said settlement that their respective claims which were made the subject of this litigation should be reserved for future adjustment and settlement and that said claims should not be prejudiced by the settlement of the Air Way litigation.

[10-14] Before proceeding to a consideration of the other findings and conclusions of the trial court with respect to defendant's fourth cause of cross-complaint, we will state that there was substantial evidence to sustain all of the material findings above summarized and we are of the opinion that said findings would have been sufficient to sustain a money judgment for defendant for her loss thus sustained. The loss sustained in the Air Way litigation was clearly a loss sustained as the result of the acts of one coadventurer outside of the scope of the joint venture and in violation of the agreement of joint venture, and such loss must be borne by the party responsible therefor. See 33 C.J., p. 866; Caldwell v. Richards, 91 Cal.App. 428, 267 P. 127; O'Hara v. Harman, 14 App.Div. 167, 43 N.Y.S. 556; see, also, with respect to partnerships, Mechem's Elements of Partnership, 1899 Ed., sec. 115, p. 115; Rowley, Modern Law of Partnership, 1916 Ed., Vol. 1, p. 435. The action to recover such loss was based upon a breach of the agreement of joint venture, or in other words, upon a breach of contract, and in such case, the party guilty of the breach may not defend upon the ground of alleged good faith, lack of negligence or advice of counsel. Nor was the defense of "voluntary payment" available here. If the payment by defendant of a share of the loss sustained in the Air Way litigation may be said to have been voluntary as to the persons receiving the sums paid, it does not follow that such payment was voluntary as between defendant and Replogle so as to bar a recovery for defendant's loss. See 48 C.J., p. 736; Devine v. Meramec etc. Co., Mo.App., 253 S.W. 444. Furthermore, there was an agreement between the parties at the time of payment, that the rights between the parties would be reserved for future settlement. This constituted an express reservation of the right to recover any sums due and the doctrine of voluntary payment is inapplicable. 48 C.J., p. 741.

Proceeding to the other findings and conclusions of the trial court on the fourth cause of cross-complaint, the following appears in the conclusions of law: "By reason and solely on account of the facts found as stated in paragraph XII of the court's findings with respect and in response to defendant and cross-complainant's fourth cause of cross-complaint, the court concludes that defendant and cross-

complainant Agnes Ray is not entitled to recover anything against plaintiffs or either of them under or by reason of the said fourth cause of cross-complaint." In the above mentioned paragraph XII of the findings, the trial court found that Ray was advised by Replogle of his intention to secure foreign patents and to license foreign manufacturers other than Air Way and knew of Replogle's trips to Europe for that purpose but that the "record in this case does not show" that "said Ray asserted that he held or would hold Replogle liable for the loss suffered through the latter's incautious action in granting licenses to said foreign patents". In the same paragraph, the court found that Replogle did not anticipate that he was "inviting retaliation" by Air Way or subjecting Ray or defendant to loss and damage; that Ray had shared with Replogle without complaint the expense of previous litigation; that neither Replogle nor Ray had reason to believe that the loss "would be so excessive or to the extent which resulted" and that any statement by Ray to his wife that he believed that he had recourse against Replogle for any loss resulting from Replogle's acts was "the expression of a hope rather than a conviction" that Ray or defendant was entitled to reimbursement from Replogle. Immediately following finding XII and in finding XIII, the trial court made a finding with respect to the facts found in finding XII that "the acts or failure of action on the part of said F. M. Ray, as therein stated were due to and on account of advice and representation made by said D. Ben Replogle" as found in two preceding paragraphs of the findings relating to plaintiffs' alleged second cause of action. In said two preceding paragraphs, the court found that at all times mentioned, Replogle was an attorney at law; that he undertook to advise and did advise Ray; that said Ray relied upon such advice in all matters connected with the joint venture and, as to all of those matters, a fiduciary relationship existed between Replogle and Ray; that Ray reposed trust and confidence in Replogle and relied on Replogle to protect Ray's rights in the patents and all matters connected with the joint venture; that Replogle advised Ray that Ray had no interest in foreign patents or foreign licenses; that he further advised Ray that Replogle had the sole right to said foreign patents and to grant foreign licenses and that his action in granting foreign licenses was not in violation of the contract with Air Way. It was there further found that Replogle did not advise Ray or defendant to obtain, nor did they obtain, independent counsel until after the entry of the decree of the Ohio court and shortly before the Air Way settlement, but on the contrary, Replogle advised that such independent counsel was not necessary.

It thus appears that the trial court concluded that defendant should be denied any recovery on the fourth cause of cross-complaint solely by reason of its finding that the record did not show that "said Ray asserted that he held or would hold Replogle liable for the loss suffered through the latter's incautious action in granting licenses to said foreign patents". That portion of finding XII is the only portion of said finding to which the court could have referred in the above mentioned conclusion of law. But the trial court also found in said finding XIII, that any failure of Ray to make such assertion was occasioned by the advice and representations of Replogle, Ray's trusted associate and legal adviser, to the effect that nothing which he was doing with respect to foreign licenses violated any of the rights of Ray or of Air Way.

[15, 16] We are of the opinion that the trial court's sole reason for denying to defendant a recovery on the fourth cause of cross-complaint was insufficient. Assuming that there may be instances in which the mere failure to assert that one will hold another liable for the violation of a claimed right will defeat a subsequent action for such violation, we are satisfied that this is not such a case. Such failure here was found to be directly due to the advice given by Replogle to Ray, while Replogle was acting as Ray's attorney, and which advice was relied on by Ray. Under such circumstances, the mere failure of Ray to assert that he would hold Replogle liable for such violation cannot be held to have prejudiced Ray or his assignee in any subsequent action based upon such violation.

It appears that plaintiffs make no attempt to justify the ground upon which the trial court denied a recovery on said fourth cause of cross-complaint. They state that "It is Mrs. Ray's contention that the judgment is based upon the idea that 'Ray can legally be bound by some sort of acquiescence arising from non-assertion of claim' for damages or reimbursement". They then state that "Mrs. Ray mistakes our position" and that "we found this defense

upon the proposition that Mr. Ray actually consented that Mr. Replogle proceed in England in the exercise of these foreign rights * * *". But the trial court found against plaintiffs on the question of actual consent and we are of the opinion that the evidence amply sustains said findings.

[17] Plaintiffs then request that this court make other and different findings from those made by the trial court in order to sustain the portion of the trial court's judgment denying relief on the fourth cause of cross-complaint. We have already indicated that we believe that there is substantial evidence to support the material findings of the trial court. We are also of the view that this appeal does not present an appropriate case for the making of other and different findings under the rules laid down in Tupman v. Haberkern, 208 Cal. 256, at pages 265 to 267, 280 P. 970. This case presents to this court a situation where, upon the findings properly made and amply supported, an award should have been made by the trial court in favor of defendant on said fourth cause of cross-complaint. Upon said findings defendant was entitled to recover from plaintiff D. Ben Replogle the loss sustained by her which amounted to $29,533.33, paid to Air Way, together with $11,666, paid to the Ohio attorneys, out of her share of the impounded royalties. These two sums, added together, make a total of $41,199.33. Plaintiffs claim that, if it be conceded that defendant is entitled to judgment on the fourth cause of cross-complaint the amount to be awarded is but $16,807.74. This figure is calculated by plaintiffs upon the theory that Ray's rights to royalties terminated with the expiration of the life of the two original patents in 1933. We have heretofore discussed plaintiffs' contentions in this regard in considering plaintiffs' appeal and we found said contentions to be without merit.

[18-20] Defendant claims that the amount to be awarded on defendant's fourth cause of cross-complaint should be $44,500 but this would require the addition of an amount which defendant claimed upon the trial but upon which the trial court made no finding. In defendant's reply brief on defendant's appeal, a belated suggestion is made that this court make additional findings with respect to this claimed additional loss. But we are of the opinion that a party seeking to have an appellate court make additional findings should make such request at the earliest opportunity in order that the opposing party may have the fullest opportunity to present arguments in opposition to the making of the requested additional findings. When such request is made by an appellant for the first time in his reply brief, we believe that such request should ordinarily be denied. It is apparent from a reading of article VI, section 4¾ of the Constitution and of section 956a of the Code of Civil Procedure, that the power granted to appellate courts to make additional findings is a power which is to be exercised by an appellate court in the exercise of a sound discretion. In the exercise of such discretion, we believe it appropriate to deny defendant's request.

The appeal from the judgment of September 19, 1939, is dismissed. The judgment of September 22, 1939, is affirmed except as to that portion thereof which denied to defendant any relief on her fourth cause of cross-complaint. Said last mentioned portion of said judgment is reversed with directions to the trial court to enter an amended judgment awarding to defendant judgment against plaintiff D. Ben Replogle in the sum of $41,199.33 upon her fourth cause of cross-complaint. Defendant will recover her costs on these appeals.

NOURSE, P. J., and DOOLING, Justice pro tem., concurred.

48 Cal.App.2d 488

ALEXANDER v. TITLE INS. & TRUST CO. et al.

Civ. 13318.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1941.

1. Covenants ⇐72

A grantee may be relieved of restrictive provisions of deed limiting use of property to residential purposes before breach thereof, where change of conditions affecting the property since its purchase renders the property unsuitable or useless for residential purposes.

2. Covenants ⇐72

Evidence that reversionary right in plaintiff's land, which was sold subject to restriction requiring it to be used solely for residential purposes, was held by corporation as trustee for a syndicate which had disposed of all of the property in the tract under restrictions as to use, that the corporation for substantial consideration had relieved certain lots of the restrictions, and that the district involved had become predominantly a business section and unsuitable for residential purposes, was sufficient to sustain decree removing restrictions as to plaintiff's land on ground that it would be inequitable to enforce it.

3. Covenants ⇐103(3)

Where reversionary right in plaintiff's land, which had been sold subject to restrictions requiring it to be used solely for residential purposes, was held by corporation as trustee for a syndicate which had disposed of all of the property in the tract under restrictions as to use, and the corporation for substantial consideration had relieved certain lots of the restriction, including two lots owned by manager of the syndicate, the corporation and the manager were "estopped" from asserting the right to enforce the restriction as against plaintiff's land.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Trusts ⇐257

Where a trustee in the performance of its duties is called on to defend the interests of the beneficiaries, it may do so without necessity of having the beneficiaries joined as parties defendant, providing the trustee acts in good faith and its own interests are not in conflict with those of the beneficiaries.

5. Trusts ⇐257

A court of equity does not permit beneficiaries to come into court through their representative for express purpose of defending rights claimed by them adverse to plaintiff and, when they have concluded the trial of the case on its merits, to urge that the representative whom they have chosen to act for them and who has been speaking for them alone throughout the trial is without authority to do that which it has in fact done at their behest.

6. Trusts ⇐257

In action for removal of restrictions on lands in which reversionary interests were held by defendant corporation as trustee for a syndicate, wherein corporation acting in good faith appeared and contested the action, individual members of syndicate were not required to be made parties defendant in order to authorize trial court to dispose of the issues, in absence of evidence of lack of power on the part of the corporation.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by Raphael I. Alexander against the Title Insurance & Trust Company and others for declaratory relief and to quiet title to realty, wherein the plaintiff sought to remove restrictions on the realty. From an adverse judgment defendants appeal.

Affirmed.

James A. Miller and Philip C. Farman, both of Los Angeles, for appellants.

Fred H. Luth, Earl G. Read, and Arthur Lasher, all of Los Angeles, for respondent.

R. H. SCOTT, Justice pro tem.

Defendants appeal from judgment for plaintiff in suit to remove restrictions on certain real property.

Plaintiff brought this action for declaratory relief and to quiet title to lot 162, tract 3912, located on the southwest corner of Wilshire boulevard and Tremaine street in the city of Los Angeles. In February, 1921, the corporation defendant, as owner of the real property known as tract 3912, executed and had recorded a declaration of restrictions, including one limiting the use of the

lots to single residences. This case was brought on the theory that conditions in the district where the lots were located had so changed as to make it inequitable to enforce the provisions limiting it to use for single residences. It was tried in May, 1940, and judgment was rendered for plaintiff against the corporation defendant as trustee and defendant Barry. The restriction was held to be no longer valid or binding upon plaintiff's property and therefore unenforceable. Other restrictions concerning the same property were not affected by the decree.

Three questions are submitted for our consideration on this appeal:

(1) Was the evidence sufficient to uphold the finding that it would be inequitable to enforce the restriction?

(2) Had the defendant corporation as trustee waived and abandoned the restriction and reversionary right so as to be estopped from asserting it?

(3) Was the plaintiff required to serve the beneficiaries for whom defendant corporation as trustee held the reversionary right?

The trial court found that defendant Barry is representative and manager of a syndicate which has as its sole assets the reversionary interests in tract 3912 together with some money which it received as consideration for relinquishment of this reversionary interest in certain lots in the tract. It does not own any of the real property in the tract. Whenever any transaction or litigation has arisen concerning the reversionary interests held by defendant corporation as trustee it has been referred to Barry. He has secured legal counsel, disposed of reversionary rights and paid the costs. The syndicate which Barry represents in all these matters has acted through defendant corporation as trustee.

Tract 3912 is bounded on the north by Wilshire boulevard, on the east by Rimpau avenue, on the south by Olympic boulevard and on the west by Longwood avenue. At the time this suit was brought 1114.17 feet of frontage of the tract on Wilshire boulevard was already unrestricted as to business use; only 650.17 feet remained subject to the restriction. The southeast corner of Wilshire and Rimpau, opposite to the corner of this tract, is improved with a three-story building occupied by an insurance company. The only improvements on Wilshire frontage of the tract are plaintiff's house and the residence of a neighbor on the lot adjoining it on the west. Across Wilshire, on the north side, the lots contiguous to or facing on the boulevard and opposite to and extending east of the tract, are unimproved except for the grounds of a high school. The last residence built on Wilshire boulevard from a point many blocks east and extending west about five miles to the Los Angeles city limit is that of plaintiff, built in 1926.

It appears that about 1921 a portion of an old ranch was subdivided and sold under an instrument of trust held by defendant corporation as trustee. Wilshire boulevard was then a narrow country road. It has since been widened, paved and lighted. Assessments and taxes have greatly increased; public transportation and private vehicles fill it with noises, odors and other disturbances. The trial court found that the property is no longer suitable or desirable for residential purposes; that it now has only a small market value for such purposes, and is now wholly business property, and that a large gasoline service station occupies a lot diagonally across Wilshire boulevard from plaintiff's lot.

It further appears that Barry, who is a defendant in this case, brought suit against this corporation defendant in 1928 to quiet title to two lots, numbers 212 and 213, in this same tract, for the purpose of removing the same restrictions, and obtained a judgment accordingly. He brought another suit against all the individual lot owners in the tract, except those whose property already had been exempt from operation of the restriction, for the purpose of securing individual judgments against them to like effect. Judgment was obtained against all of them by default, waiver or consent. In a suit against this trustee corporation one Leon Kaufman obtained a similar judgment as to lots 28, 29 and 30, which are 847 feet east of plaintiff's lot 162. They start at Wilshire boulevard and extend south to the next street.

In his suit against defendant corporation Barry paid $5,000 to the corporation for permitting him to get a consent decree. In the suit brought by Kaufman to release the three lots it cost him $8,000, which he paid the corporation, to obtain a similar decree.

[1] Changes which have taken place in this section of the city of Los Angeles have resulted in the removal of similar restrictions affecting adjacent and nearby tracts of land. In Forman v. Hancock, 3 Cal.App. 2d 291, 39 P.2d 249, judgment was upheld relieving plaintiff of restrictions on land lo-

cated to the west and across Wilshire boulevard. In that case the court said, 3 Cal.App. 2d at page 296, 39 P.2d at page 250: "The evidence adequately supports the findings and judgment to the effect that the changed conditions surrounding the premises in question which have occurred since the purchase of the lots render it inequitable and unreasonable to enforce the restrictive clauses of the deeds limiting the use of the lots to residential purposes, relieving the grantees therefrom, and authorizing the plaintiffs to construct structures thereon and use the same for business purposes. It is the established law of this state that a grantee of real property is entitled to be relieved of the restrictive provisions of his deed of conveyance before the breach thereof which limits the use of his property to residential purposes and prohibits the erection or use of buildings thereon for business or commercial purposes when it appears that conditions affecting the property which have occurred since the purchase thereof have changed so as to render the property unsuitable or useless for the purpose to which it was originally confined. [Citing numerous cases.]"

Our Supreme Court in Hurd v. Albert, 214 Cal. 15, at page 23, 3 P.2d 545, 76 A.L.R. 1348, has declared the leading case in this jurisdiction to be Downs v. Kroeger, 200 Cal. 743, 254 P. 1101, decided in 1927. Since that year numerous cases have arisen, including some of those relied upon in Forman v. Hancock, supra. In each of these cases, however, the facts were measured by the same equitable rule.

[2] In the instant case the evidence adequately supports the findings and determination in favor of plaintiff. It discloses a situation in which the reversionary right is held by an entity which is not the owner of the land in the same tract and cannot claim that its right as a landowner would be adversely affected as to use or value by removal of the restriction. It is held by a corporation as trustee for the syndicate which has disposed of all of the property in the tract under restrictions as to use. These obviously had as their basis the benefit to be conferred on other property in the same tract. It may be questioned whether such a restriction may be enforced by anyone other than the owner of part of the land for the benefit of which the restriction was imposed. Young v. Cramer, 38 Cal.App.2d 64, 100 P.2d 523. This vendor, having sold the land and having left in its hands the bare reversionary right, is in the extraordinary position of being the owner of rights usually attributable to the owner of a dominant tenement, retaining them while selling the entire tract of land under restrictions which make them all servient to its bare and bodiless right. Being in this position, it has not concerned itself with the enforcement of this equitable right for the benefit of those landowners who purchased their property with a knowledge of and doubtless in reliance upon the restrictions in those earlier days when they appeared just and proper. On the contrary, this vendor has conceived it proper, for a substantial consideration, amounting to $13,000, to relieve five lots of the restriction and to waive its reversionary right thereto. This money was divided among the members of the syndicate. Defendant Barry, as above noted, was plaintiff in one of the suits, paid $5,000 to relieve his two lots of the restrictive burden, as manager of the syndicate saw that it was distributed among its members and as one of the members shared in the payment.

[3] Such conduct on the part of defendants and the members of the syndicate whom defendants represent constitutes evidence of the inequity of enforcing the restrictive provision against this plaintiff. The trial court found that it operated as an estoppel against defendant Barry, and might well have considered whether it would operate as an estoppel to preclude any others who were parties to such transactions from asserting any such claim of adverse right. Wedum-Aldahl Co. v. Miller, 18 Cal.App.2d 745, 64 P.2d 762. It did find that the other lot owners by their acquiescence, which they manifested by consenting to a judgment against them in the case above discussed, had demonstrated that they had no further interest in upholding the restrictions here attacked. We conclude, therefore, that the evidence was adequate to support the determination of the trial court favorable to plaintiff.

[4] In considering whether any further parties were required to be joined to enable the trial court to effectually dispose of the issues in this case, we have examined into the relationship of defendant corporation to defendant Barry and the syndicate. In the previous cases above mentioned affecting property in this tract the contention that the members of the syndicate were necessary parties had not been raised. Nor was evidence introduced in this case indicating lack of authority or power in defend-

ant corporation. The trustee appeared and contested the action, admitting by its pleadings claim of ownership of the reversionary rights involved. The trial court found that because of the number and uncertainty as to the members of the syndicate, who were the beneficiaries of the trust, it would be an oppression on plaintiff and was unnecessary to make all or a substantial part of the beneficiaries parties to the action. It further found that the controversy in the instant case is one between the trust and strangers, and not between parties to the trust, trustor, trustee or beneficiaries. As noted above, whenever such an action as this has been brought the defendant corporation has referred it to Barry. He has referred it to a syndicate committee, which has hired an attorney to contest or settle the case, and it has paid whatever costs were incurred. Under such circumstances, where a trustee in the performance of its duties is called upon to defend the interests of the beneficiary, it may do so without the necessity of having the beneficiaries joined as parties defendant, provided the trustee acts in good faith and its own interests are not in conflict with those of the beneficiary. Johnson v. Curley, 83 Cal.App. 627, 257 P. 163.

[5, 6] A court of equity does not permit beneficiaries to come into court through their representative for the express purpose of defending rights claimed by them adverse to plaintiff, and when they have concluded the trial of the case on its merits, to urge that this representative, whom they have chosen to act for them and who has been speaking for them alone throughout the trial, is powerless and without authority to do that which it has in fact done at their behest and on their behalf. In its brief the defendant corporation intimates that perhaps it does not know who the beneficiaries are or what may be the terms of the very trust agreement under which it has been operating for twenty years. There is nothing to indicate that it made any effort to clear up any obscurity in matters which it now claims are essential. The cases of Lee v. Silva, 197 Cal. 364, 240 P. 1015, and Title Guarantee & Trust Co. v. Henry, 208 Cal. 185, 280 P. 959, are relied upon by appellants but are not in conflict with the views herein expressed.

Judgment affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

48 Cal.App.2d 459

PEOPLE v. COHEN.

Cr. 3500.

District Court of Appeal, Second District, Division 1, California.

Dec. 15, 1941.

1. Criminal law ⇐448(7)

In trial for keeping drugstore and building with books, papers and paraphernalia for recording and registering bets and selling pools on horse races, a police officer, whose qualifications were stipulated to, was properly permitted to testify as to significance, meaning and use of marks and figures on betting markers and scratch sheets, found in building, in business of bookmaking. Code Civ.Proc. § 1863; Pen.Code, § 337a, subd. 2.

2. Criminal law ⇐1169(9)

In trial for keeping store and building with books, papers and paraphernalia for recording and registering bets and selling pools on horse races, where evidence sufficiently established use of premises for purpose of registering wagers on such races, apart from police officer's testimony as to meaning of markings on scratch sheets and other papers found on premises, admission of such testimony was not error warranting reversal of conviction, even if testimony was as to intended meaning of particular marks, rather than meaning thereof in business of bookmaking. Pen.Code, § 337a, subd. 2.

3. Gaming ⇐98(5)

In trial for keeping store and building with books, papers and paraphernalia for recording and registering bets and selling pools on horse races, evidence *held* sufficient to establish corpus delicti. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Mickey Cohen was convicted of keeping a drugstore and building with books, papers, apparatus, devices and paraphernalia for purpose of recording and registering bets and selling pools on results of horse races, and he appeals.

Affirmed.

George Stahlman and Harry Duckett, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was found guilty and convicted of the crime of violation of section 337a, subdivision 2, of the Penal Code, a felony, upon an information charging him with having kept and occupied a drug store and building in the city of Los Angeles with books, papers, apparatus, devices and paraphernalia for the purpose of recording and registering bets on horse races, and for the purpose of selling pools and purported pools upon the results of such races. The case was tried before the court sitting without a jury, a trial by jury having been expressly waived.

At the trial the following was presented as evidence. On February 1, 1941, an officer of the Los Angeles Police Department, vice detail, accompanied by other police officers, went into a drug store located at 758 South Rampart in Los Angeles. In the prescription room he observed a stairway leading to a room upstairs and attempted to gain entrance thereto, but found the door padlocked. The druggist in the store did not comply with a request to open this door. The officer walked into the kitchen, in back of the drug store lunch counter, observed a trap door in the ceiling, climbed up and raised the unhinged trap door and saw the appellant throwing objects through a small opening into another room. As the officer pulled himself through the trap door, the appellant ran back into the main portion of the attic room, which was built in an L shape. The officer followed the appellant and there found a table with phone wires leading over to the table. The wires had been snipped. The officer then crawled through the opening leading into the other small attic room and recovered the objects he had seen thrown in there by appellant. These objects included a bunch of papers identified by the officer as betting markers, and another bundle containing racing publications or scratch sheets, including one which the officer stated was privately circulated and commonly used by persons keeping a book on horse racing in the locality. These objects were found by the officer in a paper carton lying on the floor of the small attic room. The scratch sheets were marked with red crayon in a manner which the officer stated had particular significance to persons keeping a book on horse races. One of the sheets in question was dated February 1, 1941, the date of appellant's arrest. The officer also found a basket containing what in his opinion were old betting markers. The officer also found three disconnected phones in the small attic room. Two of the phones thus found had attached to them a plug similar to a light plug. One of these phones the officers connected up by plugging it in to a wire in the large attic room, and through that phone so connected the officers received incoming phone calls. When the phone rang upstairs in the attic or balcony the phone in the prescription room also rang. One of the officers answered the phone several times and wrote down the conversations, as follows. The phone rang and a voice stated: "This is Verma; I want to talk to Mickey", and then it said: "489, 3 to win; 582, 3 to win; 267, 1 to win, insured; 266, parleyed; 268, 2 to win; 304, 2 to win; 306, 2 to win" and "Who won the first race?" The phone rang again and a voice said: "Hello, Mickey, this is Jeff. Have the cops pinched you?" Again the phone rang, and the party on the other end of the line said: "Is this Mickey? This is Verma again. 481, 2 to win, insured, and 1 to place on the same horse." The phone rang many other times but the officer did not write down the conversations. The officer who took these calls, who, it was stipulated, was familiar with bookmaking paraphernalia, testified in relation to the messages thus received that the number preceding the phrases "3 to win", "2 to win", etc., corresponded to the number of the horse appearing on the scratch sheet; and that the words "2 to win insured" meant that it would cost the bettor $2.20—10c additional on each $1.-00—so that if the horse won the bookmaker would pay track odds. At the time of his arrest appellant admitted to the officers that he was the "bookie" and was compensated at the rate of $5.00 per day.

[1] Appellant contends that the court erred in permitting the police officer to testify as to the meaning of handwriting and marks on certain alleged betting markers and scratch sheets; that the testimony of the officer in this regard merely amounted to a conclusion of the witness, and under such circumstances no corpus delicti was proven and the judgment cannot be supported by extra-judicial statements of defendant. Hence, appellant argues, there was insufficient evidence offered at the trial to support a finding of appellant's guilt as to the charge.

The qualifications of the officer who testified as to the writing and markings were stipulated to at the trial; but appellant contends that his testimony, to which objection was made, was not as to the custom and manner in which alleged bookmakers oper-

ated, but instead was as to the meaning of the particular notations and marks on the material before the court. The manner in which such testimony was elicited is reflected by the following quotations from the record:

"Q. Now, I will direct your attention to the printed form appearing on these several sheets of paper and ask you if this form is a form commonly used by persons keeping book on horse races in this vicinity? A. It is.

"Q. Does this form have any particular name; that is, among persons familiar with its use? A. Well, it might be classed as an ABC marker. Outside of that I do not know of any name. It really is not—

"The Court: Whether it is a regular ABC marker or not, is it or is it not a betting marker? A. It is a betting marker, yes, sir.

"Q. By Mr. Loucks: Now, I will direct your attention to the writing appearing on the first sheet of this bunch of papers that are clipped together and ask you if you have examined that writing? A. I have.

"Q. Can you state whether or not the writing appearing on this first sheet is—bear memoranda of bets on horse races?

"Mr. Taylor: Objected to on the ground it is calling for a conclusion of the witness.

"The Court: Well, I do not think that objection is tenable in view of the stipulation. However, I think there is another objection to it. Looking at the exhibit, what does the writing on there mean, in the bookmaking business, if it has any meaning?

"Q. By Mr. Loucks: First, I will direct your attention to item 1, and ask you to read off the writing and tell his Honor what that writing means to persons engaged in keeping a book on horse races?"

"Q. Have you examined the writing appearing on the other several sheets of this same bundle of papers? A. I have.

"Q. Can you state whether or not the writing indicates they were memoranda of bets placed on horse races? A. In my opinion they are.

"The Court: And the same system of marking the markers is or is not followed throughout that pad, as far as they have been marked? A. Yes."

"Q. By Mr. Loucks: Now, I will show you another bundle of papers which is headed: 'Los Angeles Edition, Official Race Entries, Weather Conditions, Jockeys, Post Positions, Scratches, Commission Horses, Sporting News', and I will ask you if you have seen those publications before? A. I have.

"Q. Where were these particular sheets when you first saw them? A. They were in a paper carton lying on the floor of this attic."

"Q. Now, there appears on this particular scratch sheet under the main caption, 'Hialeah Park' red crayon figures and marks, and under '1st Race' there is an elliptical figure around the number '12, Albatross'; does that particular mark have any significance to persons engaged in keeping a book? A. Well, it is ordinarily circled to indicate that the horse has won.

"Q. That is, won that race? A. Yes, has won."

"Q. And then in this same section denominated '1st Race, Hialeah Park' there is the number '26' and 'Bellcoda', and after the word 'Bellcoda' appears in red crayon the figure '3'; does that figure have any particular significance to persons keeping a book on horse races? A. Yes, it indicates that that horse has come in third or showed."

The foregoing excerpts serve to show that the testimony of the police officer was given not as to the intended meaning of the particular marks and figures before the court, but as to the significance, meaning and use of such marks in the business of bookmaking. His qualifications having been stipulated to, the officer was properly permitted to so testify. People v. Hinkle, 64 Cal.App. 375, 378, 221 P. 693; sec. 1863, Code Civ. Proc.

Appellant relies upon People v. Davis, 47 Cal.App.2d 331, 117 P.2d 917, recently decided by this court. But the situation in that case was the opposite to that here presented. There the officer was permitted to testify as to what was meant by the notations produced in evidence; that is, the officer there in effect testified as to the intent with which the particular notations were made. Appellant here concedes that had the officer testified that such markings were customarily put on alleged scratch sheets and markers by bookmakers in conducting bookmaking establishments, then said evidence would have been admissible. Since it is shown that the officer's testimony was to that effect, there is no merit to appellant's contention.

[2, 3] Moreover, as pointed out by respondent, even if appellant's contention in this regard were to be upheld, it cannot overcome the evidence that the premises in

question were occupied for the purpose of registering wagers on horse races. The use to which the premises were put was sufficiently established, apart from the testimony of the police officer as to the meaning of the markings on the scratch sheets and other papers. The corpus delicti was sufficiently established in any event. People v. Shapiro, 40 Cal.App.2d 321, 104 P.2d 688; People v. Ryan, 15 Cal.2d 492, 102 P.2d 320; People v. Gibbons, 39 Cal.App.2d 671, 103 P.2d 1005; People v. Reifenstuhl, 37 Cal.App.2d 402, 99 P.2d 564.

The appeal is without merit and the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.



48 Cal.App.2d 393

PEOPLE v. KAUFFMAN.

Cr. 3464.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1941.

Hearing Denied Jan. 7, 1942.

1. Forgery ⇐44

Evidence showing that defendant with intent to defraud signed name of another person to a check supported conviction of forgery. Pen.Code, § 470.

2. Criminal law ⇐1169(3)

In forgery prosecution, sustaining objection to evidence tending to prove that defendant had several bank accounts under different names was not prejudicial, where trial court in fact permitted defendant to testify over objection that he had more than one bank account and that they were under different names. Pen.Code, § 470.

3. Criminal law ⇐338(1)

In forgery prosecution, where it appeared that defendant without authority issued a check upon a bank in which he had no account signed "Dr. Warren F. Clark", trial court properly refused to permit defendant to prove that he had made arrangements with bank on which check was drawn to open an account under the name of "W. F. Clark". Pen.Code, § 470.

4. Criminal law ⇐1023(12)

An order granting probation and suspending pronouncement of judgment and sentence was not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Harry Kauffman was convicted of forgery, and he appeals.

Order denying new trial affirmed, and appeal from order granting probation dismissed.

Hearing denied; HOUSER and CARTER, JJ., dissenting.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was found guilty of forgery after trial before the court without a jury. From orders (1) granting him probation and (2) denying his motion for a new trial he appeals.

Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

Defendant, who is known as Harry Lieb or Harry Kauffman, went to the main office of the Bank of America National Trust and Savings Association, obtained a book of blank checks and a signature card. Thereafter, he took the blank checks to a printer and had the name "Warren F. Clark, M. D., 7046 Hollywood Blvd." printed on them. On June 17, 1940, he tendered to J. W. Robinson Company in payment of merchandise a check which he had written reading thus:

"16-5 LOS ANGELES MAIN OFFICE 16-15
660 SOUTH SPRING STREET
BANK OF AMERICA No. 452
NATIONAL TRUST & SAVINGS ASSOCIATION

"FOR LOS ANGELES, CALIF., June 15, 1940
LUGGAGE

"Pay to the
order of J. W. Robinson Co. $180 25/xx
ONE HUNDRED EIGHTY DOLLARS
and 25/xx DOLLARS
"WARREN F. CLARK, M. D.
"7046 HOLLYWOOD BLVD.
Warren F. Clark."

At the time he presented the check, the clerk for J. W. Robinson Company asked

defendant if he was Dr. Warren F. Clark, to which defendant nodded that he was. Later the cashier of the store asked defendant if he was Dr. Warren F. Clark and he stated that he was. Defendant admitted that he had no authority from Dr. Warren F. Clark to write the check. Neither did he have an account with the Bank of America National Trust and Savings Association.

Defendant relies for reversal of the order denying his motion for a new trial on these propositions:

First: The evidence is insufficient to sustain a conviction because there was (a) no forgery, (b) no showing of any lack of authority upon the part of defendant to sign the name Dr. Warren F. Clark, and (c) no intention to defraud.

Second: The trial court committed prejudicial error in sustaining an objection to evidence tending to prove (a) that defendant had several bank accounts under different names, and (b) that defendant had made arrangements on June 17, 1940, to make a deposit with the Bank of America National Trust and Savings Association under the name of W. F. Clark.

[1] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence to sustain each and every finding of fact set forth above together with such other findings as were necessary to support the judgment of forgery. From the undisputed evidence it appears that defendant went to J. W. Robinson Company and ordered three pieces of luggage of the value of $180.25. These he ordered sent C. O. D. to an apartment which he had rented at 1749 North Sycamore Street, Hollywood. In payment of rental for this apartment he gave a check to the proprietress signed with the name "Dr. Warren F. Clark," at the same time stating that he was Dr. Warren F. Clark.

The luggage was delivered to the apartment by an employee of the United Parcel Delivery, who told defendant that he had a large amount of "C. O. D.'s" for him. The employee asked defendant what relation he was to Dr. Clark, since he had known Dr. Clark for a number of years, to which defendant replied that he was a cousin of Dr. Clark. Defendant then came out with a check book in his hand but said he was afraid he didn't have enough money in the bank to cover the merchandise, but to return it to the store where he would call for it. This he did on June 17, 1940, and tendered the check above mentioned. However, prior to calling for the merchandise, defendant had gone to the manager of the apartment house, told her that his wife had refused to move into the apartment which he had rented, and asked her to return the check which he had given her. This she did.

From the evidence and facts set forth above the trial court properly found that defendant was guilty of forgery, since such evidence shows that defendant with intent to defraud signed the name of another person to a check. (Sec. 470, Pen.Code.)

Defendant's second proposition is likewise untenable.

[2] (a) The trial court in fact permitted defendant to testify over objection that he had more than one bank account and that they were under different names. People v. Becker, 137 Cal.App. 349, 30 P.2d 562, relied upon by defendant, is inapplicable, for the reason that in the case just cited the prosecution was predicated upon a violation of section 476a of the Penal Code, while the present action was predicated upon a violation of section 470 of the same Code.

[3] (b) It was likewise proper for the trial court to refuse to permit defendant to prove that he had made arrangements with the Bank of America National Trust and Savings Association to open an account under the name of W. F. Clark. The name used in the instant case was not W. F. Clark, but Dr. Warren F. Clark.

[4] An order granting probation and suspending the pronouncement of judgment and sentence, as was done in the instant case, is not an appealable order (People v. Smith, 36 Cal.App.2d 361, 362, 97 P.2d 867). Therefore, the purported appeal from the order granting probation is dismissed.

For the reasons set forth above the order denying defendant's motion for a new trial was properly denied and it is therefore affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 422

PEOPLE v. MITCHELL.

Cr. 1777.

District Court of Appeal, Third District, California.

Dec. 11, 1941.

1. Criminal law ⇐741(1), 742(1)

In murder prosecution, credibility of eyewitness and weight to be given his testimony were for the jury.

2. Homicide ⇐250

Testimony of eyewitness that accused in the heat of passion beat, kicked and tramped deceased to death, together with corroborating circumstances, sustained conviction of manslaughter.

3. Criminal law ⇐1159(4)

Where witness testified that he saw accused kick and beat the deceased, and that accused had asked witness to falsely account for injuries inflicted on deceased, witness' testimony on cross-examination in light of circumstances indicating that witness was afraid of accused did not conclusively show that witness' testimony as a whole was so inherently improbable as to require reversal of manslaughter conviction.

4. Criminal law ⇐1159(4)

A reviewing court should not reverse judgment of conviction on the ground that the story of the prosecution's witness is inherently improbable, unless it is so apparently false and unbelievable that reasonable minds might not differ in that regard.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Raymond Mitchell was convicted of murder of the second degree, and on motion for new trial the trial judge reduced the offense to that of manslaughter and denied the motion and sentenced the accused, and he appeals.

Affirmed.

Orr M. Chenoweth, of Redding, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Acting Presiding Justice.

The defendant was convicted of murder of the second degree. On motion for a new trial, the judge being doubtful of the sufficiency of the proof of malice, reduced the crime to that of manslaughter, and thereupon denied the motion. The defendant was sentenced to imprisonment in state prison for the term prescribed for manslaughter. From that judgment this appeal was perfected.

It is contended the judgment is not supported by the evidence for the reason that the story which was related by James Wright, the chief witness for the prosecution, who is the only living eye-witness of the affair, with the exception of the defendant, is inherently improbable and utterly unbelievable. Counsel for the defendant earnestly and vigorously declares his faith in the innocence of his client. We commend him for his able and conscientious defense. He was appointed to represent the defendant, who was without financial means to employ an attorney, and he has faithfully served without compensation.

[1] We are, however, unable to agree with appellant's counsel that the prosecution's theory of the guilt of the defendant is inherently improbable. It appears that the defendant had a fair and an impartial trial in accordance with a liberal construction of the established rules of criminal procedure. The jury found him guilty of murder of the second degree and the trial judge, giving him the benefit of a doubt, reduced the crime to that of manslaughter. The testimony of the chief witness for the prosecution is corroborated by other reliable witnesses upon certain essential facts strongly indicating the guilt of the defendant. The defendant took the witness stand in his own behalf and there is an irreconcilable conflict of evidence upon the chief issues of the case. The credibility of the witnesses was a problem to be determined solely by the jury. Giving credence to the testimony of the prosecution's witnesses, the judgment is amply supported by the evidence.

The defendant and the deceased were itinerant workers who, for some time prior to the homicide, occupied an old abandoned box-car which was stationed on an unused timber railroad track near the town of Anderson in Shasta County. The car was entered by means of improvised steps leading to a side door. About one week before the homicide which occurred Friday night, January 24, these men were joined by James Wright, another migrant worker, who had lived in that vicinity where he had engaged in spasmodic farm labor for sever-

al years. He had never previously met either the defendant, James Blair, or the deceased. The car was equipped with three temporary bunks and a makeshift stove. James Wright's bunk was at the extreme southerly end of the car. The bed occupied by the deceased was at the opposite end of the car. The defendant's bunk was stationed near the center of the car. The defendant and Mr. Wright were on good terms. The defendant had just been employed to perform some farm work for a resident in the vicinity of Anderson. He had agreed to share equally with Mr. Wright the work and wages. They discussed the details of that enterprise in the box-car that night of the homicide. It had been raining that day. The evidence discloses no enmity between the deceased and Mr. Wright. The deceased was addicted to the excessive use of liquor. The defendant had previously severely criticized Blair on the ground that he was disorderly, drunken and filthy in his habits. The defendant disliked him on that account.

Mr. Wright spent a part of that day in the town of Anderson. He returned to the car about half past four in the afternoon, where he found the defendant and a junk man. The latter left soon afterward. The defendant and Wright prepared and ate their dinner, and then spent some time discussing their farming enterprise. About half past eight Wright removed his shoes and lay down upon his bed, soon falling asleep. The defendant remained in the car.

The deceased had been playing cards and drinking that day in a saloon in the town of Anderson, until after ten o'clock at night. There is some evidence that he became quarrelsome with the proprietor, but no witness stated that he was engaged in an affray with anyone. When he left the saloon he had a quart bottle of wine. There is no dispute over the foregoing statement of facts.

Mr. Wright testified that he was awakened by the "hollering" of Mr. Mitchell and by the disturbance which was going on in the car. Mitchell, who had a flashlight in his hand, was standing over James Blair who was lying on his bed at the opposite end of the car. He said Mitchell was "just kicking (the deceased) up here around the throat and in the head, around the head". He asked the defendant, "What's the matter?" Mitchell replied, "He had some trouble up there with the officers and he came up and stumbled over me and broke my eggs. * * * He had a quart bottle full and he raised up to take a drink and I broke it over his head." Wright testified that Mitchell continued to kick the deceased "with his right foot" for about five minutes. He said the deceased just lay there groaning. Mitchell then moved his bed down toward the bunk occupied by Wright, and lay down upon it. For about fifteen minutes Blair lay in his bed moaning. Mitchell got up again and exhibiting an iron hook to Wright he said, "You see this? * * * I made this hook a week or so ago in order to rake his guts out of him." Wright said, "then he went back there and gave him another working over and at that time he kicked him down around the stomach more. * * * He (the defendant) just kept cussing and raving there". After another interval of time had elapsed, during which the deceased lay upon his bed groaning, Mitchell said, "I will fix that groaning", and he took a coffee can filled with water which he dashed in his face, after which the groaning ceased for a time.

When Wright was asked why he did not interfere with the beating of the deceased, he said, "People on the road traveling around the way we travel around lets people take care of their own business." It is not unreasonable to believe that Wright feared to interfere with an angry, raving man who was armed with an iron hook.

About daylight Mitchell and Wright arose. Blair still lay upon his couch groaning. The defendant and Wright looked at him. His face was badly cut, bruised and bloody. Mitchell told Wright that Blair's face was bruised and bloody when he came into the car in the night time and fell over the stove, breaking the eggs in the spider. The defendant said that Blair told him he had fallen on the railroad track on his way to the car and that he was injured in that manner. Mitchell said "he had lots of influence there and he would fix this thing up". He washed the blood from the face of Blair with the use of some water and paper. Wright testified that Mitchell asked him to tell the folks in Anderson that Blair was hurt by falling out of the car door. The witness said that he refused to go to town with the defendant. Blair was apparently alive when Wright rolled up his blankets and left the car about eight o'clock that morning. Apparently he intended to get away from anticipated trouble with the officers over the inhuman beating of Blair.

He said that he walked down the road a quarter of a mile, and after thinking the matter over he said to himself, "I am going back and see that thing through". He got back to the stockyard and set his roll down under the shelter of a roof. It was then raining. Mr. King, the undersheriff, and Mr. Casebeer, the constable, came along and took him into custody. He was retained in custody as a witness for the prosecution until the time of the trial.

It appears that after Mr. Wright left the car on the morning following the attack upon James Blair, the defendant went uptown and informed someone that there was a man in the box-car who was "in bad condition" and needed medical aid. Doctor G. E. Flora and Constable Casebeer visited the car about eight or nine o'clock that morning and found the body of the deceased on his couch with a blanket spread over him to his chin. Near his head there were fragments of the broken bottle with which Wright said that Mitchell had struck him on the head. There were several bruises and lacerations on the face. On the forehead near the temple there was a cut through the flesh to the skull. Blood was upon his face and on the blanket. There was considerable blood on the floor of the car near his head, although there was evidence that his face had been washed with water and a dampened paper. The wet and bloody paper was found in the car. Blair was then dead. Mitchell, who was present, claimed to be surprised that Mr. Blair was dead.

Doctor Ernest Dozier made a post mortem examination of the body, and testified to the result of that investigation. He found several severe bruises and at least one laceration on the face and head of the deceased. There were numerous bruises on the chest and body. Six of his ribs were fractured. The eighth rib had punctured the liver. A large quantity of blood had seeped into the abdomen. The tissues about the fractured end of the eighth rib and surrounding the liver were badly lacerated. Doctor Dozier testified that it was his opinion from the macerated condition of the tissues that "somebody stood on him and teetered on him until his ribs were broken and his blood vessels opened and he bled to death". He said that Mr. Blair died as a result of the injuries to his chest and head, together with the shock which followed the beating, tramping and kicking which he received. He also testified that the injuries to the chest, liver, ribs and face could not have been inflicted by merely falling on the railroad track or falling out of the car.

It will be recalled that Wright testified he saw the defendant violently kicking the deceased with his right foot on and about the face which was cut and bruised and which bled freely so that blood was found upon his face and in the vicinity of his head. Roger S. Green, chemist for the State Bureau of Criminal Identification, scientifically examined the right shoe, sock and cuff of the trousers of the defendant. He found upon each of them the presence of human blood.

[2] We are of the opinion these corroborating circumstances strongly indicate that the story of Mr. Wright was substantially true, and that the defendant in the heat of passion beat, kicked and tramped him to death.

In a final brief the appellant earnestly insists the Attorney General has failed to answer his contention that two statements of the witness, Wright, conclusively show his testimony that the defendant kicked and stamped James Blair to death was false. These statements relied upon occurred as follows: On cross-examination Mr. Wright was asked if the defendant did not ask him to go uptown with him to get a doctor, to which he replied: "You go after a doctor and I will go down to the pool room * * * and get the lowdown on what kind of trouble Bruce (Blair) had last night." On cross-examination of the same witness he was asked if he did not say to the officers when they asked him if he and Mitchell were not friends, that he replied, "Yes, until he tried to place the blame on me."

[3] The foregoing statements may be said to be inconsistent with Mr. Wright's testimony that he saw the defendant kick, stamp and beat the deceased. The credibility of the witness and the weight of his evidence were matters for the determination of the jury. They are expected to reconcile the testimony if possible. We must presume they attempted in good faith to do so. The witness may have been led into answering questions thoughtlessly. Wright had not testified on direct examination that the defendant had asked him to go uptown with him to see a doctor. He did say the defendant "wanted me to wait around there and go uptown with him". It is true that

the defendant and Wright had previously been friendly. According to the statement of Wright, the defendant exhibited a violent temper and brutally kicked and beat the deceased without cause. They had been acquainted only about a week. It is not unreasonable that Wright may have been in great fear of opposing the defendant and that he pretended he would assist him to falsely account for the injuries inflicted on the deceased. He said Mitchell told him Blair came into the car with a bruised and bloody face and that he said he was injured by falling on the railroad track. The defendant also told Wright that Blair said he had had "some trouble up there" with the officers. The last statement may have led Wright to use the excuse for not going uptown with the defendant that he would inquire at the pool room to find out what trouble Blair had with the officers. Mitchell had asked Wright to falsely tell the people in town that Blair was injured by falling out of the car. Anticipating trouble over the affair and being anxious to get away, Wright may have said he would find out about the trouble with the officers as a mere excuse and to appease the defendant and lead him to think he intended to try and help him fasten the blame on someone else. Evidently he did not intend to do so. The weight of his evidence was for the determination of the jury. It is significant that the defendant became a witness in his own behalf and that he did not attempt to charge Wright with the crime. No one intimates that Wright was guilty of the crime as an accessory or otherwise. Wright, Mitchell and the deceased were the only ones in the car. If Mitchell did not cause the death of Blair by kicking and stamping him, we ask ourselves who accomplished that inhuman beating. There is no evidence of any previous affray in which the deceased was involved. In a small community every unusual transaction is likely to be known. Yet there was no evidence of anything in which the deceased was involved which could reasonably account for the condition in which he was found. The testimony of Wright is corroborated by the presence of human blood on the right shoe, sock and trouser leg of the defendant. Doctor Dozier testified positively that the deceased could not have broken six ribs and sustained the macerated and pulpy condition of the tissues and flesh about the broken end of the eighth rib which had punctured the liver, by merely falling on the railroad track. He said it was evident someone had been teetering up and down on his chest. We are therefore of the opinion the statements relied upon do not conclusively show that Wright's testimony is inherently improbable.

[4] It has been repeatedly held that a reviewing court should not reverse a judgment on the ground that the story of the prosecution's witness is inherently improbable unless it is so apparently false and unbelievable that reasonable minds may not differ in that regard. People v. Jefferson, 31 Cal.App.2d 562, 88 P.2d 238; People v. Lewis, 18 Cal. App. 359, 364, 123 P. 232; People v. Dunn, 40 Cal.App.2d 6, 11, 104 P.2d 119; People v. Stangler, Cal.Sup., 117 P.2d 321. We do not believe the story of James Wright was inherently improbable. It does not seem unreasonable. Both the jury and the trial judge believed it. The trial judge clearly indicated his belief in the defendant's guilt by denying a motion for new trial.

The judgment is affirmed.

TUTTLE, J., concurred.



48 Cal.App.2d 452

CROFTON v. YOUNG.

Civ. 2828.

District Court of Appeal, Fourth District, California.

Dec. 12, 1941.

Hearing Denied Feb. 5, 1942.

1. Quieting title ⇐30(1)

Where ex parte order making an individual a party defendant in quiet title suit, after finding that individual was a necessary party for determination of rights of parties to suit, ordered that individual was thereby made a party defendant and given 10 days in which to file an answer and cross-complaint, and an answer and cross-complaint was filed which sought a lien on land in amount of a judgment against grantor who allegedly conveyed land to plaintiff in fraud of grantor's creditors, the statute authorizing court in suit to determine claims to realty to authorize the bringing in of additional

parties by amendment was complied with. Code Civ.Proc. § 389.

2. Quieting title ⇐30(1)

Where it clearly appeared from record in quiet title suit that entire interest of original defendant had been assigned to an individual and that individual was the real party in interest and should have been made defendant, and issues could not properly be determined without individual's presence, trial court had authority to make individual a defendant. Code Civ.Proc. §§ 387, 389.

3. Bankruptcy ⇐156

In suit by judgment debtor's son against judgment creditor to quiet title to land which had been conveyed by debtor to son before execution was levied thereon, where trial court properly ordered that creditor's assignee be made a party defendant, court had power to thereafter make an order substituting debtor's trustee in bankruptcy as party defendant and cross-complainant for assignee. Code Civ.Proc. §§ 387, 389.

4. Appeal and error ⇐931(1)

Presumptions may usually be indulged in favor of an order or judgment from which an appeal has been taken.

5. Appeal and error ⇐931(1)

Where it clearly appeared from record in quiet title suit that an answer setting up a substantial interest in land had been filed by individual who was made a party defendant by ex parte order, that no evidence had been taken in that connection, and that effect of order granting plaintiff's motion to strike out the ex parte order and individual's answer and cross-complaint was to eliminate all defendants who had any interest in land growing out of a judgment lien, it could not be presumed on appeal from order granting motion that anything could have been presented on hearing of motion which was sufficient to overcome facts disclosed by record.

6. Bankruptcy ⇐156

Under the record, those portions of order in quiet title suit which struck out a previous order substituting judgment debtor's trustee in bankruptcy as party defendant and cross-complainant in place of judgment creditor's assignee and which struck out the answer and cross-complaint filed by assignee were erroneous, at least in so far as they applied to trustee.

7. Judgment ⇐153(1)

The general rule concerning the time within which a default judgment may be set aside has no application where a clerk exceeds the limited power conferred upon him by statute in entering default, in which event the clerk's action is a nullity and open to attack at any time. Code Civ.Proc. §§ 473, 585.

8. Judgment ⇐120

Where the only service of cross-complaint shown by record was that upon plaintiff's attorney, the clerk had no power to enter a default against plaintiff on plaintiff's failure to answer cross-complaint, and such default should have been entered only by trial court. Code Civ.Proc. § 585.

9. Quieting title ⇐40

Allegations of answer in quiet title suit were deemed denied by plaintiff.

10. Judgment ⇐106(1)

Where a cross-complaint is unnecessary in view of allegations of answer, the clerk has no authority to enter a default.

11. Quieting title ⇐39

Usually, a cross-complaint is unnecessary in a suit to quiet title, since full relief may be granted defendant pursuant to answer.

12. Judgment ⇐106(5)
Quieting title ⇐40

Where issues are fully presented by complaint and answer in quiet title suit, further pleading by plaintiff is not required, and omission to answer an unnecessary pleading will confer no authority on the clerk to enter plaintiff's default.

13. Judgment ⇐138(1)
Quieting title ⇐39

Where a single pleading denominated "Answer and Cross-Complaint" was filed by defendant in quiet title suit, and portion of pleading under heading "Answer" alleged ultimate facts, while the portion called "Cross-Complaint" went more into detail in alleging probative facts, and prayer in pleading asked for nothing which could not be given under answer if it stood alone, cross-complaint was unnecessary and setting aside of plaintiff's default for not answering cross-complaint, which default was entered by clerk, was proper. Code Civ.Proc. §§ 473, 585.

14. Pleading ⇐348

Where clerk erroneously entered a default against plaintiff for failure to answer an unnecessary cross-complaint, denial of defendant's motion for judgment on pleadings after default was properly set aside was proper.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Suit to quiet title to realty by John Crofton against the Pacific Coast Joint Stock Land Bank of San Francisco, wherein O. F. Neal obtained an ex parte order making him a party defendant and filed a cross-complaint and Fred S. Young, as trustee in bankruptcy of the bankrupt estate of Thomas N. Crofton, was substituted as party defendant and cross-complainant in place of O. F. Neal. From an order granting plaintiff's motions to strike out a default as entered by the clerk against plaintiff on the cross-complaint and to strike out the order joining O. F. Neal as a party defendant and the answer and cross-complaint filed by him and an order denying a motion by Fred S. Young, trustee, etc., for a judgment on the pleadings, Fred S. Young, trustee, etc., appeals.

Order denying motion for judgment on the pleadings affirmed, and that portion of the order setting aside plaintiff's default for failure to answer cross-complaint affirmed and the rest of such order reversed.

F. L. Richardson, of San Diego, for appellant.

O. A. Thorpe, Gray, Cary, Ames & Driscoll, and B. Kenneth Goodman, all of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from orders entered in a quiet title action. A prior attempt to review most of these orders through certiorari proceedings failed because the orders were appealable. Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363.

The defendant bank recovered a judgment against Thomas N. Crofton and levied execution on the real property in question which Crofton had previously conveyed to his son, the plaintiff herein. The bank assigned its judgment to one Neal. Thereafter, the plaintiff brought this action to quiet his title to the land, naming the bank as sole defendant. On October 1, 1938, Neal obtained an ex parte order making him a party defendant, and then served on the plaintiff's attorney and filed an answer to the complaint and a cross-complaint alleging that Thomas N. Crofton was the owner of the property, that it had been conveyed to the plaintiff in fraud of creditors, and claiming a lien in the amount of the judgment. The plaintiff not having answered the cross-complaint within ten days his default was entered by the clerk on October 20, 1938, on Neal's application. On November 14, 1938, an answer to the cross-complaint was filed bearing the acknowledgment of Neal's attorney that he had received a copy thereof. This answer to the cross-complaint was, after motion duly made, stricken from the files by an order entered on June 13, 1939. This order is not involved on this appeal.

In May, 1939, the appellant, as the duly appointed trustee in bankruptcy of the bankrupt estate of Thomas N. Crofton, moved for an order substituting himself as party defendant and cross-complainant in the place of Neal and that he be subrogated to all of Neal's rights against the plaintiff on the ground that, as such trustee, he had succeeded to all of the rights of both of the bankrupt and of Neal, whose claim had been filed in the bankruptcy proceeding. This motion was granted on June 5, 1939, and an order entered that the appellant be substituted as a party defendant in place of Neal, and subrogated to all rights of Neal and the bankrupt.

On June 24, 1939, the plaintiff moved to strike the default as entered by the clerk on October 20, 1938, and to set aside the order striking his answer to the cross-complaint. On the same day, the plaintiff also moved to strike the order of October 1, 1938, joining Neal as a party defendant and the answer and cross-complaint filed by Neal. On July 17, 1939, these motions were heard by a different judge than the one who had made the orders and were all granted, with the exception of the motion to strike the order striking the answer of the plaintiff to the cross-complaint. The order entered not only struck out the order joining Neal as a party defendant, the answer and cross-complaint filed by Neal, and the default of the plaintiff in failing to answer the cross-complaint within time, but went beyond the terms of the notices of motions and the motions themselves as stated by the court in its order, and struck out the order of

June 5, 1939, substituting Young as trustee in the place of Neal. The effect of the order as entered was to dismiss from the case the defendant Neal and the defendant Young, who had been substituted in his place, and to strike out the only answer which had been filed.

The trustee in bankruptcy has appealed from this order of July 17, 1939, and also from an order denying his motion for a judgment on the pleadings, which was entered on the same day.

The order entered on June 5, 1939, clearly substituted the appellant as party defendant in the place of Neal and expressly subrogated and substituted him to all of Neal's rights as a party to this action, among which was the right to rely upon the answer and cross-complaint which had been filed by Neal. It does not clearly appear why the appellant was thus substituted for Neal instead of being merely added as a party defendant. It is conceivable that Neal may have had interests as a judgment-creditor which were not identical with those of the trustee in bankruptcy, as representing also the other creditors. It might have saved another action to have allowed Neal to remain as a defendant in this action. Be that as it may, Neal did not appeal from that order and that matter is not involved on this appeal other than as it affects the interests of the trustee in bankruptcy.

[1] The main questions here presented are whether the court erred in setting aside the order making Neal a party defendant, in setting aside the order substituting this appellant for Neal, and in striking out the answer and cross-complaint which had been filed by Neal. In support of the order, the respondent argues that the court was justified in striking out the order making Neal a party because that order was in excess of the court's jurisdiction, it being argued in this behalf that a litigant has the right to select the persons whom he desires to make defendants in an action and that Neal, if he had any interests which he desired to protect, could only become a party through intervention as provided for in section 387 of the Code of Civil Procedure, or by complying with the provisions of section 389. It is further argued that Neal did not comply with the requirements of section 389 because the court's order making him a defendant did not provide that he be brought in "by the proper amendment", and that the order bringing him in was, therefore, void. The order in question, after finding that Neal was a necessary party for the determination of the rights of the parties to the action, ordered that Neal "be and he is hereby made a party defendant herein and hereby given ten days in which to file an answer and cross-complaint setting up his interest in the real estate described in plaintiff's complaint". This was a sufficient compliance with the statute and the answer and cross-complaint permitted to be filed was a "proper amendment" within the meaning of that language of the statute.

[2, 3] It clearly appears from the record before us that the entire interest of the original defendant, the bank, had been assigned to Neal and that he was the real party in interest and should have been made the defendant. Without his presence the issues in the quiet title action could not properly have been determined. The court had power and authority to make him a defendant under sections 387 and 389 of the Code of Civil Procedure. Young v. Superior Court, supra. The court likewise had power to make the order of June 5, 1939, substituting this appellant for Neal whether or not that order went farther than necessary in entirely eliminating Neal as a party defendant.

[4-6] No good reason is advanced in support of the order of July 17, 1939, which had the effect of eliminating all defendants except the bank, which no longer had any interest, and of striking the only answer which had been filed. While presumptions may usually be indulged in favor of an order or judgment appealed from it clearly appears here that an answer had been filed setting up a substantial interest in the property, that no evidence has been taken in this connection, and that the effect of the order appealed from is to shut out that defense and eliminate all defendants who now have any interest in the property in question growing out of this judgment lien. Under such circumstances, it cannot be presumed that anything could have been presented on the hearing of the motion which was sufficient to overcome the facts disclosed by the record, and it must be held that the court erred in making this order. The same considerations apply to those portions of the order which struck out the previous order substituting the appellant in place of Neal and struck out the answer and complaint

which had been filed. The order was in this respect erroneous, at least in so far as it applied to the appellant.

[7-9] The appellant next attacks that portion of the order appealed from which sets aside the default entered by the clerk on the failure of the respondent to answer the cross-complaint filed by Neal. It is argued that the court had no power to set aside that default because this was done more than six months after the default was entered and section 473 of the Code of Civil Procedure provides that such a default may be set aside within a reasonable time, but in no case after the lapse of six months. Conceding that general rule it has no application where a clerk exceeds the limited power conferred upon him by statute, in which event the clerk's action is a nullity and open to attack at any time. Baird v. Smith, 216 Cal. 408, 14 P.2d 749; Farrar v. Steenbergh, 173 Cal. 94, 159 P. 707. In the last-named case, doubt was expressed whether under section 585 of the Code of Civil Procedure a clerk is authorized to enter a default for failure to answer a cross-complaint since that section refers to the time to answer specified in a summons while under another section the cross-complaint may be served upon the attorney of a party who has appeared and there is no necessity for a summons. In 1915 that code section was amended further limiting the clerk's power to enter a default to cases where "the defendant has been personally served", and the only service of the cross-complaint shown by this record was that upon the attorney for the respondent. There would appear to be a good reason for holding that a clerk has no power to enter a default under such circumstances and that such a default should be entered only by the court. Frequently, such a cross-complaint contains matter which is also put in issue by the answer. The allegations of the answer are deemed denied by the plaintiff and the plaintiff should not be put in the position of having at the same time admitted those matters, through the purely ministerial act of a clerk. The clerk should have no power to thus interfere with those issues which are thus pending and which must be decided by the court.

[10-12] Whether or not this is a sufficient justification for that portion of the order appealed from which sets aside the clerk's entry of this default, we think that portion of the order must be affirmed on another ground. Where a cross-complaint is unnecessary in view of the allegations of the answer the clerk has no authority to enter a default. Brooks v. White, 22 Cal. App. 719, 136 P. 500. It was pointed out in that case that in quiet title actions a cross-complaint is usually unnecessary since full relief may be granted the defendant pursuant to his answer. While certain exceptions were noted, it was held that where the issues are fully presented by the complaint and answer further pleading on the part of a plaintiff is not required, and the omission to answer an unnecessary pleading will confer no authority on the clerk to enter a plaintiff's default.

[13] In the instant case, a single pleading was filed which was denominated "Answer and Cross-Complaint". In the first part of the instrument, under the heading "Answer", it is alleged that the judgment obtained from the bank is a first lien upon the property, that the judgment has been assigned to Neal, that the judgment-debtor, Thomas N. Crofton, is the owner of the real property, and that the plaintiff and respondent is not and never has been the owner thereof. Following that, under the heading "Cross-Complaint", the same facts are alleged more in detail, and it is specifically alleged that the property was transferred by the judgment-debtor to the plaintiff and respondent without consideration and for the purpose of defrauding the judgment-creditor. The allegations of the answer are then adopted by reference as a part of the cross-complaint. There is but one prayer in which "this answering defendant" prays that the plaintiff take nothing and that "the defendant" Neal be adjudged to have a first lien upon the property. The answer alleges the ultimate facts while the portion called a cross-complaint goes more into detail in alleging probative facts, and the prayer asks for nothing which could not be given under the answer if it stood alone. Under these circumstances the cross-complaint was unnecessary and the setting aside of the respondent's default for not answering the cross-complaint was proper since its entry by the clerk was unauthorized.

[14] It follows from what we have said that the appellant's motion for judgment on the pleadings was properly denied.

It seems apparent that this action has been unnecessarily prolonged and complicated although the issues presented are

simple and direct. Those issues should be tried on their merits and neither party should be subjected to technical handicaps created by orders which should not have been made.

The order denying the motion for judgment on the pleadings is affirmed. That portion of the order of July 17, 1939, which sets aside the respondent's default for failure to answer the cross-complaint is affirmed, and the rest of that order is reversed.

MARKS and GRIFFIN, JJ., concurred.



48 Cal.App.2d 514

PEOPLE v. MARTIN et al.

Cr. 3492.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1941.

1. Criminal law ⇐274

Where defendants, moving to set aside their pleas of guilty of burglary, made insufficient showing that such pleas were ignorantly induced or made inadvertently without due deliberation or through motives of hope or fear, but it appeared at most that they entered pleas under hope of leniency, with knowledge of their rights and consequences of their acts, trial court did not abuse its discretion in refusing to allow defendants to change such pleas to pleas of not guilty.

2. Burglary ⇐10

In burglary prosecution, where it was stipulated that burglary was committed between 11:30 p. m. and 7:30 a. m., there was considerable room for difference of opinion as to reasonableness of defendants' explanation of their failure to enter burglarized house until 7 a. m. as claimed by them, and trial court's view that their story that they entered house after daylight was false had support in record, court did not err in finding defendants guilty of first-degree burglary on their pleas of guilty to charges of burglary in information. Pen.Code, § 1097.

3. Criminal law ⇐1069(1)

Where judgment on plea of guilty of burglary was rendered on April 3, 1941, defendant gave no oral notice of appeal therefrom, his motion to set aside judgment and enter plea of not guilty was heard and denied on April 30, 1941, and he filed notice of appeal from conviction, judgment and sentence, not from order denying such motion, on May 3, 1941, appeal was too late.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Glen Martin and one Pope were convicted of first degree burglary, and they appeal.

Affirmed.

Vernon R. Hamilton and E. W. Miller, both of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

In an information filed against them, appellants were each charged in the first count thereof with burglary, and in the second count with attempted burglary. Both appellants first entered pleas of not guilty as to the charges, but later changed their pleas to guilty as to the charge of burglary contained in the first count; and judgment was accordingly pronounced thereon. The second count of the information was dismissed as to each of the appellants. Both appellants moved the court to set aside their pleas of guilty and to be permitted to enter pleas of not guilty. Appellant Pope made his motion before judgment, appellant Martin after judgment. Appellant Martin's motion also was one to set aside the judgment. The motions were denied. The appeal is based upon the grounds that the convictions and judgments are against the evidence and the weight of the evidence; that the court erred in denying defendants' motions to set aside their pleas of guilty; and that the court erred in fixing the degree of burglary charged as of the first degree.

The motions for permission to change the pleas were based upon affidavits by appellants generally to the effect that the pleas of guilty were entered under the impression that the facts in the case would show the burglary to be of the second degree only and that appellants would not

have entered a plea of guilty had they known that there was a possibility of the degree of the crime being fixed as that of the first degree; and that the pleas of guilty were also entered by appellants in reliance upon promises of leniency given in return for information, both as to other burglaries and as to "fences" receiving stolen property. In this regard, appellant Martin's affidavit states that the promises given him led him to believe that he would only receive a county jail sentence. Affidavits by members of the district attorney's staff, filed in opposition to appellants' motions for change of plea, deny any promise of leniency, and state in effect that after discussing appellants' case with the police officers it was made known that it would be satisfactory to the district attorney's office if appellants would plead guilty to one count of burglary. While the record indicates that the police officers may have promised appellants that their cooperation would be called to the attention of the court, it does not appear, except in appellants' affidavits, that, as to the matter of leniency, appellants were told anything more than that such a matter was one for the court to decide.

[1] In any event, appellants have made an insufficient showing that their pleas of guilty were ignorantly induced, or were made through inadvertence or without due deliberation, or were made through motives of hope or fear unduly and improperly operating upon appellants' volition. At the most, it appears that appellants entered their pleas of guilty under a hope of leniency, knowing their rights and the consequences of their act. This fact, standing alone, presents no ground for the exercise of the discretion of the court in the matter of permitting a change of plea; and it cannot be said that the court abused its discretion in refusing to allow appellants to change their pleas to not guilty. See 7 Cal.Jur. 1000, 1001, and cases cited.

[2] As to fixing the degree of the crime, it was stipulated that the burglary was committed between the hours of 11:30 p. m. and 7:30 a. m. The house entered by appellants was a large one, about fifty-six rooms according to appellants. It was occupied at the time and apparently well manned by servants. Appellants claimed to have entered the house at 7 a. m. after wandering through the district most of the night seeking a suitable house to burglarize. Appellants contend that they gave a perfectly natural and logical explanation as to why they did not enter the house earlier than 7 a. m. There is considerable room for a difference of opinion as to the logic and reasonableness of the explanation; and appellants concede, necessarily so, that the ground of doubt, as provided in section 1097 of the Penal Code, which requires conviction of the lowest degree only, must be a *reasonable* ground of doubt. The trial court's view of the matter is summed up in the following excerpt from the record: "He has entered a plea of guilty to the burglary of an occupied residence, and his story that they entered this dwelling after daylight is in this court's judgment a farcical one, particularly as they further by their admission show that they had been out in this area at 12:30, and they tromped this whole area from 1:30 in the morning until 7 o'clock in the morning before they entered this occupied dwelling in the daytime while people were asleep in there, and this defendant went up in the second story where people were asleep in the daytime. That is preposterous, and the court refuses to be so gullible as to believe it, and the defendant knows in his own heart it is not true, no matter what he says here." This view of the court finds support in the record.

[3] While the matter has not been called to the attention of this court by either party, it should be noted that judgment was rendered against Martin on April 3, 1941. It does not appear that appellant Martin gave any oral notice of appeal therefrom. Thereafter, and on April 30, 1941, Martin's motion to set aside the judgment and to enter a plea of not guilty was heard and denied. Appellant Martin did not file his written notice of appeal until May 3, 1941. This notice of appeal states that Martin appeals from the "conviction, judgment and sentence". It does not state that an appeal is taken from the order denying appellant's motion to set the judgment aside and to be allowed to change the plea. The elapsed time between rendition of the judgment and notice of appeal therefrom is thirty days.

The appeal is devoid of merit and the judgments are affirmed.

YORK, P. J., and WHITE, J., concurred.

48 Cal.App.2d 352

PINKSTON et al. v. LIEB.

Civ. 13159.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

1. Limitation of actions ⇐127(16)

In action for slander, where complaint alleged in first of two causes of action that defendant made slanderous remarks in presence of specified police officers and others at certain police station, allegation in amendment of such cause of action that defendant made similar statements in presence of named person and another police officer at different place on same date, which was over a year before filing of amendment, stated new and entirely separate and distinct cause of action, which was barred by statute of limitations. Code Civ.Proc. § 340, subd. 3.

2. Limitation of actions ⇐181

One method of raising the bar of the statute of limitations is by answer.

3. Limitation of actions ⇐181

In action for slander, where plaintiff amended first of two causes of action stated in complaint by alleging new and entirely separate and distinct cause of action after expiration of limitation period, defendant properly raised bar of statute of limitations by answer to such amendment. Code Civ. Proc. § 340, subd. 3.

4. Libel and slander ⇐98

In action for slander, where plaintiffs' counsel, after defendant was permitted to amend his answer in general denial by pleading proof of alleged slanderous remarks charged as second of two causes of action in complaint, requested and was granted continuance until following morning to readjust plaintiffs' plan of prosecution, but did not request additional time when court reconvened on following day, court's ruling permitting such amendment was not error. Code Civ.Proc. § 473.

5. Continuance ⇐14(1)

When amendment to pleading is allowed, trial court should grant pleader's opponent a continuance, if it appears necessary in furtherance of justice. Code Civ. Proc. § 473.

6. Disorderly house ⇐16

The fact that a house is one wherein prostitution is carried on may be proved by evidence of its general reputation.

7. Libel and slander ⇐110(1)

In action for slander by statement that plaintiffs were running a whore house, where one issue was whether building in which plaintiffs lived was being used for purposes of prostitution, trial court properly admitted evidence as to its general reputation in such respect.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Tillie Pinkston and another against Fred Lieb for slander. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Hahn, Graf & Ross, of Los Angeles, for appellants.

Bernard Brennan, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to recover damages for slander, plaintiffs appeal.

Viewing the evidence in the light most favorable to defendant (respondent), the essential facts are:

June 19, 1940, plaintiffs, who are sisters, filed an action for slander against defendant alleging that on or about June 22, 1939, defendant stated to a number of police officers and other persons at the Lincoln Heights Police Station, Los Angeles, that, referring to plaintiffs, "They are running a sporting house." In a second cause of action it was alleged that on or about June 24, 1939, defendant in the hearing of one Mr. Fred Carter said, referring to plaintiffs, "They are running a whore house."

In addition the complaint contained appropriate allegations to complete two causes of action for slander. January 6, 1941, the second day of the trial, defendant filed an answer generally denying the material allegations of the complaint. On the same day the trial judge permitted plaintiffs to change the allegation in their first cause of action that the alleged slanderous remarks were made in the hearing of police officers and other persons at the Lincoln Heights

Police Station to show that the remarks were made in the hearing of Carl W. Bittner and another police officer at or about No. 3018 Division Street, Los Angeles. To this amendment the trial judge permitted defendant to file an answer consisting of a general denial and pleading the bar of the Statute of Limitations in that the amendment stated a new and separate cause of action from that stated in the original and first amended complaint because more than one year had elapsed from the time of the alleged slanderous remark until the filing of the new cause of action.

January 8, 1941, the fourth day of the trial, the trial judge permitted defendant to file an amendment to his answer, by which he added a separate and affirmative defense to the second cause of action by pleading the truth of the charge therein contained.

Plaintiffs rely for reversal of the judgment on the propositions that it was error for the trial judge to:

First: hold that plaintiffs' amendment to the first cause of action stated a new cause of action and was therefore barred by the Statute of Limitations;

Second: permit defendant to amend his answer to allege as an affirmative defense to the second cause of action the truth of the alleged slanderous remarks;

Third: admit evidence as to the general reputation of the building in which plaintiffs lived as proof of the truth of the charges made against them and as proof of the use being made of the building.

[1-3] Plaintiffs' first proposition is untenable. It needs no citation of authority to support the proposition that an allegation that defendant made slanderous remarks in the presence of certain specified persons at the Lincoln Heights Police Station on June 22, 1939, is an entirely separate and distinct cause of action from an allegation that he made similar statements in the presence of Carl W. Bittner and another police officer at or about No. 3018 Division Street, Los Angeles, on June 22, 1939. Proof of each of the allegations would have supported judgments on two separate and distinct causes of action. Recovery on one would not have constituted a bar to a recovery upon the other cause of action.

One method of raising the bar of the Statute of Limitations is by answer (Atkinson v. Amador & S. Canal Co., 53 Cal. 102, 105). In the instant case this method was properly followed by defendant. Hence, since the alleged slanderous remarks were made on June 22, 1939, and the first cause of action was not alleged until January 6, 1941, more than a year had elapsed from the time the alleged slanderous words were spoken until recovery was sought upon such cause of action and it was barred by the Statute of Limitations (sec. 340, subd. 3, Code Civ.Proc.).

[4, 5] Plaintiffs' second proposition is likewise without merit. Section 473 of the Code of Civil Procedure permits the trial judge in the furtherance of justice to permit necessary amendments to the pleadings, and, should it appear necessary in the furtherance of justice when an amendment is allowed to grant a continuance, the trial court should do so. In the instant case at the time defendant was permitted to amend his answer as to the second cause of action, the following conversation took place between the court and plaintiffs' counsel:

"Mr. Hahn: Under the conditions, your Honor, your ruling puts us in a position where we have to prosecute a case in a little different manner than where we started out, and I would ask the Court to give me until tomorrow morning, to continue this case until tomorrow morning, so we can readjust our plan of prosecution.

"The Court: Very well. If you need additional witnesses—

"Mr. Hahn: We don't need that, but we would like to talk matters over with these witnesses."

Upon the following day when court reconvened, plaintiffs' counsel did not request additional time. It thus appears that plaintiffs were ready to proceed with the trial of the action.

[6, 7] Plaintiffs' final proposition is also untenable. The law is established in California that the fact that a house is one where prostitution is carried on may be proved by evidence of the general reputation of the house relative to this subject (In re Selowsky, 38 Cal.App. 569, 579, 177 P. 301). In the instant case one of the issues before the court was whether or not the building in which plaintiffs lived was being used for purposes of prostitution. Therefore, the trial court properly admitted evidence as to the general reputation of such house upon this subject.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 449

MARTIN v. GIBSON et al.

Civ. 6679.

District Court of Appeal, Third District, California.

Dec. 12, 1941.

1. Dismissal and nonsuit ⇐60(1)

The statute providing that an action which is not brought to trial within five years after it is filed shall be dismissed is not applicable where a trial has been dispensed with, and hence defendants were not entitled to have action dismissed because it was not brought to trial within five years, where defendants in their answer admitted all allegations of complaint, since a "trial" within meaning of statute is a determination of issues of fact. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

2. Dismissal and nonsuit ⇐60(1)

Under statute providing that an action which is not brought to trial within five years after it has been filed shall be dismissed, a court has no discretion but to dismiss, where an answer is filed and five years have elapsed since the commencement of the action. Code Civ.Proc. § 583.

3. Statutes ⇐176

Court has the duty to construe a statute with common sense and the dictates of justice.

4. Dismissal and nonsuit ⇐60(1)

The object of the statute providing that an action will be dismissed unless it is brought to trial within five years after it has been filed, is to expedite the administration of justice in the matter of the trial of any issues of fact. Code Civ.Proc. § 583.

5. Dismissal and nonsuit ⇐60(1)

The failure to proceed diligently with an action in other respects than dealt with by statute providing that action must be brought to trial within five years after it is filed, or it shall be dismissed, can be reached by a motion to dismiss for want of prosecution. Code Civ.Proc. § 583.

6. Mortgages ⇐581(1)

Where counsel fees for foreclosure of mortgage were fixed in mortgage at five per cent. of amount to be found due, defendants in mortgage foreclosure action were not entitled to a trial to determine and fix counsel fees.

Appeal from Superior Court, Colusa County; Ben R. Ragain, Judge.

Action to foreclose a mortgage by Clara H. Martin against Andrew A. Gibson and others. From an order granting defendants' motion to dismiss the action, the plaintiff appeals.

Order reversed.

Pillsbury, Madison & Sutro, of San Francisco (Marshall P. Madison and Everett A. Mathews, both of San Francisco, of counsel), for appellant.

Brown & Ford, of Colusa, for respondents.

TUTTLE, Justice.

This is an action to foreclose a mortgage. The complaint was filed on May 8, 1930. On April 12, 1932, the defendants filed the following answer:

"Now come defendants Andrew A. Gibson, Ruth B. Gibson and Emma G. Trebilcot, and for answer to plaintiff's complaint on file herein admit each, every and all of the allegations in said complaint contained.

"Wherefore, having fully answered said complaint said defendants pray for such relief therein as they are entitled to by law."

On May 15, 1939, defendants filed a notice of motion to dismiss under section 583 of the Code of Civil Procedure on the ground that the action had not been brought to trial within five years after the filing of defendants' answer. On July 18, 1939, the superior court entered an order granting the motion. Plaintiff appeals from said order.

The portion of said section which appears to be applicable to the situation reads as follows:

"Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended."

[1-5] Appellant contends that the foregoing provision is not applicable where the

record shows that a trial has been dispensed with, and there can therefore be no trial. We think appellant has properly construed the law. A trial, within the meaning of said section, is a determination of the issues of fact. Perrin v. Miller, 35 Cal.App. 129, 169 P. 426. Here defendants admitted that all the facts set forth in the complaint were true. In effect, they agreed that there should be no trial. It must be remembered that the motion here is not based upon want of prosecution, but upon a failure to bring the action to trial within five years. It is true that the court has no discretion under said section but to dismiss the action where an answer is filed and five years have elapsed since the commencement of the action. (Allyne v. Superior Court, 200 Cal. 661, 254 P. 564), but it is our duty to construe the section in question "with common sense and the dictates of justice". 23 Cal.Jur., § 104, p. 722. We do not believe the legislature intended to compel a dismissal where there would be no trial, the object being to expedite the administration of justice in the matter of the trial of any issues of fact. Other causes for the law's delays or the failure to diligently proceed with any action can in other respects be reached by a motion to dismiss for want of prosecution. All references to the "section" include only the portion quoted above.

[6] It is contended that there must be a trial to determine and fix counsel fees which are fixed in the mortgage at 5 per cent of the amount found due. Defendants were not entitled to a trial upon that phase of the case. The mortgage was made a part of the complaint, and it was prayed that counsel fees be allowed in the sum of 5 per cent of the amount of the note. The following excerpt from the case of Huber v. Shedoudy, 180 Cal. 311, 181 P. 63, 64, shows that the position of respondents is untenable:

"It is found that plaintiff executed the mortgage, which is equivalent to a finding that he agreed to pay a reasonable attorney's fee for the mortgage so provided. The averment that the fee claimed was a reasonable amount is not necessary. (Carriere v. Minturn, 5 Cal. 435); the attorney's fee was not the cause of action, but an incident to it. (Mulcahy v. Buckley, 100 Cal. 484 (35 P. 144), affirming Carriere v. Minturn, supra.) See, also, Brooks v. Forington, 117 Cal. 219 (48 P. 1073). Prescott v. Grady, 91 Cal. 518, (27 P. 755), does not overrule or conflict with Carriere v. Minturn, supra. As an averment was unnecessary, so also was a finding. The conclusion of law that defendant was entitled to recover attorney's fees rested upon the provisions of the mortgage, and the court could determine what amount would be reasonable without hearing any testimony thereon." (Citing many cases.)

The order is reversed.

THOMPSON, Acting P. J., concurred.



48 Cal.App.2d 359

PEOPLE v. NEARY.

Cr. 3498.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

Robbery ⇐24(1)

Evidence supported conviction of robbery in the first degree.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

James P. Neary was convicted of robbery in the first degree, and he appeals.

Affirmed.

Harvey L. Silbert, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery in the first degree after trial before a jury, defendant appeals.

Viewing the evidence in the light most favorable to the people (respondent), the facts are:

On February 15, 1941, at about 11 p. m. defendant entered a liquor store at 8876 South Western Avenue, pointed a gun at the proprietor, and said, "This is a stick-up," whereupon the proprietor went to

the cash register and took therefrom $112 which he gave to defendant. Defendant then left the store.

Defendant relies for reversal of the judgment on this single proposition:

There is no substantial evidence to sustain the finding of the jury that defendant participated in the robbery of which he was convicted.

This proposition is untenable. An examination of the record discloses substantial evidence taken together with inferences which the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgment was necessarily predicated, including the identity of defendant as the perpetrator of the crime of which he was convicted. For example, the proprietor of the store which was robbed and a friend of his, Mr. Houlihan, both positively identified defendant as the robber. Further discussion of the evidence would serve no useful purpose (see People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685).

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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19 Cal.2d 181

TREASURE ISLAND CATERING CO., Inc., v. STATE BOARD OF EQUALIZATION.

Sac. 5456.

Supreme Court of California.

Dec. 17, 1941.

1. Licenses ⇐15(1)

In absence of legislative definition of meaning of term "on the premises" within Retail Sales Tax Act exempting food products not consumed on the premises, court would not determine that Legislature intended to include an area over which concessionaire of booths dispensing frankfurter and hamburger sandwiches had no control and which was intended by authorities of Exposition where booths were located to be for the use of the general public. St.1935, p. 1253, § 5(e).

The interpretation to be given to the word "premises" depends entirely upon its use in the instrument where it appears, and the subject matter to which it refers.

See Words and Phrases, Permanent Edition, for all other definitions of "Premises" and "On the Premises".

2. Licenses ⇐15(1)

"Hot dog" and hamburger sandwiches sold over a ledge or shelf which formed the top of outer walls of booths in Exposition, purchasers of which sandwiches were not given access to the booths nor provided with accommodations for consumption of the sandwiches were not consumed "on the premises" and hence were not subject to sales tax, as against contention that sandwiches consumed within immediate vicinity of booths were consumed on the premises, in view of fact that concessionaire had no control over adjacent premises. St.1935, p. 1253, § 5(e).

3. Appeal and error ⇐1010(1)

A trial court's findings supported by ample evidence may not be disturbed.

4. Licenses ⇐15(1)

A "meal" within Retail Sales Tax Act excluding from the exemption of sales of food products meals served on or off the premises of retailer, was not used by Legislature in a restricted meaning, so as to include "hot dog" or hamburger sandwiches sold over the counter, notwithstanding that in some circumstances and for certain individuals a single sandwich may constitute a "meal". St.1939, p. 2173, § 5(e).

The generally accepted concept of a "meal" is that it not only consists of a larger quantity of food than that which ordinarily comprises a single "sandwich" but that it usually consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which could not conveniently be consumed while one was standing or walking about.

See Words and Phrases, Permanent Edition, for all other definitions of "Meal" and "Sandwich".

5. Licenses ⇐15(1)

That a beverage is consumed with a sandwich does not necessarily result in a "meal" within Retail Sales Tax Act excluding from the exemption of sales of food products meals served on or off the premises of retailer. St.1939, p. 2173, § 5(e).

6. Appeal and error ⇐1008(1)

Whether "hot dog" and hamburger sandwiches wrapped in paper napkins constituted "meals" whether consumed with or without a beverage, and whether seller of such sandwiches "served" meals within Retail Sales Tax Act excluding from the exemption of sales of food products meals served on or off the premises of retailer, were primarily for trial court. St.1939, p. 2173, § 5(e).

7. Licenses ⇐15(1)

One who merely prepares a sandwich for consumption, wraps it in a paper napkin and hands it to a purchaser without offering

any facilities for its consumption on the premises and with intention that it be consumed elsewhere has not "served" a meal within Retail Sales Tax Act excluding from the exemption of sales of food products meals served on or off the premises of retailer. St.1939, p. 2173, § 5(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Serve".

8. Licenses ⇐15(1)

Where 82½ per cent. of purchasers of "hot dog" and hamburger sandwiches sold at booths in Exposition did not utilize ledges which formed the top of the walls of the booths as counters, and due to height and narrowness of ledges it was inconvenient, if not impracticable, for ledges to be used as counters, such ledges, though utilized as counters by 17½ per cent. of purchasers, did not constitute "counters" as to the 82½ per cent. within Retail Sales Tax Act excluding from the exemption of sales of food products foods furnished, prepared or served for consumption at counters. St.1939, p. 2173, § 5(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Counter".

9. Licenses ⇐15(1)

The use of paper napkins in wrapping "hot dog" and hamburger sandwiches sold by concessionaire in booths did not constitute the providing of "tableware" within Retail Sales Tax Act excluding from the exemption of sales of food products foods served from trays, glasses, dishes or other tableware provided by the retailer where napkins were furnished as a convenience for handling or carrying the sandwiches. St. 1939, p. 2173, § 5(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Tableware".

10. Licenses ⇐15(1)

Under rule of "ejusdem generis", the word "tableware" within Retail Sales Tax Act excluding from the exemption of sales of food products foods served from trays, glasses, dishes or other tableware provided by the retailer, must be construed to be of the same general character as the preceding words. St.1939, p. 2173, § 5(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Ejusdem Generis".

11. Licenses ⇐15(1)

Under Retail Sales Tax Act excluding from the exemption of sales of food products foods served from trays, glasses, dishes or other tableware provided by the retailer, the article contemplated by word "tableware" must generally be deemed to be of the same degree of permanency as that possessed by other objects enumerated and hence does not include a paper napkin, even though ordinarily a napkin may constitute an article of tableware. St.1939, p. 2173, § 5(e).

12. Licenses ⇐15(1)

Paper napkins in which were wrapped "hot dog" and hamburger sandwiches sold by concessionaire at booths in Exposition did not constitute articles of "tableware" within Retail Sales Tax Act excluding from the exemption of sales of food products foods served from trays, glasses, dishes or other tableware provided by the retailer. St.1939, p. 2173, § 5(e).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the Treasure Island Catering Company, Inc., against the State Board of Equalization to secure a refund of sums paid under protest for retail sales taxes. From a judgment for plaintiff, defendant appeals.

Affirmed.

Earl Warren, Atty. Gen., and H. H. Linney and Adrian A. Kragen, Deputies Atty. Gen., for appellant.

Oscar Samuels and Tevis Jacobs, both of San Francisco, for respondent.

Loeb & Loeb, of Los Angeles (Leon H. Levi and Frank M. Keesling, both of Los Angeles, of counsel), amici curiae for respondent.

PER CURIAM.

Appeal by the defendant from a judgment in favor of the plaintiff awarding a tax refund in the sum of $10,964.96.

The sole question here presented for determination relates to the construction to be placed on section 5(e) of the Retail Sales Tax Act. (Stats.1933, p. 2599, as amended.)

During the construction and operation of the Golden Gate International Exposition, the plaintiff catering corporation oper-

ated several sandwich stands, or booths, on Treasure Island. Four booths were located within the entrances to exposition buildings and several others were placed throughout the grounds at allocated places. The plaintiff sold only frankfurter (commonly referred to as "hot dog") and hamburger sandwiches, together with coffee, milk, ale and beer. It paid without protest the retail sales tax measured by the sales price of the beverages which it sold, but did not include therein the amount of the sales price of frankfurter and hamburger sandwiches, except those sold at one booth in the exposition grounds where customers were seated at tables provided by the plaintiff for their accommodation. The remaining sales of hamburger and frankfurter sandwiches—which are the subject of this action—were made at the other booths on the grounds, each of which was adjacent to main roadways, paths or walks, and at the four booths located in the entrance halls of the buildings. Each of those booths occupied a space about ten feet square, and neither tables nor chairs were provided for customers. The sandwiches were prepared for consumption, each wrapped in a paper napkin and handed to the purchaser over a ledge, or shelf, which formed the top of the outer walls of the booths.

After the close of the exposition, the defendant assessed an additional retail sales tax against the plaintiff, based on the sales of sandwiches at the booths and in the manner last described. Such assessment covered sales made during the period from November 21, 1937, to October 30, 1939. The plaintiff paid the additional taxes under protest and the present action was instituted to secure a refund thereof. By the terms of the judgment the plaintiff was awarded a refund of 82½ per cent of the tax which it had thus paid under protest.

Prior to July 1, 1939, section 5 of the Retail Sales Tax Act provided in part as follows: "There are hereby specifically exempted from the provisions of this act and from the computation of the amount of tax levied, assessed or payable * * * (e) The gross receipts from the sale of food products for human consumption. * * * 'Food Products' does not include * * * the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property." St.1935, p. 1253.

With respect to sales of sandwiches by the plaintiff prior to July 1, 1939, the paramount question is whether such "tangible personal property" was consumed "on the premises" of the seller. The trial court found the premises of the plaintiff were limited by the outer walls of each of the booths; that no purchaser was given access to the booths, nor were accommodations provided therein for the consumption of food or beverages by such purchasers; that 82½ per cent of the food products sold prior to July 1, 1939, was sold for consumption, and was consumed, off the premises; and that the remaining 17½ per cent was consumed "in the immediate proximity" of the booths. The finding last referred to was based on evidence that approximately 17½ per cent of plaintiff's customers leaned against the walls of the booths or permitted bottles or paper cups to rest on the ledges which formed the top of such walls.

[1-3] The defendant contends the trial court erred in its finding that plaintiff's premises were limited by the outer walls of the booths, and that it should have found that sandwiches consumed "within the immediate vicinity of the outside booths or within the building in the case of inside booths" were "consumed on the premises of plaintiff". The word "premises" has been variously defined. In Ballsun v. Star Petroleum Co., 105 Cal.App. 679, 687, 288 P. 437, 441, the court said: "* * * the interpretation to be given to the word 'premises' depends entirely upon its use in the instrument where it appears, and the subject-matter to which it refers." With respect to the present case, the evidence shows that as to about 82½ per cent of the sales some of the customers who purchased sandwiches at the booths located on the grounds walked to nearby benches and seated themselves, or remained standing in the vicinity of the booths while consuming their sandwiches, but that many others walked away through the grounds carrying their purchases with them. The benches and walks which were so utilized by plaintiff's customers were used in common with the general public patronizing the exposition. As to the booths located inside the buildings the evidence shows that some of the purchasers consumed their sandwiches on the verandas of the buildings while the

balance of them carried their purchases out of the buildings into the grounds. It further appears that by agreement with the exposition company plaintiff's rights of occupancy and control of the grounds or buildings as a concessionaire were limited to and confined within the limits of its concession spaces, and that the roadways, paths and walks of the exposition grounds, as well as the entrance corridors of the buildings, wherein were located four of plaintiff's booths, were under the exclusive control of the exposition company. No relationship existed between the plaintiff and the exposition company that would have made any areas outside the confines of the booths a part of the "premises" of the plaintiff concessionaire. As a condition of taxability the statute required that the food be "consumed *on* the premises" of the seller, and not merely "near to" or "in the neighborhood of" the retailer's premises (Alameda Macadamizing Company v. Williams, 70 Cal. 534, 543, 12 P. 530, 534); and in the absence of a legislative definition of the meaning and scope of the term "on the premises", as used in the act, we may not accept the defendant's contention that by the use of such term it was the legislative intent to include an area over which plaintiff not only had no control but which was intended by the exposition authorities to be for the use of the general public and not merely for the accommodation of plaintiff's customers. Doherty's Case, 294 Mass. 363, 2 N.E.2d 186, 187, 105 A.L.R. 576. There was ample evidence to support the trial court's findings that at least 82½ per cent of plaintiff's customers used such areas in consuming purchases made at the booths of plaintiff prior to July 1, 1939, and the finding in that regard may not be disturbed.

With respect to the period following July 1, 1939, by an amendment to section 5(e) of the act, which became effective as of the date last mentioned (Stats.1939, p. 2173), the exemption of the sales of "food products" was not applicable to "meals served on or off the premises of the retailer" nor to "foods furnished, prepared or served for consumption at tables, chairs or *counters* or from trays, glasses, dishes *or other tableware* provided by the retailer". (Emphasis added.)

[4-7] The trial court found that the sandwiches prepared and sold by plaintiff after July 1, 1939, did not constitute "meals" and that plaintiff did not "serve" any meals. The defendant contends the finding was erroneous; that a sandwich is per se a "meal"; that even if, ordinarily, sandwiches are not "meals" they become such when consumed with beverages; also that plaintiff's method of operation and sale constituted the "serving" of a meal. Those contentions are based primarily on a statement made in Sandelin v. Collins, 1 Cal.2d 147, 156, 33 P.2d 1009, 1013, 93 A.L.R. 956, which is as follows: "Under our modern system of living, a sandwich served in good faith as a meal would constitute a meal as contemplated by law." The court was there construing the State Liquor Control Act of 1933, St.1933, p. 1697 (since repealed) in the light of the question whether a sandwich, when served with wine or beer, was a meal furnished in good faith as contemplated by the constitution and the statute there involved. The court also said that the question whether, within the import of the statute, a sandwich constituted a "meal" was in each instance primarily a question of fact, and that a general rule of law could not be laid down in all cases with reference to a question so intimately connected with and controlled by individual tastes, conditions of diet and circumstances. The statute here is silent as to what was intended by the legislature in the use of the word "meal". It may be that in some circumstances and for certain individuals a single sandwich might be said to constitute a "meal", whether served with or without a beverage. However, we do not think the legislature intended a restricted meaning to be applied to the word as used in the statute here under consideration, nor that in amending the section, it was not cognizant of certain well-recognized distinctions between the type of food prepared for consumption which is known as a "sandwich" and that embraced by the term "meal". The generally accepted concept of a meal is that it not only consists of a larger quantity of food than that which ordinarily comprises a single sandwich, but that it usually consists of a diversified selection of foods which would not be susceptible of consumption in the absence of at least some articles of tableware and which could not conveniently be consumed while one was standing or walking about. A "hot dog" or hamburger sandwich is the type of food frequently offered for sale to and desired by persons who wish to eat something while walking about. It is not the type of food generally ordered by a person who patronizes a hotel, restaurant or other public eating establish-

ment with the intention of securing a "meal". Nor do we agree with defendant's contention that, in any event, where a beverage is consumed with a sandwich it necessarily amounts to a "meal". The questions whether the sandwiches sold by plaintiff constituted "meals"—where consumed with or without a beverage—and whether, within the import of the statute, plaintiff "served" meals, were primarily for the trial court. It may not be said that one has "served" a meal who merely prepares a sandwich for consumption, wraps it in a paper napkin and hands it to a purchaser without offering any facilities for its consumption on the premises, and with the intention that it be consumed elsewhere.

[8] The defendant also contends that the sale of sandwiches by plaintiff after July 1, 1939, came within the provisions of section 5(e), which excluded from the exemption "foods furnished, prepared or served for consumption at * * * *counters* or from trays, glasses, dishes, or other *tableware* provided by the retailer". (Emphasis added.) It is contended that the ledges which formed the top of the walls of the booths constituted "counters" within the meaning of the statute. As heretofore stated, the finding of the trial court was that the purchasers of 17½ per cent of the food products sold by plaintiff since July 1, 1939, utilized the ledges as counters by leaning against them while consuming their purchases, or by allowing a beverage purchased with their food to rest thereon; and that the remaining 82½ per cent of such food products sold after July 1, 1939, "was not furnished, prepared, sold or served for consumption, nor consumed, at * * * counters". The evidence shows that the ledges were not intended to be used as "counters" on or at which the sandwiches might be consumed, due to the fact that a continued or general utilization of the ledges for such purpose would have interfered with the accessibility to plaintiff's booths by prospective customers. No stools were installed along the outer walls of the booths such as are usually provided for the convenience of purchasers when food is sold or served for consumption at "counters". The evidence further shows that the ledges had a width of only eight inches; that due to the height of the walls none of the ledges was less than fifty inches from the floor, or ground—some of them being as high as fifty-six inches from the base of the walls; and that due to the height and narrowness of such ledges it was inconvenient, if not impracticable, for the ledges to be used as counters. The fact that in a few instances the ledges were so utilized cannot place the remaining 82½ per cent of the sandwiches sold by plaintiff—which were carried away from the premises—in the classification of "food products" which were "furnished, prepared or served for consumption at * * * counters * * * provided by the retailer".

[9-12] The defendant further argues that a napkin is "tableware" and that the use of paper napkins by the plaintiff in wrapping the sandwiches constituted the providing of "tableware" within the meaning of the statute. However, the trial court, on sufficient evidence, found that the paper napkins "were furnished as, and constituted a convenience for handling or carrying said sandwiches". Moreover, the plaintiff points out that under the rule of ejusdem generis the word "tableware" as used in section 5(e) must be construed to be of the same general character as the words which precede it in the statute. Hart v. City of Beverly Hills, 11 Cal.2d 343, 347, 79 P.2d 1080; City of Los Angeles v. Superior Court, 2 Cal.2d 138, 140, 39 P.2d 401; Id., 32 P.2d 999; 23 Cal.Jur., p. 755; sec. 3534, Civ. Code. The language in which the word is here used is: "* * * trays, glasses, dishes, *or other tableware* * * *" (Emphasis added.) Therefore, even if it be conceded that ordinarily a table napkin may be said to constitute an article of "tableware"—applying to section 5(e) the rule just referred to, the article contemplated by the word "tableware" must be deemed to be one which is in general, of the same degree of permanency as that possessed by the other objects enumerated immediately before it in the statute. Under the facts of this case, it is beyond question that a mere paper napkin, which was intended to be discarded after one use, would not be an article of "tableware" such as is contemplated by the statute here involved.

In view of the conclusion reached, as hereinbefore outlined, it is unnecessary to consider defendant's contention that as a condition of recovery it was incumbent on plaintiff to have apportioned its sales as in part taxable as meals, and in part not taxable because not served as meals.

The judgment is affirmed.

TRAYNOR, J., did not participate herein.

19 Cal.2d 176

JOHNSON v. GRIFFITH et al.

L. A. 17998.

Supreme Court of California.

Dec. 15, 1941.

1. Appeal and error ⇐1008(1)

Where owner of automobile parked double on wide street, where it had stalled for lack of gasoline, was engaged in pouring gasoline into tank at right rear side of automobile when it was struck by defendants' automobile, and thereafter owner was found lying on ground between his automobile and automobile parked at the curb, and, though there was no evidence as to precise manner in which he was thrown to ground and after accident he was unable to speak coherently and his mental capacity was that of a six year old child, evidence on issue of negligence of driver of colliding automobile presented a question of fact for trial court.

2. Appeal and error ⇐931(1)

On appeal, all conflicts in the evidence must be resolved, and all reasonable inferences must be conceded, in favor of judgment of trial court.

3. Automobiles ⇐244(14)

Evidence that plaintiff owner of automobile double parked on wide street where it had stalled because of lack of gasoline was standing at right rear of his automobile pouring gasoline into tank when his automobile was struck by defendants' automobile and, after accident, was found lying between the automobiles seriously injured, and defendant's testimony that he failed to observe plaintiff's automobile sooner because of car ahead traveling in same direction, and that when he attempted to turn out he could not do so because of another car on his left, was sufficient to support trial court's finding that defendant operated his automobile in a negligent manner.

4. Appeal and error ⇐931(1)

It was not province of appellate court to infer that injuries sustained by plaintiff motorist, who was filling his tank with gasoline when his car became stalled, may have been due to a fainting spell or to acts of others than defendant, in opposition to trial court's finding that injuries were caused by force of collision of defendants' automobile with plaintiff's, merely because of absence of direct evidence as to precise manner in which plaintiff was injured.

5. Damages ⇐185(1)

In action for injuries to motorist who had double parked on wide street when his automobile ran out of gasoline and who was filling tank at right rear of automobile when defendants' automobile ran into it, evidence sustained finding that injuries were caused by force of collision.

6. Negligence ⇐134(2)

The rule requiring that negligence must in some way be fastened to the injury does not require demonstration of the connection between the proved or admitted negligence and the resulting injury, nor is it necessary that an eyewitness be produced to testify directly to the fact, but the connection may be made by circumstantial evidence.

7. Appeal and error ⇐1008(1)

Where plaintiff, owner of automobile double parked on wide street where automobile had stalled because of lack of gasoline, while filling tank with gasoline was injured when defendants' automobile ran into the automobile, the issue of plaintiff's contributory negligence in violating city ordinance prohibiting double parking was question of fact for determination of trial court.

8. Appeal and error ⇐1008(1)

Where plaintiff's automobile stalled on wide street and curb line of street was occupied by parked automobiles, it was not incumbent on him to push his automobile until he could find available curb space for parking purposes, and reasonableness of his action in double parking and promptly procuring gasoline from a nearby station with which to operate automobile was for trier of facts.

9. Automobiles ⇐244(32)

In action for injuries sustained in automobile accident against driver and his adult daughter, evidence that automobile had been in defendants' family for several years and that both defendants admitted that signatures on registration certificates looked like daughter's signature on driver's license, coupled with prima facie showing of daughter's ownership arising from registration of automobile in her name, was sufficient to support trial court's finding that daughter was owner of automobile at time of accident.

In Bank.

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by Alton L. Johnson against Ernest Edward Griffith and another for injuries sustained in an automobile accident. Judgment for plaintiff and defendants appeal.

Affirmed.

Prior opinion, 112 P.2d 967.

Jerrell Babb and Flanagan & Sampson, all of Los Angeles, for appellants.

W. I. Gilbert, Jr., Jean Wunderlich, and Donn B. Downen, Jr., all of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an action to recover damages for personal injuries received when plaintiff's automobile was struck by that of the defendants. Plaintiff's injuries left him permanently incompetent and the action was therefore prosecuted by his guardian. The court below, sitting without a jury, found and concluded that plaintiff was free of contributory negligence and that the defendants' negligence was the sole and proximate cause of the accident. Judgment was accordingly entered against the defendant Ernest Griffith, as driver, in the sum of $15,000, and against the defendant Muriel Griffith, his adult daughter, as owner of the automobile, in the sum of $5,000. Both have appealed. Defendants do not challenge the amount of damages awarded. They do contend, however, that the evidence will not support the judgment. In our opinion, the evidence and inferences reasonably deducible therefrom sustain the trial court's disposition of the cause.

[1] The accident occurred at approximately 6 o'clock on the night of December 24, 1937. At the time, plaintiff with his wife and minor daughter was proceeding in his automobile easterly on Washington boulevard in the business area of Culver City. As he approached the intersection of Main street, his car began to "sputter" for lack of gasoline, but he succeeded in getting it across the intersection. It stopped, however, about ten feet beyond the intersection and two feet to the left and parallel to the line of cars parked at the curb of Washington boulevard. The street is approximately eighty feet wide and ample space remained between the center of the boulevard and plaintiff's car to permit other easterly-bound traffic to pass without encroaching upon that half of the boulevard reserved for traffic moving in the opposite direction.

Plaintiff left his car, with its front and taillights burning, and went to a nearby station where he procured some gasoline. He was engaged in pouring the gasoline into the tank at the right rear side of his car when the automobile operated by the defendant Ernest Griffith, proceeding easterly on Washington boulevard, struck the left rear of plaintiff's car. Immediately after the accident plaintiff was found lying on the ground in the narrow space between his car and the car parked at the curb. He had suffered severe head injuries.

Defendant testified that as he proceeded along Washington boulevard he did not see plaintiff's stalled car until he was approximately thirty feet therefrom. His failure to observe it sooner, he testified, was due to another car ahead of him traveling in the same direction. When he did discover plaintiff's car, he attempted to turn left and pass it, as did the car preceding, but was prevented from so doing by a car passing to his left. He therefore swerved back to the right. When he again turned left, it was too late to avoid a collision, and the right front of his car struck the left rear of plaintiff's car. The accident occurred about ten minutes after plaintiff's car had stalled. Although plaintiff's wife and minor child had been sitting in the car, and a disinterested witness saw plaintiff pouring the gasoline into his car, no one observed the precise manner in which he was thrown to the ground. Plaintiff was not called as a witness. The evidence shows that as a result of a brain injury received in the accident he was left without power to speak coherently and his mental capacity was that of a six-year-old child.

The issue of negligence was one of fact for the determination of the court below. It reasonably could have inferred that under traffic conditions then prevailing defendant was following the car ahead of him too closely to permit of discovery of plaintiff's disabled car in time to avoid striking it. Or it may have inferred that defendant was remiss in not perceiving plaintiff's car at a greater distance than thirty feet, the street lights and the lamps on both cars being illuminated. Again, it may have inferred that the admitted speed of twenty miles an hour through the designated intersection on Christmas eve was excessive under the traffic conditions then prevailing. Or, in the light of the

photographic exhibit showing the damage to defendant's car, it might have concluded that defendant operated his car at a speed in excess of twenty miles an hour.

[2, 3] Citation of authority is unnecessary to support the established principle that on appeal all conflicts in the evidence must be resolved, and all reasonable inferences must be conceded, in favor of the judgment of the trial court. The record supports the finding that defendant Griffith operated the automobile in a negligent and careless manner.

[4-6] What has been said is equally determinative of the defendants' contention that in the absence of direct evidence as to the precise manner in which plaintiff was hurt it cannot be said that the collision caused his injuries. It is not our province to infer, as defendants would have us do, in opposition to the finding of the court below, that plaintiff's injuries may have resulted from a fainting spell or from the act of others than the defendants. The only reasonable inference deducible from the evidence was that drawn by the trial court to the effect that plaintiff's injuries were caused by the force of the collision of defendants' car with that of the plaintiff. Gorman v. County of Sacramento, 92 Cal.App. 656, 661, 268 P. 1083, 1085, declares that the rule which requires that the negligence must in some way be fastened to the injury "does not require demonstration of the connection between the proved or admitted negligence and the resulting injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be proved."

[7, 8] Equally without merit is the contention that plaintiff was guilty of contributory negligence as matter of law in that he assertedly violated an ordinance of Culver City which prohibited "double parking". The facts of this case disclose an involuntary stopping or disabling of plaintiff's car, coupled with immediate procurement of gasoline in order to remove it. The issue of contributory negligence, like that of defendant's negligence, was one of fact for the determination of the court below. Arellano v. City of Burbank, 13 Cal.2d 248, 257, 89 P.2d 113. As already indicated, the curb line of Washington boulevard at the time of the accident was occupied by parked cars. Under the circumstances, it was not incumbent upon plaintiff, as urged by defendants, to push his car until such time as he could find available curb space for parking purposes. The reasonableness of plaintiff's alternative course in promptly procuring gasoline from a nearby station with which to operate the stalled vehicle, was for the determination of the trier of the fact. Wright v. Ponitz, 44 Cal.App.2d 215, 112 P.2d 25. The court below, therefore, properly found and concluded that plaintiff was not guilty of contributory negligence as a matter of law.

[9] The judgment entered against the defendant Muriel Griffith as owner of the car is challenged on the basis of the defendants' testimony that the car was owned by the defendant Ernest Griffith who, because of financial embarrassment, assertedly had caused it to be registered in his daughter's name without her knowledge. In the light of other evidence in the record, the trial court reasonably might, and apparently did, reject this testimony. There was other evidence to the effect that the car had been in the family for several years and that the registration certificates bore signatures which closely resembled the signature of defendant Muriel Griffith. Defendants both admitted that signatures on the registration certificates "looked like" the signature of defendant Muriel Griffith on her driver's license. This evidence, coupled with the prima facie showing of the daughter's ownership arising from registration of the car in her name, is adequate to support the finding that she was the owner of the car at the time of the accident.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

BASTAJIAN v. BROWN et al.

L. A. 16671.

Supreme Court of California.

Dec. 19, 1941.

As Modified on Denial of Rehearing

Jan. 16, 1942.

1. Judgment ⇐297, 340

Independently of statute, a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made. Code Civ.Proc. § 473.

2. Judgment ⇐304, 355

While a court has power to set aside judgments and orders inadvertently made which are not actually the result of exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure.

3. Judgment ⇐355, 363

Where trial judge intended to pronounce judgment for defendants but signed a judgment for plaintiff, whose counsel had prepared findings of fact, conclusions of law, and judgment, the error in signing judgment was a "clerical error" and not a "judicial error", and hence trial court, on defendants' motion, had power to vacate findings and judgment on ground that they were signed as result of mistake. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Error" and "Judicial Error".

4. Appeal and error ⇐1024(4)

The Supreme Court would not disturb trial judge's order vacating findings of fact, conclusions of law, and judgment for plaintiffs or find that judge's declaration that findings and judgment did not conform to the true judgment rendered by trial court was untrue, in light of evidence supporting order and declaration.

5. Judgment ⇐324, 392

Facts within the trial judge's personal knowledge may be considered in determining whether a judgment should be vacated on grounds of a clerical error, and in vacating or correcting a clerical error or mistake the judge may give effect to his own recollection; and a declaration in an order vacating a judgment has a direct bearing on existence of such error.

6. Judgment ⇐214

While a minute entry, which was made shortly after trial in which judgment was ordered for defendants, was not the "decision" or "judgment" of trial court and opinion thereby expressed was not binding upon the court, the entry was evidence of the court's intent as to decision, findings of fact, and conclusions of law which trial judge intended ultimately to make.

See Words and Phrases, Permanent Edition, for all other definitions of "Decision" and "Judgment".

7. Judgment ⇐304

The signing of findings does not necessarily establish that an error in a judgment is a "judicial error", which the trial court has no power to correct after a regular submission.

8. Appeal and error ⇐1024(4)

The trial court's finding upon conflicting evidence that a clerical error exists with respect to a judgment, and the nature thereof, is conclusive upon Supreme Court.

9. Judgment ⇐306

Where judgment as signed by trial judge does not express the actual judicial desire or intention of the trial court, but is contrary thereto, the signing of such purported judgment is a "clerical error", which the trial court has inherent power to correct after regular submission, rather than a "judicial error".

EDMONDS and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Suit by Blanche H. Comstock, for whom S. B. Bastajian, as administrator with the will annexed of Blanche H. Comstock, deceased, was later substituted as plaintiff, against James E. Brown and others, to quiet title to real property. From an order granting defendants' motion for an order vacating findings of fact and conclusions of law and a judgment for plaintiff, plaintiff appeals.

Affirmed.

For prior opinion, see Cal.App., 113 P.2d 454.

Rehearing denied; EDMONDS and HOUSER, JJ., dissenting.

Astor Elmassian, C. P. Von Herzen, George C. Woods, Frank S. Hutton, and Paul Vallee, all of Los Angeles, for appellant.

Reynolds & Painter, Thomas Reynolds, Sidney A. Cherniss, and John W. Preston,

all of Los Angeles (Richard Hungate, of Los Angeles, of counsel), for respondents.

CARTER, Judge.

This action was commenced by plaintiff, Blanche H. Comstock, against defendants to quiet title to real property based on the claim that two trust deeds thereon and a conveyance thereof to defendants were obtained by fraud and undue influence and that the consideration was inadequate. Defendants' theory of defense was, that the trust deeds held by them and encumbering the property were valid, and that the conveyance of the property was made to them in consideration of the satisfaction of the trust deeds and the payment of a small sum of money. The case was tried and submitted to the court for decision, and on May 14, 1936, the following minute entry was made: "395524. Blanche H. Comstock v. James E. Brown, et al. Cause heretofore tried and submitted, the court now orders judgment for defendants." A year expired, during which time no findings of fact and conclusions of law were submitted to the court. On about May 11, 1937, findings of fact and conclusions of law and a judgment prepared by C. P. Von Herzen, one of plaintiff's attorneys, were filed by him with the clerk to be presented to the judge; they were signed by the judge and filed on June 4, 1937. That judgment determined that the trust deeds were valid in every respect and the property was subject to them but that the conveyance of the property from plaintiff to defendants was invalid as claimed in the complaint; and that if the sums payable under the trust deeds were not paid in six months, plaintiff should no longer have any interest in the property. Prior to the signing thereof, and on May 11, 1937, a copy of the findings and judgment were served on Wilbur Bassett, one of defendants' attorneys; the service was acknowledged by him as such attorney; notice of entry of judgment was likewise served on him on June 9, 1937. No motion for a new trial was made and no appeal was taken by defendants. On August 23, 1937, defendants through substituted counsel, served and filed a notice of motion for an order of the court vacating the findings and judgment on the grounds that they did not conform to and were not the true judgment rendered by the court; that by reason of clerical mistake the findings and judgment did not conform to the judgment which the court directed to be prepared; that the judgment was rendered through the mistake, inadvertence, surprise and excusable neglect of defendants; and that the judgment was procured from the court by fraud and deception. On September 29, 1937, the trial court made the order, from which the appeal is here taken, granting the motion and vacating the findings and judgment and directing defendants to prepare findings of fact and conclusions of law and judgment in accordance with the decision of the court theretofor announced. The order of vacation finds in part as follows:

"(1) That the Findings of Fact and Conclusions of Law and the Judgment * * * do not conform to and set forth the true judgment rendered by the court herein, in that the court intended to pronounce and did pronounce judgment in this action in favor of the defendants upon all of the issues presented, and decreed, among other things, that the deed conveying the premises involved in this action to the defendants Brown was valid and in force and effect and conveyed good title to them, while said Findings of Fact and Conclusions of Law and said Judgment inadvertently and erroneously contained findings against said defendants and in favor of the plaintiff, and inadvertently and erroneously decreed that said deed be set aside, which was not the judgment of this court; that said Findings of Fact and Conclusions of Law and said Judgment were signed by this court inadvertently and by mistake, and did not express the intent of this court nor the true judgment rendered herein, and that the signing of the same by said court constituted a clerical mistake;

"(2) That said Findings of Fact and Conclusions of Law and said Judgment were made and rendered against said defendants through the mistake, inadvertence, surprise and excusable neglect of said defendants and their counsel, under circumstances which involved the illness and death of the chief counsel for said defendants, all as particularly set forth in the affidavits on file herein;

"(3) That at the time of the presentation of said Findings of Fact and Conclusions of Law and said Judgment to this Court for signature approximately one year had elapsed since this Court had announced its decision herein and had judicially determined the issues of this case, and that said Findings, Conclusions and Judgment were signed by this Court in reliance upon the

representations of plaintiff's counsel then and there made to this Court that the instruments so presented for signature contained the true Findings, Conclusions and Judgment of this Court * * * as previously announced by the Court; that the statement to this Court that said instruments * * * did contain the true judicial determination of the issues of this action was untrue in that said instruments contained provisions contrary to the actual decision made and announced by this Court, and inconsistent with and different from the judicial determination of the issues herein involved, and that the presentation of said Findings of Fact and Conclusions of Law and said Judgment to this Court for signature constituted a fraud and deception practiced upon this Court in misrepresenting and misstating the true decision of the Court after the lapse of a long period of time; * * *."

From the affidavits filed in support of and in opposition to the motion it appears that the following events transpired. Defendants originally employed W. D. Spalding as counsel to represent them in the action. Spalding associated Wilbur Bassett as co-counsel in the case, and informed defendants of the association and that Bassett would conduct the trial. Bassett conducted the trial, Spalding also being present. On May 15, 1936, one of the defendants was informed by Spalding that defendants had prevailed and nothing more remained to be done; the attorney's fee was paid to Spalding. Defendants first had personal knowledge that judgment was rendered for plaintiff instead of in their favor in August, 1937; Bassett, of course, had prior knowledge as above shown. Spalding became ill and died shortly after the trial. According to the affidavit of Bassett, he prepared a draft of findings and judgment after being advised on May 14, 1936, that defendants were to have judgment and mailed them to Spalding who he presumed presented and filed them. When the findings prepared and filed by plaintiff's counsel were served upon him about a year later he observed the same to be contrary to the court's prior minute order and, being unsuccessful in his endeavor to locate defendants, mailed a letter dated May 12, 1937, to the judge which read: "Findings drawn by C. P. Von Herzen have been left at my office. I drew findings a year ago in this cause and sent them to W. D. Spalding. Brown was his client and I was employed to try the case for Spalding. I do not know where Brown is and you know Spalding has been dead several months. I have no file. My recollection is that Von Herzen is not entitled to any such findings. VI and VII (holding the conveyance invalid) are pure bunk. Why Spalding did not close this case I do not know, except that his health became shaky, and he did only what he had to." According to the affidavit of C. P. Von Herzen, plaintiff's counsel, after a year had elapsed and no findings were forthcoming, he prepared findings and judgment favorable to plaintiff which he served on Bassett and on May 3, 1937, filed with the clerk for presentation to the judge; and that ten days thereafter he made inquiry of the clerk of the court concerning the same and was informed by him that the letter written by Bassett had been received; that the judge informed him that he would wait a few days for the presentation of other findings, and the judge would then decide which findings he would sign; that on June 4, 1937, the judge signed and filed the findings and judgment presented by Von Herzen, and on June 9, 1937, a notice of entry of judgment was served on Bassett; that between the filing of the findings presented by him and the signing thereof the judge informed him that he intended to sign those findings. There is conflicting evidence on the subject of whether Bassett was defendants' attorney and authorized to represent them, or was merely employed for the trial only by Spalding who was originally retained.

Defendants' motion invokes the inherent power of a court to vacate and correct its judgments, which because of clerical error are improvidently or inadvertently made, as well as the power under section 473 of the Code of Civil Procedure to correct clerical errors, and to vacate judgments as the result of accident, surprise and excusable neglect on the part of the parties or their counsel. In view of the conclusion reached herein we will not discuss the rights with respect to the exercise of the last-mentioned power.

[1, 2] Independently of statute a trial court has power to correct mistakes and to annul orders and judgments inadvertently or improvidently made. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147. While a court has power to set

aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend judicial error except under appropriate statutory procedure. Stevens v. Superior Court, supra.

[3-8] We are satisfied that the error of the court was not a judicial one. The judge's solemn declaration and finding in the order vacating the judgment was that the findings and judgment "do *not conform to and set forth* the *true judgment* rendered by the court, in that the court *intended* to pronounce judgment * * * in favor of the defendants upon all the issues presented. * * *" That declaration cannot be wholly disregarded nor lightly brushed aside. It was a declaration of a fact that was concealed in the mind of the judge, and no one was in a better position than he to state his true intent. He may have failed to read the findings and judgment before signing them. He may have supposed they were in favor of defendants. His declaration may be construed to so indicate. Under such circumstances it is obvious that the findings and judgment would not *in fact* be the decision actually intended to be rendered by him, or that he in the exercise of judicial authority arrived at. While it may be that certain circumstances tend to contradict that declaration of the judge, such as the letter sent to the judge by defendants' counsel Bassett, the conversations between plaintiff's counsel Von Herzen and the judge, and the lapse of time between the presentation and signing of the findings, we are not inclined to disturb the judge's order of vacation or find that his declaration was untrue in the light of other evidence supporting them. The facts within the personal knowledge of the judge may be considered, and in vacating or correcting a clerical error or mistake he may give effect to his own recollection. The declaration in the order vacating the judgment has a direct bearing on the existence of such error. Livesay v. Deibert, 3 Cal.App.2d 140, 147, 39 P.2d 466; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; King v. Emerson, 110 Cal.App. 414, 288 P. 1099, 294 P. 768; In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; In re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508; Carpenter v. Pacific Mut. Life Ins. Co., 14 Cal. 2d 704, 96 P.2d 796. The record is not lacking in evidentiary support of the judge's declaration. As heretofore mentioned a minute entry was made shortly after the trial of the case in which judgment was ordered for defendants. While that minute entry was not the decision or judgment of the court and the opinion thereby expressed was not binding upon the court (Phillips v. Hooper, 43 Cal.App.2d 467, 111 P.2d 22; Scholle v. Finnell, 173 Cal. 372, 159 P. 1179), it must be true that it is evidence of the intent of the court as to the decision, findings of fact and conclusions of law, he intended to ultimately make. It may be inferred therefrom that his intent was the same when he in fact did sign findings, and as those findings were contrary to the intention so expressed, the signing thereof was a clerical error. It also appears that in the latter part of May, 1936, after the minute entry was made, the judge informed Sidney A. Cherniss that he had decided the case in favor of defendants on all of the issues. The signing of the findings does not necessarily establish that an error in a judgment is a judicial one. See Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561. The trial court's finding upon conflicting evidence that a clerical error exists, and the nature thereof, is conclusive upon this court. In re Estate of Burnett, supra.

[9] Stevens v. Superior Court, supra, strongly relied upon by plaintiff, rather than supporting his view, is particularly illustrative of the distinction between a clerical and a judicial error. There an order denying a motion for a new trial was vacated on the ground that the judge had misinterpreted a waiver filed in connection with the motion, he believing that the waiver was of any error with respect to certain jury instructions. In its order vacating its order of denial the court recited that the latter order was inadvertent "by reason of such neglect, oversight, accident, and mistake in the reading of the waiver and *conclusion as to its effect.*" [7 Cal.2d 110, 59 P.2d 989.] Obviously the court's error in its conclusion as to the effect of the waiver or its error in the interpretation thereof was judicial. It exercised its judgment on the issue of how the waiver should be construed and its legal effect. But where the judgment as signed does not express the actual judicial desire or intention of the court at all, but is contrary thereto, the signing of such purported judg-

ment is a clerical error rather than a judicial one.

The order is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

EDMONDS, Justice (dissenting).

In failing to perceive that the order appealed from was the correction of a judicial error and not an alteration made necessary by inadvertence or misprision, the majority opinion, I believe, has departed from the well-established rule which compels a contrary determination. A court, so the rule declares, may correct clerical errors or mistakes in its records and proceedings because such correction does not change a judicial act previously done, but is an alteration to make the record speak the truth. It may also set aside judgments and orders made prematurely, or through inadvertence, as this presents no question of judicial review upon the merits. But it has no power, once it has made a decision after regular submission of the case, to set aside or amend for judicial error, especially when the only reason for so doing is that the judge has come to a conclusion contrary to that expressed by the earlier adjudication. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, and cases cited: Harth v. Ten Eyck, 16 Cal.2d 829, at page 832, 108 P.2d 675.

Here the evidence shows without contradiction that the trial judge signed the findings of fact and the judgment after having them under consideration for several weeks. No other findings in the case were presented. He had before him also a letter of protest from defendant's counsel charging that they were, at least in part, "pure bunk". In his order he stated that he intended to pronounce judgment in favor of the defendants, and the decision, affirming it is placed, in large measure, upon his declaration to that effect.

The recitals in an order of a trial judge that a judgment was signed by him as a result of a clerical error is not conclusive upon an appellate court, In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; Stevens v. Superior Court, supra, and in the present case, the record is absolutely devoid of any evidence to support the statement that a clerical error was made. On the contrary, there is ample support for the conclusion that any error committed in giving judgment for the plaintiff was a judicial one and subject to correction only upon timely motion for a new trial or by appeal.

HOUSER, J., concurred.



19 Cal.2d 198

HALL v. CITY OF LOS ANGELES.

L. A. 17952.

Supreme Court of California.

Dec. 18, 1941.

1. **Municipal corporations** ⇐812(2)

Compliance with statute relating to claims for personal injuries against municipalities is "mandatory", and there must be at least a substantial compliance with its provisions before a suit for damages for personal injuries resulting from a defective sidewalk or street may be maintained against a city. Gen.Laws 1937, Acts 5149, 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. **Municipal corporations** ⇐741(2)

A defect in the form of compliance with the requirements of statute relating to claims for personal injuries against municipalities is not fatal so long as there is "substantial compliance", but substantial compliance cannot be predicated upon no compliance with the requirements enumerated by the statute. Gen.Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Compliance".

3. **Municipal corporations** ⇐812(7)

Under statute relating to claims for personal injuries against municipalities, claim for injuries allegedly resulting from defective condition of sidewalk was fatally defective where it did not state the place of accident and the "substantial compliance" doctrine was not applicable. Gen.Laws 1937, Act 5149, § 1.

4. Municipal corporations ⇐812(7)

The entire failure to designate, in claim against city for personal injuries allegedly resulting from defective condition of sidewalk, the place where the accident occurred, precluded maintenance of personal injury action against city. Gen.Laws 1937, Act 5149, § 1.

5. Municipal corporations ⇐812(5)

Where claim against city for personal injuries allegedly resulting from defective condition of sidewalk did not designate place where accident occurred, the city's action in investigating and rejecting claim did not operate as a "waiver" of defect in the claim. Gen.Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

6. Municipal corporations ⇐741(3)

A city is powerless to waive a compliance with the statute relating to claims for personal injuries against municipalities. Gen.Laws 1937, Act 5149.

7. Municipal corporations ⇐741(1)

Actual knowledge on part of city officials of facts required to be stated in claim against city for personal injuries does not dispense with filing of a proper claim. Gen. Laws 1937, Act 5149.

8. Municipal corporations ⇐816(7)

In action against city for damages for personal injuries allegedly resulting from defective condition of sidewalk, the city was not "estopped" from raising defense of insufficiency of claim because of city's failure to specially plead such defense in its answer, since sufficiency of plaintiff's claim was placed in issue by city's general denial of plaintiff's allegation that she had filed her claim with city. Gen.Laws 1937, Acts 5149, 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Municipal corporations ⇐817(1)

In pedestrian's action against city for personal injuries allegedly resulting from defective condition of sidewalk, the pedestrian had burden of proving compliance with statute relating to claims for personal injuries against municipality. Gen.Laws 1937, Acts 5149, 5619.

CARTER and HOUSER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Personal injury action by Mary E. Hall against the City of Los Angeles. From an adverse judgment, plaintiff appeals.

Affirmed.

For prior opinion, see Cal.App., 111 P. 2d 382.

Porter C. Blackburn, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Norman Brand, Louis A. Babior, and Victor P. Spero, Deputy City Attys., all of Los Angeles, for respondent.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the appellant. On such consideration we agree with the disposition of the appeal by the District Court of Appeal of the Second Appellate District and adopt as the opinion of this court the opinion of that court prepared by Justice Wood with the modifications that hereinafter appear:

"Plaintiff has appealed from a judgment of dismissal entered in her action to recover damages for personal injuries alleged to have resulted from the defective condition of a sidewalk under the control of the defendant city.

"Plaintiff suffered her injuries on September 14, 1938, when she slipped on some mud or other slippery substance which was covered with leaves or debris. She seeks to recover damages under the provisions of the Public Liability Act of 1923. Deering's Gen.Laws, Act 5619. The Complaint contains the allegations usual in such actions and in particular it is alleged that the accident occurred on the sidewalk at the corner of Union Drive and Sixth Street in the City of Los Angeles and that plaintiff had regularly filed her claim for damages with the defendant city. In its answer defendant denies all of the material allegations of the complaint. Upon the issue as to the regularity of the claim filed with defendant plaintiff proved that on November 9, 1938, the following verified claim for damages was filed with defendant: 'To Mrs. Mary E. Hall, Address c/o Porter C. Blackburn, 1314 Washington Bldg., Los

Angeles. Sept. 14, 1938. Personal injuries received from slipping on sidewalk which was covered with mud, leaves and debris, resulting in injury and fracture to spinal column: Damages; Medical expenses $500; permanent injury $5000; loss of earnings $2500—$8000.00'

"Defendant objected to the introduction of any further evidence on behalf of plaintiff on the ground that the foregoing claim failed to state the place where the accident happened and therefore did not comply with the provisions of the 1931 statute (Deering's Gen.Laws, Act 5149) relating to claims for personal injuries against municipalities. Prior to a ruling by the court on such objection plaintiff offered in evidence the following letter which she had received from the city clerk of defendant city about two weeks before the present action was commenced: 'Greetings: At the meeting of the Council held this day, the following report of the Finance Committee, was adopted: "In the matter of the claim of Mary E. Hall, in the amount of $8,000.00, for damages because of personal injuries alleged to have been received when she slipped on a muddy sidewalk at the corner of Union Drive and Sixth Street, on September 14, 1938: The City Attorney reports that after making a complete investigation of this matter, he is of the opinion that there is no municipal liability involved, and recommends that the claim be denied. We recommend, in view of the City Attorney's report, that said claim be denied and the matter filed."' The Court sustained defendant's objection and thereafter entered the judgment of dismissal from which the appeal is taken.

"We are called upon to decide whether or not the claim filed by plaintiff sufficiently complies with the provisions of Deering's General Laws, Act 5149, to enable her to maintain this action. Section 1 of this act provides: 'Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received.' Defendant contends that the failure of plaintiff to specify the place of the accident in the claim is fatal to her right to maintain the present action.

[1] "Compliance with the statute referred to is mandatory and there must be at least a substantial compliance with its provisions before a suit for damages for personal injuries resulting from a defective sidewalk or street may be maintained against the City. Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal. App.2d 215, 82 P.2d 216.

"It is contended by plaintiff that the notice in question substantially complied with the requirements of the act and that since the city officials actually investigated and discovered the place where the accident occurred, the city was not misled by her failure to designate the place of the accident in the claim. In support of this proposition plaintiff relies principally upon Sandstoe v. Atchison, T. & S. F. R. Co., supra, and Kelso v. Board of Education, 42 Cal.App. 2d 415, 109 P.2d 29. In the Sandstoe case this court held that a claim (apparently complete and regular on its face) which was filed in duplicate with the city controller and the city clerk at the same time substantially complied with the requirement of the city charter that the claim must be filed with the legislative body within 30 days after rejection by the city controller. The claim under consideration in the Kelso case met the statutory requirements in all respects except that it was verified by plaintiff's father instead of by the minor plaintiff and it was held that a substantial compliance with the requirements of the statute had been made."

[2, 3] In each of these cases there was compliance with all of the requirements enumerated by the statute, but the manner of complying with one of them was defective. The courts held that a defect in the form of compliance is not fatal so long as there is substantial compliance with the essentials of the requirement. In the present case, however, there is an entire failure on the part of the plaintiff to comply with one of the mandates of the statute. Substantial compliance cannot be predicated upon no compliance. A contrary holding would permit a claimant to bring suit against a city on the basis of a claim that

included none of the information required by the statute if he offered to show that the city acquired the information independently of the claim. Such a holding would emasculate the statute.

[4] The present case is governed not by the doctrine of substantial compliance but "by the principles enunciated in Cooper v. County of Butte, supra, and Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P. 2d 320. In each of these cases it was held that the filing of an unverified claim is not a substantial compliance with the requirements of the statute. The failure to state the place of the accident is as serious a defect as is the failure to verify the claim. Indeed no part of the claim can be of more importance to the city officials than that part which gives them information to enable them to locate the point where the alleged accident occurred and to make proper investigation of the condition of the premises. In a number of jurisdictions it has been held that a claim is fatally defective if it fails to designate the place of the accident in such manner as to enable the officials to locate it. Atkinson v. City of Indianapolis, 101 Ind.App. 620, 199 N.E. 157; Cronin v. City of Boston, 135 Mass. 110; Village of Dawson v. Estrop, 243 Ill. App. 552; Benson v. City of Madison, 101 Wis. 312, 77 N.W. 161; Reichert v. City of Chicago, 169 Ill.App. 493, and Purdy v. City of New York, 193 N.Y. 521, 86 N.E. 560, 561. We must therefore hold that the entire failure to designate in the claim the place where the accident occurred constituted such a failure to comply with the statutory requirements so as to preclude plaintiff from maintaining the present action.

[5-7] "Plaintiff's contention that defendant by investigating and rejecting the claim waived any defects therein cannot be sustained. In the Spencer case, supra, an unverified claim was filed with the city and after investigation the city made an offer of compromise which plaintiff rejected. At no time did the city object to the defective form of plaintiff's claim. In holding that the city was not estopped to assert the defense of failure to comply with the statutory requirements relative to the claim the court observed that the city was powerless to waive compliance with the statutory provisions. The holding of the Spencer case was expressly approved by the Supreme Court in Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353, and was declared to be the law in all cases coming within its purview. Since the city is powerless to waive a compliance with the statute, actual knowledge on the part of the city officials of the facts required to be stated in the claim does not dispense with the filing of a proper claim. Kline v. San Francisco Unified School District, 40 Cal. App.2d 174, 104 P.2d 661, 105 P.2d 362.

[8, 9] "Plaintiff's final contention is that defendant is estopped to raise the defense of the insufficiency of the claim because of its failure to specially plead such defense in the answer. This proposition must be rejected for the question as to the sufficiency of plaintiff's claim was placed in issue by defendant's general denial of plaintiff's allegation that she had filed her claim with the city. Since the statutory requirements are mandatory and compliance therewith is a prerequisite to the maintenance of a suit for the damages claimed (Cooper v. County of Butte, supra, and Sandstoe v. Atchison, T. & S. F. R. Co., supra)the burden of proof of such compliance was on plaintiff. Since plaintiff failed to sustain this burden the court properly entered the judgment of dismissal."

The judgment is affirmed.

CARTER, Justice (dissenting).

I dissent.

The majority opinion is contrary to every concept of fairness and good faith. If a similar situation were presented in which an individual or private entity rather than a municipal corporation were involved it would be unhesitatingly held that there had been a substantial compliance, or that the defendant was estopped to assert the insufficiency of the claim, or that there was a waiver of the alleged defect therein. Surely a government agency should be at least as much bound, if not more, than an individual by the requirements of equity. justice and fair dealing. Indeed, such agency should be held to a higher standard of fairness as a matter of example for others. When this case was before the District Court of Appeal, Second Appellate District, Division Two, Mr. Justice McComb of that court wrote a very able dissenting opinion which I am adopting as a part of my dissenting opinion in this case. He said:

"There are two rules supported by respectable authority which in my view are controlling in the present case.

"First: Substantial compliance with the requirements of section 1 of Act 5149, Deering's General Laws, [1931] is sufficient to permit an injured person to maintain an action against a municipality. (Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. R. Co., 28 Cal.App.2d 215, 220, 82 P.2d 216.)

"Second: When a claim has been filed with a municipality, full investigation made thereof and the claim rejected for some reason not connected with the form of notice or its contents, the notice has performed its function and defects therein can no longer be relied upon to prevent a recovery. Bowles v. City of Richmond, 147 Va. 720, 129 S.E. 489, 133 S.E. 593, 595; Bowman v. Ogden City, 33 Utah 196, 93 P. 561, 564; Nevala v. City of Ironwood, 232 Mich. 316, 205 N.W. 93, 94, 50 A.L.R. 1189; Greenburg v. City of Waterbury, 117 Conn. 67, 167 A. 83, 84; Lindley v. City of Detroit, 131 Mich. 8, 90 N.W. 665; Hunter v. Village of Durand, 137 Mich. 53, 100 N.W. 191, 192.

"Applying the foregoing rules to the facts of the present case, we find, as stated by this court in Sandstoe v. Atchison, T. & S. F. R. Co., supra, at page 223, that 'the purpose of filing a claim against the city is to enable city officials to make proper investigation concerning the merits of the claim and to settle it without the expense of a lawsuit if settlement should be shown to be proper'. That such is the purpose underlying the requirement is clear. Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann.Cas.1916E, 720.

"From the statements contained in the letter in the present case from respondent's clerk notifying plaintiff of denial of her claim, it is apparent that respondent was not misled by failure of the claim to specify the place where the accident took place. The letter describes the precise place where the accident occurred and refers to a 'complete investigation' of the matter by the city attorney. The purpose of the statute in requiring the filing of a claim was therefore in fact accomplished, although the claim itself was defective. There is no evidence of any intention on the part of plaintiff to mislead defendant by filing a defective claim. So far as the record discloses, plaintiff filed such a claim in a bona fide attempt to comply with the statutory requirements. Under such circumstances where, as here, there is no evidence that such claim did in fact mislead the municipality, it will be deemed sufficient to enable plaintiff to maintain an action against the city following the rejection of such claim. Kelso v. Board of Education, supra; Sandstoe v. Atchison, T. & S. F. R. Co., supra.

"The principle underlying the rule is well stated in Decker v. City of Seattle, 80 Wash. 137, 141 P. 338, at page 339, where it is said (quoting from Hammock v. Tacoma, 40 Wash. 539, 82 P. 893):

"'* * * where there has been a bona fide effort to comply with the statute, and there has been *no intention to mislead,* it is a sound and just rule which opens the door of the court to an inquiry whether the notice *did in fact mislead.* If it did not in fact mislead, but if its deficiencies or mistakes were helped out by other information given to the proper officers, or by other knowledge on their [the city's] part, no matter how acquired, then it would turn the statute into a mere trap for the ignorant and unskillful, to deprive them of a right of action because of failing to do something which caused the municipality no injury and put it to no disadvantage.'

"In addition, the case clearly falls within provisions of the second rule above stated, to wit, that, where the municipality has, as in the present case, received a defective claim, made full investigation of the accident, and then rejected it for reasons other than a defect in the form of notice or its contents, the city is estopped from relying upon a defect in the notice of claim to prevent recovery in an action subsequently brought. See numerous cases above cited.

"For the foregoing reasons in my opinion the judgment of the trial court should be reversed."

In addition to the cases cited in Mr. Justice McComb's dissenting opinion, see: Barton v. City of Seattle, 114 Wash. 331, 194 P. 961; Cawthorn v. City of Houston, Tex.Com.App., 231 S.W. 701; Draper v. Village of Springwells, 235 Mich. 168, 209 N.W. 150; Naze v. Town of Hudson, 250 Mass. 368, 145 N.E. 468.

It has been repeatedly declared by the courts of this state that the purpose, aim and object of the claim statute here involved is twofold, namely, to enable the city to in-

vestigate the accident and conditions causing it, and to compromise or pay the claim if it deems it expedient, thus avoiding the expense of litigation. No other purposes have ever been mentioned. In the instant case the purposes of the statute have been wholly satisfied and fulfilled. There can be and is no dispute on that subject. The city made a complete and thorough investigation of the accident and gave consideration to the claim and rejected it. There is not a vestige of any detriment or disadvantage having been suffered by the city. There is not a single act or thing the city could or would have done had the claim been more complete. On the other hand, the plaintiff under the majority opinion suffers great and irreparable damage. She is absolutely foreclosed from having a determination of her case on the merits. What purpose or reason can be given to sustain the conclusion reached in the majority opinion? I submit that there is nothing but the most specious argument based upon a finespun technicality. It has always been my opinion that all the law whether enacted by the legislature, or as interpreted by the courts, is based upon reasonableness and justice. Indeed, that principle has been declared by the courts in a legion of cases. One of the ramifications of that principle is that form and technicality shall not render the courts impotent to rectify wrongs even when it is necessary to look through a maze of technicalities to protect substantive rights.

As I have stated, there is a substantial compliance with the statute in this case and the city is estopped from asserting that the claim is defective. This is not conferring a power upon the city which it does not possess, or making lawful ultra vires acts. The city has the power and the duty to pay just claims for injuries due to dangerous or defective condition of its property. It has the power and duty to pass upon such claims. It inescapably follows that it has the power, inherent and implicit in those general powers, to pass directly or indirectly, upon the sufficiency of those claims. True, the statute states that the filing of a claim is a condition precedent to the city's liability, but even if it be said that when no claim has been filed the city has no power to admit liability and pay damages for the injury suffered, yet there is a vast difference between no claim and a defective claim. If a claim has been filed, that condition prerequisite to liability has been satisfied, the dormant power of the city to act has been activated and brought into existence. Henceforward, it has power to determine the sufficiency of that claim. That determination may be evidenced by express action by the city on that specific subject, or by conduct of the city or its officials which constitutes an implied finding or determination that the claim is in proper form. Such implied determination may arise from the application of the doctrines of either waiver or estoppel. An analogous situation might be imagined in the instance of a court which has general jurisdiction or power to adjudicate tort actions. If no complaint is filed, it has no power on its own initiative to grant or refuse recovery to the injured person. But once a complaint has been filed its general power enables it to pass upon the sufficiency of that claim for relief. Merely because the claim was defective in that it lacked some indispensable element would not mean that the court was ousted from jurisdiction, or deprived of its power to pass upon the sufficiency of the claim.

In the case at bar it is conceded that plaintiff filed a claim with the proper official of the city of Los Angeles within sixty days after she received the injury complained of. This claim was fully investigated by the city and rejected upon the advice of the city attorney. The notice of rejection of said claim is as follows: "Greetings: At the meeting of the Council held this day, the following report of the Finance Committee, was adopted: 'In the matter of the claim of Mary E. Hall, in the amount of $8,000.00, for damages because of personal injuries alleged to have been received when she slipped on a muddy sidewalk *at the corner of Union Drive and Sixth Street*, on September 14, 1938: The City Attorney reports that after making a complete investigation of this matter, he is of the opinion that there is no municipal liability involved, and recommends that the claim be denied. We recommend, in view of the City Attorney's report, that said claim be denied and the matter filed.'"

It will be observed from the foregoing notice of rejection that the place where the accident occurred was known to the city officials and that the claim was rejected upon the advice of the city attorney "that there is no municipal liability involved". The form or substance of the claim was not questioned by the city officials until after this action was commenced.

To hold, under the circumstances of this case, that plaintiff is denied recovery be-

cause she failed to file a sufficient claim is, in my opinion, substituting form for substance and technicality for common sense. Such result was obviously never intended by the framers of the statutory provision here involved.

In my opinion the judgment should be reversed.

HOUSER, J., concurred in the foregoing conclusion.



19 Cal.2d 233

JALOF v. ROBBINS et al.

L. A. 18024.

Supreme Court of California.

Dec. 22, 1941.

Rehearing Denied Jan. 19, 1942.

1. Dismissal and nonsuit ⇐5

The phrase "before trial" in statute providing that an action may be dismissed by the plaintiff at any time before trial means before submission. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Before Trial".

2. Dismissal and nonsuit ⇐7(2)

A case is deemed to be under "submission" within rule that plaintiff may dismiss any time before case is submitted when the court, trying case without a jury, has heard the evidence and arguments of counsel and has taken the case under advisement. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Submission".

3. Dismissal and nonsuit ⇐7(2)

Under rule that plaintiff may dismiss an action at any time before case is submitted, whether a case is submitted at conclusion of testimony and argument depends upon terms of order made by court. Code Civ. Proc. § 581, subd. 1.

4. Dismissal and nonsuit ⇐7(2)

Where at conclusion of testimony, court indicated party in whose favor judgment would be rendered but ordered that another be required to plead as a party defendant, the order was inconsistent with a "submission" of the case and plaintiff was entitled to dismiss. Code Civ.Proc. §§ 389, 581, subd. 1.

5. Dismissal and nonsuit ⇐5

The practice of dismissing an action during trial upon learning how the judge intends to decide should not be encouraged but a litigant is allowed to do so until completion of trial. Code Civ.Proc. § 581, subd. 1.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by William R. Jalof against Harry Robbins and wife on an open book account to recover value of merchandise sold. From an order denying a motion of defendants, defendants appeal.

Affirmed.

For prior opinion of District Court of Appeal, see 113 P.2d 728.

Rehearing denied; TRAYNOR, J., dissenting.

Samuel W. Newman, Meyer M. Willner, and Earl I. Swetow, all of Los Angeles, for appellants.

Robert M. Clarke and Dixie Dunnigan, both of Los Angeles, for respondent.

EDMONDS, Justice.

During the trial of the action brought by the respondent, he filed a dismissal of it. The appellants then moved the court for an order vacating the dismissal and directing their counsel to prepare findings of fact, conclusions of law and a judgment in accordance with a decision which had been orally announced. The appeal is from an order denying that motion.

The respondent is suing Harry Robbins and his wife upon an open book account to recover the value of merchandise sold. On June 3, 1940, the parties called witnesses and placed certain documents in evidence. Each counsel then announced "that's all". Thereupon, the trial judge stated that as Robbins had paid Halper Construction Co. $3,041 to be credited to Jalof, "my conclusion is that the defendants are entitled to credit for that amount on their indebtedness to Jalof". He also said that Jalof is not entitled to recover an additional amount of $220 which he claims. But, he added, Halper Construction Co. would have to be made a party to the action "because Jalof is entitled to be protected against any claim

that might be made against him by it". The minutes of the court showing the proceedings of that day conclude with the following: "The Court under Section 389, C. C.P. orders the Halper Construction Co. made a party defendant and to file necessary pleading regarding the item of $3,041. Trial is continued to July 8, 1940."

Ten days later the respondent filed a dismissal of the action and on the date to which the trial had been continued, the appellants' objections to it were overruled and the court ordered the action dismissed. Thereafter, the court made the order which is now attacked.

The appellants contend that a plaintiff may not dismiss his action when a trial has been had and the judge has indicated the party in whose favor judgment will be rendered. The respondent takes the position that an action may be dismissed at any time before the cause is submitted for decision and that there was no submission in the present case.

[1-3] Section 581(1) of the Code of Civil Procedure provides that the plaintiff may dismiss an action "* * * by written request to the clerk, filed with the papers in the case * * * at any time before the trial * * *". The phrase "before the trial" as used in this section has been construed to mean "before submission". MacDermot v. Grant, 181 Cal. 332, 184 P. 396; Rutherford v. Peppa, 53 Cal. App. 309, 199 P. 1111; Provencher v. City of Los Angeles, 10 Cal.App.2d 730, 52 P.2d 983. A case is deemed to be under submission when the court, trying the case without a jury, has heard the evidence and the arguments of counsel and has taken the case under advisement. MacDermot v. Grant, supra; King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268. Whether or not a case is submitted at the conclusion of the testimony and argument depends upon the terms of the order made by the court. Franks v. Cesena, 192 Cal. 1, 218 P. 437.

[4, 5] By the order made in the present case, the trial was continued to a later date and the Halper Construction Co. was required to plead as a party defendant. This order is entirely inconsistent with a submission of the case. Indeed, when the appellants' objections to the dismissal were being heard, the trial judge stated that the case had not been finally submitted. And although the practice of dismissing an action during trial upon learning how the judge intends to decide should not be encouraged, the long established rule in this state allows a litigant to do so until the completion of the trial.

The order is affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 217

VAN DENBURGH v. GOODFELLOW et al.

L. A. 16742.

Supreme Court of California.

Dec. 19, 1941.

1. Bankruptcy ⇐425

Under Bankruptcy Act providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as have not been duly scheduled, a debt is not "duly scheduled" if the bankrupt has listed the creditor's address incorrectly. Bankr.Act §§ 7(8), 17, 11 U.S.C.A. §§ 25(8), 35.

See Words and Phrases, Permanent Edition, for all other definitions of "Duly Scheduled".

2. Bankruptcy ⇐425

A bankrupt is under duty to use reasonable diligence to ascertain creditor's residence and if he acquires knowledge of such residence he must state it correctly, and if he fails to ascertain knowledge of such residence, he must state that the residence is unknown. Bankr.Act §§ 7(8), 17, 11 U.S.C.A. §§ 25(8), 35.

3. Bankruptcy ⇐436(3)

Where judgment debtors moved to quash execution and to restrain future executions on ground that they had been released from indebtedness by adjudications of bankruptcy, evidence did not support finding that judgment creditor's address was properly set forth in bankruptcy schedules. Bankr.Act §§ 7(8), 17, 11 U.S.C.A. §§ 25(8), 35.

4. Bankruptcy ⇐425

Where judgment debtors' bankruptcy schedules did not correctly set forth address of judgment creditor, and judgment debtors could easily have determined the judgment

creditor's correct address, the judgment debtors' good faith in listing the debt was immaterial, in passing on judgment debtors' motion to quash execution and to restrain future executions on ground that they had been released from indebtedness by adjudications of bankruptcy. Bankr.Act §§ 7(8), 17, 11 U.S.C.A. §§ 25(8), 35.

5. Bankruptcy ⇐436(3)

Where judgment debtors moved to quash execution and to restrain future executions on ground that they had been released from indebtedness by adjudications of bankruptcy, evidence was insufficient to support finding of trial court that judgment creditor received notice of the bankruptcy proceedings within time prescribed by law for filing claims. Bankr.Act, § 57, sub. n, 11 U.S.C.A. § 93, sub. n.

6. Bankruptcy ⇐425

Publication of notice of bankruptcy proceedings in newspaper was not sufficient notice to judgment creditor, since the Bankruptcy Act requires that actual notice be given to creditors. Bankr.Act §§ 7(8), 17, 11 U.S.C.A. §§ 25(8), 35.

7. Bankruptcy ⇐336

Where debt has been imperfectly scheduled and creditor has not been given timely notice of bankruptcy proceeding, a bankruptcy referee may in his discretion permit creditor to file a formal claim after six-month period fixed by statute for filing claims has elapsed, under the theory that the formal claim is merely an amendment to an informal claim made within the time limit. Bankr.Act § 57, sub. n, 11 U.S.C.A. § 93, sub. n.

8. Bankruptcy ⇐425

The notice of bankruptcy proceedings required by the Bankruptcy Act to be given to creditors must be given within the six-month period allowed by the act for filing of claims. Bankr.Act § 57, sub. n, 11 U.S.C.A. § 93, sub. n.

9. Bankruptcy ⇐425

A creditor of bankrupt must receive notice of bankruptcy proceedings in time to enable him to take advantage of the benefits of the bankruptcy law. Bankr.Act § 57, sub. n, 11 U.S.C.A. § 93, sub. n.

10. Bankruptcy ⇐425

The right of creditor of bankrupt to participate in the administration of the affairs of the estate, including the right to vote for the trustee, cannot be disregarded on the theory that such participation would have made no difference. Bankr.Act § 57, sub. n, 11 U.S.C.A. § 93, sub. n.

11. Bankruptcy ⇐363

Where bankruptcy referee permitted judgment creditor to file formal claim after expiration of six-month period for filing claim, and on the basis of such claim the creditor shared in the bankrupt's estate, the voluntary participation by the creditor in the bankruptcy proceeding operated to discharge the debt owed him by the bankrupt, despite the incorrect address of judgment creditor given in bankruptcy schedules and late notice of the bankruptcy proceeding. Bankr.Act §§ 7(8), 17, 57, sub. n, 11 U.S.C.A. §§ 25(8), 35, 93, sub. n.

12. Bankruptcy ⇐363

Certain types of debts, including liabilities for obtaining property by false pretenses, for willful and malicious injuries, for alimony or maintenance of wife or child, for seduction, for fraud, for embezzlement and taxes, for reasons of "public policy", cannot be discharged by bankruptcy proceedings, and a creditor who files a claim and shares in the assets is not barred from subsequently enforcing the unsatisfied portion of the debt. Bankr.Act § 17(2), 11 U.S.C.A. § 35(2).

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

13. Bankruptcy ⇐425

The provisions of the Bankruptcy Act requiring either a correct statement of creditor's address or actual notice to creditor are intended to insure the creditor an opportunity to participate in the administration of bankrupt's estate and to share in the assets. Bankr.Act, §§ 7(8), 17, 57, sub. n, 11 U.S.C.A. §§ 25(8), 35, 93, sub. n.

14. Bankruptcy ⇐425

A creditor, who refrains from making a claim against bankrupt when provisions of Bankruptcy Act requiring either a correct statement of creditor's address or actual notice to creditor are violated, does not share in the assets of bankrupt's estate but retains his debt unimpaired. Bankr.Act §§ 7(8), 17, 57, sub. n, 11 U.S.C.A. §§ 25(8), 35, 93, sub. n.

15. Bankruptcy ⇐363

Where provisions of Bankruptcy Act requiring either a correct statement of credi-

tor's address or actual notice to creditor are violated, if creditor elects to file a claim with permission of referee, the creditor "waives" any rights arising from the defects in the schedule or notice or from any detriment he may suffer because of having no opportunity to participate in the administration of the estate. Bankr.Act §§ 7(8), 17, 57. sub. n, 11 U.S.C.A. §§ 25(8), 35, 93, sub. n.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

16. Bankruptcy ⇐428

Where co-debtors instituted separate bankruptcy proceedings and provisions of Bankruptcy Act requiring either a correct statement of creditor's address or actual notice to creditor were not complied with in either proceeding, and where the creditor did not file a claim in one bankruptcy proceeding, the debtor whose estate was involved in that proceeding remained liable on the debt, notwithstanding creditor had, with bankruptcy referee's permission, filed claim in the other proceeding so that the claim had been discharged as to the other debtor. Bankr.Act §§ 7(8), 16, 17, 57, 11 U.S.C.A. §§ 25(8), 34, 35, 93.

17. Bankruptcy ⇐336, 425

Information supplied by a bankrupt may be considered a claim only for purpose of allowing a petitioning creditor to file an amended claim after the statutory period for filing claim has expired, when equity and good conscience require that creditor be permitted to participate in the bankruptcy proceedings, and the Bankruptcy Act does not require the creditor to petition for leave to file such an amended claim. Bankr.Act § 57, 11 U.S.C.A. § 93.

18. Execution ⇐176

A motion by judgment debtors to quash execution is a "special proceeding" so that costs thereof must be allowed the prevailing party. Code Civ.Proc. §§ 23, 1032(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

19. Executors and administrators ⇐456(5)

Where there was no charge of mismanagement or bad faith on part of administrator who had secured a writ of execution on a judgment and had levied on property of judgment debtors, costs allowable on the sustaining of motion of one debtor to quash execution were chargeable against the estate of the deceased and not against the administrator personally. Code Civ.Proc. §§ 23, 1026, 1032(a).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceeding by Harry G. Van Denburgh, as administrator of the estate of Mrs. Arthur J. Clark, deceased, against Walter V. Goodfellow and Elizabeth B. Goodfellow, wherein defendants moved to quash execution and to restrain future executions. From an adverse order and judgment, plaintiff appeals.

Order and judgment affirmed so far as they apply to Walter V. Goodfellow, and reversed so far as they apply to Elizabeth B. Goodfellow.

For prior opinion of the District Court of Appeal, see 112 P.2d 949.

Oscar S. Elvrum and Girard F. Baker both of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondents.

TRAYNOR, Justice.

On August 15, 1935, plaintiff Harry G. Van Denburgh, as administrator of the estate of Mrs. Arthur J. Clark, obtained a judgment against defendants Walter V. Goodfellow and Elizabeth B. Goodfellow, upon a note secured by a mortgage. On September 10, 1935, the mortgaged premises were sold and a deficiency judgment was entered against the defendants. On September 23, 1936, the defendants filed separate petitions in bankruptcy in the federal district court, and each was adjudicated a bankrupt. They listed plaintiff's judgment in the schedule of debts attached to each bankruptcy petition. Under the caption "Creditors Whose Claims Are Unsecured" there was listed: "Harry G. Van Denburgh, Admr. of Estate of Mrs. Arthur J. Clark, deficiency on foreclosure judgment and sale * * * $20,000.00". The same indebtedness was also listed in each petition under the caption "Creditors Holding Securities" as follows: "Mrs. Arthur J. Clark, deceased, care of Harry G. Van Denburgh, 1010 Title Guarantee Building, Los Angeles * * * $26,000.00". Full information about the indebtedness was given by defendants in their schedules as well as at the first meeting of the creditors. Harry G. Van Den-

burgh neither resided nor had an office at 1010 Title Guarantee Building. His name and proper address appeared in the Los Angeles telephone book and the city directory. Van Denburgh's attorneys in the matter of the estate of Mrs. Clark, whose names did not appear in defendants' schedules, had offices on the tenth floor of the Title Guarantee Building but not in room 1010. A copy of plaintiff's complaint, served upon defendants, gave the office address of plaintiff's attorneys as 1019 Title Guarantee Building, but defendants read this address as 1010 Title Guarantee Building because the figures were blurred.

A referee was appointed by the bankruptcy court and the first meeting of creditors was held on October 13, 1936. Notice of this meeting was published in the Los Angeles Daily Journal, but the notices intended for plaintiff Van Denburgh and mailed to the address given in the schedules were returned undelivered. In October, 1936, a clerk of the trustee in bankruptcy telephoned the office of plaintiff's attorneys to inquire about possible assets in their possession belonging to the bankrupts' estates. The clerk, however, did not talk to the attorneys; the person answering the telephone informed him that the attorney for whom he asked was no longer associated with the office. Plaintiff received notice of defendants' bankruptcy proceedings on April 8, 1937. On May 24, 1937, plaintiff petitioned the referee in the Walter V. Goodfellow bankruptcy proceeding for leave to file a claim based on the deficiency judgment, and received permission to do so. No claim was filed in the Elizabeth B. Goodfellow bankruptcy proceeding. Plaintiff shared in the subsequent distribution of Walter V. Goodfellow's assets.

On May 3, 1937, plaintiff secured a writ of execution and levied upon property of Walter V. Goodfellow. Defendants thereupon moved to quash the execution and to restrain future executions upon the ground they were released from the indebtedness to plaintiff by the adjudications of bankruptcy. After each defendant had received a final discharge in bankruptcy on June 7, 1937, the superior court held a hearing, entered an order granting the motion, and gave judgment quashing the execution, enjoining plaintiff from securing any further writs of execution or attempting to enforce the judgment against defendants, and awarding costs to defendants. The trial court found that defendants had no intent to deceive the plaintiff and that "the plaintiff's name, claims and demands and description thereof, together with his address were properly and duly given and set forth by each of the defendants herein in their bankruptcy schedules * * * and that the plaintiff received actual notice of the filing of said bankruptcy petition and the pendency thereof of each of the defendants herein within the time prescribed by law for creditors to present and file their claims * * *". Plaintiff has appealed from the order and judgment, contending that the debt was not discharged by the bankruptcy proceedings because it was not properly listed by the defendants in their bankruptcy schedules and because he did not receive notice of such proceedings within the time prescribed by the Bankruptcy Act.

Section 7(8), 11 U.S.C.A. § 25(8), of the Bankruptcy Act requires a voluntary bankrupt to file with his petition "a list of his creditors showing their residence, if known; if unknown, that fact to be stated". The penalty for failure to schedule a debt properly is stated in section 17 of the act: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy * * *." 11 U.S.C.A. § 35.

[1, 2] It is well settled that a debt is not duly scheduled if the bankrupt has listed the creditor's address incorrectly. See cases cited under 11 U.S.C.A., § 25, note 23; Brown v. Tropp, 106 Cal.App. 605, 289 P. 648; Parker v. Murphy, 215 Mass. 72, 102 N.E. 85, 87; In re D'Alessio, D.C., 24 F.Supp. 563. "The bankrupt is under duty to use reasonable diligence to ascertain the residence of the creditor, and if thereby he acquires knowledge of such residence he must state it correctly, and if he fails to ascertain such residence, to state that the residence is unknown. It is * * * implicit in a schedule, which fails to state that the creditor's residence is unknown, that the bankrupt (after reasonably diligent inquiry, if necessary) knows such residence and has truly stated same." McGehee v. Brookins, Tex.Civ.App., 140 S.W. 2d 963, 964.

[3, 4] In the present case there is no evidence to support the finding of the trial court that plaintiff's address was properly set forth in defendants' bankruptcy schedules. The evidence establishes without contradiction that 1010 Title Guarantee Building was not the address of plaintiff, or of the estate of Mrs. Clark, or of plaintiff's attorneys. Since defendants could easily have determined plaintiff's correct address, their good faith in listing the debt is immaterial. See Fible v. Crabb, 129 Ky. 461, 112 S.W. 576.

[5, 6] There is likewise no evidence to support the finding of the trial court that plaintiff received notice of the bankruptcy proceedings within the time prescribed by law for the filing of claims. Under the provisions of the Bankruptcy Act in force at that time a creditor's claim could not be allowed unless it was filed within six months after the date on which the debtor was adjudicated a bankrupt. 44 Stats. [part 2] 666, chap. 406, § 13, 11 U.S.C.A. § 93, sub. n. The evidence shows that plaintiff received no notice of the bankruptcy proceedings until April 8, 1937, more than six months after September 23, 1936, when defendants were adjudicated bankrupts. The notices mailed to the plaintiff by the referee were returned undelivered. No information was communicated to plaintiff or his attorneys by virtue of the telephone call of the trustee's clerk. Publication of a notice of the proceedings in the Los Angeles Daily Journal was not sufficient because the act requires that actual notice be given to creditors. Santa Rosa Bank v. White, 139 Cal. 703, 705, 73 P. 577; Ragsdale v. Bothman, 81 Mont. 408, 263 P. 972; Strickland v. Capital City Mills, 74 S.C. 16, 54 S.E. 220, 7 L.R.A.,N.S., 426; Lynch v. McKee, Tex. Civ.App., 214 S.W. 484; Interstate Credit League v. Widdison, 50 Idaho 493, 297 P. 1106.

[7-10] A bankruptcy referee, however, may in his discretion permit a creditor to file a formal claim after the six-month period has elapsed, under the theory that the formal claim is merely an amendment to an informal claim made within the time limit. In re Lipman, 2 Cir., 65 F.2d 366; In re Fant, D.C., 21 F.2d 182; Scottsville National Bank v. Gilmer, 4 Cir., 37 F.2d 227. Defendants contend, therefore, that the notice to plaintiff on April 8, 1937, was within the time prescribed by law for the filing of claims, since plaintiff was permitted to file his formal claim in the Walter V. Goodfellow bankruptcy proceeding more than six months after the adjudication. It is established, however, that the notice required by the Bankruptcy Act must be given within the six-month period allowed by the act for the filing of claims. Industrial Loan & Investment Co. v. Chapman, La.App., 193 So. 504; Bell v. Georgia Chemical Works, 33 Ga.App. 286, 125 S.E. 871; Morganstern v. Tulchin, 140 Misc. 44, 250 N.Y.S. 498; In re Welte, D.C., 12 F.Supp. 612; Hunter v. Hall, 60 Ga.App. 493, 4 S.E.2d 69; see In re Feldesman, D.C., 13 F.Supp. 1010; In re R. B. Rose Co., D.C., 43 F.2d 446; Brown v. Tropp, supra. Moreover, the creditor must receive such notice in time to enable him to take advantage of the benefits of the bankruptcy law * * * "in time to give him an equal opportunity with other creditors". It may not come so late "as to deprive him of participation in the administration of the affairs of the estate * * *". Birkett v. Columbia Bank, 196 U.S. 345, 25 S.Ct. 38, 40, 49 L. Ed. 231; Brown v. Tropp, supra; Reynolds v. Whittemore, 99 Me. 108, 58 A. 415. The creditor's right to participate in the administration of the affairs of the estate, including the right to vote for the trustee, cannot be disregarded on the theory that such participation would have made no difference. Brown v. Tropp, supra.

Clearly the defendants did not properly state plaintiff's address in their bankruptcy schedules nor did plaintiff receive notice in time to render the error of no consequence. In the absence of further action on plaintiff's part, the discharge of each defendant in bankruptcy would not release his debt.

[11-15] In the Walter V. Goodfellow proceeding the referee permitted the plaintiff to file a formal claim, after the expiration of the six-month period, on the theory that it was an amendment to the claim shown to exist by the schedules of the bankrupt and his testimony at the first meeting of the creditors. On the basis of this claim the plaintiff shared in the bankrupt's estate. This voluntary participation by plaintiff in the bankruptcy proceeding operates to discharge the debt owed him by the bankrupt, despite the incorrect address and the late notice. It is true that certain types of debts for reasons of public policy, cannot be discharged by bankruptcy proceedings, and a creditor who files a claim and shares in the

assets is not barred from subsequently enforcing the unsatisfied portion of the debt. Fried v. Talcott, 228 U.S. 27, 33 S.Ct. 505, 57 L.Ed. 718; Allard v. La Plain, 147 Wash. 497, 266 P. 688; see Meyer v. Price, 250 N.Y. 370, 165 N.E. 814. Such debts, listed in section 17 of the Bankruptcy Act, include liabilities for obtaining property by false pretenses or misrepresentations, for wilful and malicious injuries to person or property, for alimony or maintenance of wife or child, for seduction, for fraud, embezzlement, or misappropriation while acting in a fiduciary capacity, and taxes. A debt that is not discharged only because it is improperly scheduled, however, does not fall into this category for there is nothing in the nature of such a debt that requires a denial of discharge. See In re Baker, D.C., 275 F. 511, 512. The provisions requiring either a correct statement of the creditor's address or actual notice to him are intended to insure the creditor an opportunity to participate in the administration of the bankrupt's estate and to share in the assets. A creditor who refrains from making a claim against the bankrupt when these provisions are violated does not share in the assets of the estate but retains his debt unimpaired. If, on the contrary, he elects to file a claim with the permission of the referee, he waives any rights arising from defects in the schedule or notice or from any detriment he may suffer because of having no opportunity to participate in the administration of the estate and receives in return the right to share in the distribution of assets. The principal right of a creditor in a bankruptcy proceeding, to which all other rights are incidental, is sharing in the assets. If a creditor such as the plaintiff in the present case elects to share in the assets, there is no reason why his debt should not be discharged.

[16, 17] Plaintiff, however, did not file a claim in the Elizabeth B. Goodfellow bankruptcy proceeding and the debtor there remains liable on the debt. That liability is in no way altered by plaintiff's claim in the Walter V. Goodfellow proceeding. The two proceedings were separate and the discharge of Walter V. Goodfellow did not discharge his co-debtor. Bankruptcy Act, 11 U.S.C.A., § 34; Wilcox v. Hersch, 43 R.I. 81, 110 A. 409; Barnes v. Silveus, 114 Pa. Super. 214, 173 A. 837; In re Quackenbush, 122 App.Div. 456, 106 N.Y.S. 773; see cases cited in 11 U.S.C.A. § 34, notes 21, 22. Defendants contend that if the detailed scheduling of plaintiff's debt and the bankrupts' extensive testimony thereon at the first creditors' meeting constituted a claim in the Walter V. Goodfellow proceeding, they must also constitute a sufficient claim in the Elizabeth B. Goodfellow bankruptcy proceeding. This contention fails to take account of the requirement in the Bankruptcy Act that the creditor must make proof of his claim. 11 U.S.C.A. § 93. Information supplied by a bankrupt may be considered a claim only for the purpose of allowing a petitioning creditor to file an amended claim after the statutory period has expired, when equity and good conscience require that he be permitted to participate in the bankruptcy proceedings. There is nothing in the Bankruptcy Act that requires the creditor to petition for leave to file such an amended claim. Brown v. Tropp, supra; Birkett v. Columbia Bank, supra.

[18, 19] Since the motion by defendants to quash the execution is a special proceeding (Code Civ.Proc., § 23; Murphy v. Davids, 55 Cal.App. 416, 420, 421, 203 P. 802; see In re Sutter-Butte By-Pass Assessment, 190 Cal. 532, 537, 213 P. 974), costs must be allowed the prevailing party. Code Civ. Proc., § 1032[a]. Defendants contend that the costs awarded them by the trial court were chargeable against plaintiff personally, and are not reviewable on appeal because plaintiff personally has not appealed. There is no charge of mismanagement or bad faith on the part of plaintiff, however, so costs are chargeable against the estate of Mrs. Clark, not against plaintiff personally, and the judgment should so state. Code Civ.Proc., § 1026; Sterling v. Gregory, 149 Cal. 117, 121, 122, 85 P. 305.

The order and judgment are affirmed in so far as they apply to Walter V. Goodfellow, and are reversed in so far as they apply to Elizabeth B. Goodfellow.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

19 Cal.2d 189

UNITED STATES et al. v. SUPERIOR COURT et al.

S. F. 16489.

Supreme Court of California.

Dec. 17, 1941.

1. Agriculture ⇐1

Agricultural Marketing Agreement Act of 1937, in establishing plan for regulating interstate marketing of agricultural products, is designed to raise farm prices and thus restore to farmer lost purchasing power, to prevent waste resulting from overproduction and to eliminate evils of unfair competition. Agricultural Adjustment Act of 1933, § 1 et seq., as amended, 7 U.S.C.A. § 601 et seq.

2. Agriculture ⇐1

The California Agricultural Adjustment Act of 1935 serves as a state counterpart to the federal act regulating interstate marketing of agricultural products and regulates the intrastate marketing of agricultural products. Gen.Laws Supp.1935, Act 146; Agricultural Adjustment Act of 1933, § 1 et seq., as amended, 7 U.S.C.A. § 601 et seq.

3. Action ⇐10

A litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts.

4. Action ⇐10

It lies within the power of an administrative agency to determine in the first instance and before judicial relief may be obtained, whether a given controversy falls within statutory grant of jurisdiction to the administrative agency.

5. Injunction ⇐108

Shippers and growers of oranges could not maintain suit in equity to enjoin members of committees appointed for administration of federal Agricultural Adjustment Act from carrying out duties prescribed for them under an alleged invalid order purporting to regulate the handling of fruit on the ground that such order was invalid, where shippers and growers had not exhausted the administrative remedy of petitioning the Secretary of Agriculture for review as provided by the Act. Agricultural Adjustment Act of 1933, § 8c(15), as amended, 7 U.S.C.A. § 608c(15).

6. Injunction ⇐118(2)

Where only allegation in complaint by shippers of fruit for injunction against enforcement of order issued by Secretary of Agriculture purporting to regulate handling of fruit, regarding injury which might be suffered by shippers was that continued enforcement of order would prevent marketing of all oranges controlled by them and there was no showing that limitation on weekly shipments would destroy their business or that they had been subject to discriminatory treatment, and the order had been enforced against shippers for over four years, there was no showing of "irreparable injury" to warrant interference by injunction with uncompleted administrative proceeding before Secretary of Agriculture for review of alleged invalid order. Agricultural Adjustment Act of 1933, § 8c(15), as amended, 7 U.S.C.A. § 608c(15).

See Words and Phrases, Permanent Edition, for all other definitions of "Irreparable Injury".

7. Injunction ⇐114(2)

Where neither federal Agricultural Marketing Agreement Act nor order of Secretary of Agriculture purporting to regulate handling of fruit regulated the production of oranges, growers were not "proper party plaintiffs" in proceeding to enjoin enforcement of the order, even though growers might be able to show certain damages arising from restrictions imposed upon shippers by the order. Agricultural Adjustment Act of 1933, § 1 et seq., as amended, and §§ 8b, 8c(1), (6), (7) (C), (8, 10, 13, 15), as amended, 7 U.S.C.A. § 601 et seq. and §§ 608b, 608c (1), (6), (7) (C), (8, 10, 13, 15).

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party Plaintiff".

8. Injunction ⇐114(2)

To be in a position to attack a statute or an order by injunction suit as invalid, it is not sufficient that complaining party show damage to himself but, in addition, he must show a violation of his legal right by the statute or order which is attacked.

In Bank.

Original proceeding in prohibition by the United States of America, and others, to prohibit the Superior Court from taking any further action in a suit pending before it which was brought by certain ship-

pers and handlers of oranges to enjoin the enforcement of an order issued by the Secretary of Agriculture, other than to dismiss a temporary restraining order and to dismiss certain orders to show cause.

Writ of prohibition to issue.

William Fleet Palmer, U. S. Atty., William F. Hall and Walter M. Campbell, Asst. U. S. Attys., Ivan G. McDaniel, and George Lyon, all of Los Angeles, for applicants.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles (G. V. Weikert, of Los Angeles, of counsel), for respondents.

EDMONDS, Justice.

This original proceeding in prohibition was instituted by the United States of America and certain members of committees appointed for the administration of the federal Agricultural Adjustment Act of 1933, as amended in 1935, 7 U.S.C.A. § 601 et seq., and as reenacted by the Agricultural Marketing Agreement Act of 1937. 7 U.S.C.A. § 674. The petitioners seek to prohibit the respondent Superior Court from taking any further action in a suit pending before it which was brought by certain shippers and handlers of oranges to enjoin the enforcement of an order issued by the secretary of agriculture other than to dissolve a temporary restraining order and to dismiss certain orders to show cause. An alternative writ issued in response to which the respondent has filed a general demurrer.

[1, 2] The Agricultural Marketing Agreement Act of 1937, supra, in establishing a plan for regulating the interstate marketing of agricultural products, is designed to raise farm prices and thus restore to the farmer a lost purchasing power, to prevent waste resulting from overproduction and to eliminate the evils of unfair competition. The marketing provisions of the statute were upheld as constitutional in Edwards v. United States, 9 Cir., 91 F.2d 767. The California Agricultural Adjustment Act of 1935 (Stats. 1935, chaps. 307, 416, pp. 1032, 1468; Deering's Gen. Laws, 1935 Supp., Act. 146, p. 480), held constitutional in Brock v. Superior Court, 9 Cal. 2d 291, 71 P.2d 209, 114 A.L.R. 127, serves as a state counterpart to the federal act and regulates the intrastate marketing of agricultural commodities. The present controversy arose in connection with the administration of the federal act.

By the terms of that statute, the secretary of agriculture is empowered to enter into marketing agreements with producers and others engaged in the handling of agricultural commodities provided such handling is in the current of, or directly burdens or affects interstate or foreign commerce in such commodities. § 608b. He is likewise empowered to issue orders applicable to processors and others engaged in the handling of such commodities. § 608c(1). Producers are specifically exempted from regulation. § 608c(13). The manner of regulation, as applicable to fresh fruits, is prescribed by section 608c (6). There may be (a) a limitation of the total quantity of any such commodity produced during a specified period, which may be marketed in interstate commerce, and (b) an allotment of this total quantity among handlers under a uniform rule based upon the amounts which each handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the secretary determines to be representative, to the end that the total quantity may be equitably apportioned among all handlers. The order may provide for the selection by the secretary of agriculture of an agency to administer the provisions of the order. § 608c(7) (C).

The statute provides that no order shall become effective until (a) the handlers of not less than 80 per cent of the volume of such commodity covered by the order have signed a marketing agreement (§ 608c(8), nor unless (b) the secretary of agriculture determines that the issuance of such order is approved by a given percentage in number and volume of the producers within the production area specified in the marketing agreement. § 608c(8). Nor shall any order be issued unless it regulates the handling of the commodity covered thereby in the same manner as the marketing agreement relating thereto. § 608c(10). Any handler challenging the validity of an order may petition the secretary of agriculture for a modification thereof and may secure a judicial review of the secretary's ruling in the United States District Court. § 608c (15).

In 1933, certain shippers and handlers of citrus fruits filed with the secretary of agriculture a petition seeking the institution of a program of prorated marketing with respect to oranges and grapefruit grown in California and Arizona. He en-

tered into a marketing agreement with these petitioners and at the same time issued a license covering all shippers of oranges and grapefruit grown in the two states. On November 15, 1935, after notice and hearing, he executed an order, known as order No. 2, which purports to regulate the handling of such fruit. Pursuant to the requirements of the act, he submitted this order to a vote of producers within the production area, and upon the basis of that vote, determined that it was approved by producers growing the requisite percentage in volume of the fruit.

The order became effective on January 13, 1936. It provides for weekly limitation from time to time of the total quantity of fruit which may be shipped in interstate commerce by all shippers and the prorate of such quantity among them. Other provisions include the appointment of certain persons to serve either as members of a growers' advisory committee, or of a distribution committee. These committees are directed to find and determine for each week the quantity of weekly shipments of each variety of fruit deemed by them advisable to be shipped and prorated, and also to determine the prorate bases for each shipper who applies for allotments. Their reports and recommendations are required to be forwarded to the secretary who, upon approving the findings of the committees, shall fix the weekly allotment for each shipper.

The secretary of agriculture, acting through the two committees as his agents, enforced this order as to oranges from 1936 until August 22, 1940, when certain shippers and growers of oranges filed an action in the respondent court seeking to invalidate the order and to enjoin the members of the two committees from carrying out the duties prescribed for them thereunder. According to the complaint in that action, the order is void. Specifically, it is alleged that the order was not approved by the requisite number or percentage of growers as specified in the act, the secretary of agriculture having accepted certain votes unlawfully cast by the California Fruit Growers Exchange on behalf of certain producers. It is also charged that the order is violative of the statute since it purports to regulate the handling of oranges in a manner differing in several particulars from the regulatory scheme provided in the Agricultural Marketing Agreement Act of 1937, supra. The committeemen are sued as individuals, the complaint charging them with being interlopers having no authority to act.

Upon this complaint, the respondent court issued a temporary restraining order enjoining the defendants from prescribing any allotments or from in any other manner attempting to enforce the provisions of order No. 2. Subsequently, and upon affidavits filed averring that certain of them had violated the temporary restraining order, the court issued orders to show cause why they should not be held in contempt of court. Thereafter the present proceeding was commenced. Later, the respondent court granted motions to dismiss the temporary restraining order and to quash the citation for contempt. A motion to dismiss the action, however, was denied.

The petitioners challenge the jurisdiction of the Superior Court to entertain or proceed with the action upon the following grounds: that the Marketing Agreement Act establishes a complete plan for administrative review of orders issued thereunder, the exhaustion of which administrative remedy is a jurisdictional prerequisite to any interference by the courts with the enforcement of such orders; that the secretary of agriculture, being the authority ultimately charged with the duty of administering and enforcing the provisions of order No. 2, is an indispensable party to the injunction proceeding; that the federal courts have exclusive jurisdiction over the enforcement of the act and the orders issued thereunder; and that the United States circuit court of appeals having decided that the order is valid, the Superior Court has no jurisdiction to enjoin the federal agency.

The Agricultural Marketing Agreement Act of 1937, supra, includes provisions for the administrative review of any order promulgated under its terms. § 8c(15). Any handler subject to an order may file a petition with the secretary of agriculture, stating that such order is not in accordance with law and praying for a modification thereof, or an exemption therefrom. The secretary's ruling thereon may be reviewed by the United States district court.

According to the complaint in the injunction proceeding, six days before it was filed, the plaintiff shippers and growers filed with the secretary of agriculture a petition under section 8c(15) attacking order No. 2 upon the same grounds as those alleged as grounds for issuance of the writ. In the

respondents' brief, it is stated that ten months later the secretary ruled upon this petition. Whether the applicants sought a review of his ruling in the United States district court does not appear, but that fact is not determinative of the issues in the present proceeding.

[3] It is now firmly established in this state that a litigant must invoke and exhaust an administrative remedy provided by statute before he may resort to the courts. Jurisdiction to entertain an action for judicial relief is conditioned upon a completion of the administrative procedure. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. In the present case, the persons who are the plaintiffs in the injunction proceeding invoked the administrative process to secure a review of the challenged order and, at practically the same time, sought judicial relief. The respondents apparently contend that the requirement of exhaustion of administrative remedies applies only to erroneous orders and does not preclude judicial interference where, as here, an order is assailed as a nullity because illegally adopted and where the agents for enforcement appointed thereunder are charged with being mere pretenders claiming powers which they do not lawfully possess. But there is no substantial difference, in so far as the necessity for resort to administrative review is concerned, between an erroneous order and one which, it is claimed, is being executed in violation of statutory authority.

[4, 5] Conceding the existence of such a distinction, however, the doctrine of exhaustion of administrative remedies is not so limited. For example, it lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction. United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638; Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978; Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408; South Porto Rico Sugar Co. v. Munoz, 1 Cir., 28 F.2d 820; 48 Yale L. J. 981, 992-995. And even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held to be a prerequisite to equitable relief. Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588, 47 S.Ct. 720, 71 L.Ed. 1219; St. Louis-San Francisco Ry. Co. v. Alabama Pub. Serv. Comm., 279 U.S. 560, 49 S.Ct. 383, 73 L. Ed. 843; Porter v. Investors' Syndicate, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226; Gorham Manufacturing Co. v. State Tax Commission, 266 U.S. 265, 45 S.Ct. 80, 69 L.Ed. 279; United States v. Illinois Central R. R. Co., 291 U.S. 457, 54 S. Ct. 471, 78 L.Ed. 909; Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259; Clark v. Lindemann & Hoverson Co., 7 Cir., 88 F.2d 59; see cases collected in 48 Yale L. J. 996, 997. If, under the rule applied in these cases, an attack upon the constitutionality of the statute does not remove the necessity for following the prescribed administrative remedy, then clearly injunctive aid may not be had where, as here, the validity of a single regulation promulgated under such a statute is challenged.

True, there are decisions dispensing with the administrative requirement and permitting immediate judicial interference where the statute, under attack as unconstitutional or invalid, creates the administrative board or establishes the method of administrative review. Hirsh v. Block, 50 App.D.C. 56, 267 F. 614, 11 A.L.R. 1238; Stout v. Pratt, D.C., 12 F.Supp. 864; El Paso Elec. Co. v. Elliott, D.C., 15 F.Supp. 81; Gilbreath v. Willett, 148 Tenn. 92, 251 S.W. 910, 28 A.L.R. 1147. These cases were decided upon the theory that if the act be held unconstitutional in toto, the remedies provided thereby fall with it and, for that reason, need not be availed of by the litigant in the first instance. There is substantial authority to the contrary, however. Hegeman Farms Corp. v. Baldwin, supra; Porter v. Investors' Syndicate, supra; United States v. Illinois Cent. R. Co., supra; see other cases cited above.

But, assuming the validity of the rule announced in the Hirsh and related cases, it is nevertheless not controlling in the present controversy. The plaintiffs in the injunction proceeding do not question the constitutionality of the Agricultural Marketing Agreement Act of 1937, supra; they do not dispute the authority of the secretary of agriculture nor do they question the existence of a validly created administrative remedy. They seek only a review of a particular order which they assert was not

adopted in conformity with the requirements of the statute. The question whether this order complies with the legislative mandates is essentially one of fact and is nonjusticiable until those claiming to be aggrieved have secured a final administrative determination of their rights. The Agricultural Marketing Agreement Act of 1937 supra, gives a dissatisfied handler a hearing before the secretary of agriculture and a right of review of the secretary's ruling in the United States district court whenever he attacks an order as "not in accordance with law". The relief sought by the petitioners in the present proceeding is the same as that which the secretary of agriculture might give, and to adopt the contention of respondent would render the provision for administrative review ineffective.

The shippers, however, alleging irreparable damage, assert a need for immediate preventive relief and contend the administrative remedy is inadequate because the statute fails to provide a means for the stay of enforcement of orders pending their review. The inadequacy of the administrative remedy, arising from threatened irremedial injury, is a recognized ground for immediate injunctive relief, and, upon proof of that fact, the exhaustion requirement has frequently been held inapplicable. An example of such a situation is where a regulatory commission has imposed allegedly confiscatory rates upon a public utility. Since the continued operation of the business under the lower rate might be so unprofitable as to result in the destruction of the business, a court will enjoin the enforcement of the new rate pending a final determination of its validity. Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S.Ct. 353, 67 L.Ed. 659.

[6] The only allegation in the complaint for injunction regarding injury which might be suffered by the shippers of fruit is that continued enforcement of the order will prevent a marketing of all the oranges controlled by them. There is no showing that the limitation on weekly shipments will destroy their business. It is not alleged that they have been subjected to discriminatory treatment or that they are not doing business at a profit under the prorate plan. If they have obtained control of more fruit than they are permitted to handle under the regulation, application may be made to the growers' advisory committee for a revision of their prorate bases to include such fruit within the estimate. In any case the order does not purport to regulate the amount of fruit which may be picked. Accordingly, when a shipper acquires fruit in excess of the quantity alloted him under the weekly quota, any injury suffered by him is self-inflicted. And since the order has been enforced against the shippers for over four years, it becomes even more apparent that there has been no showing of irreparable injury to warrant interference with an uncompleted administrative proceeding. See Hegeman Farms Corp. v. Baldwin, supra.

[7,8] The respondent points out that several of the plaintiffs in the injunction proceedings are growers who are not given any administrative remedy under the statute. But neither the Agricultural Marketing Agreement Act of 1937, supra, nor order No. 2 regulates the production of oranges and therefore growers are not proper party plaintiffs in that proceeding. The federal regulation has to do with the handlers alone and begins only when the fruit enters the stream of interstate commerce. Neither the statute nor the order require a grower to do, or to refrain from doing, anything. None of his legal rights is invaded or violated by the order. To be in a position to attack a statute or an order as invalid, it is not sufficient that the complaining party show damage to himself; in addition, he must show a violation of his legal right by the statute or order which is attacked. Massachusetts v. Mellon, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078; Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300, 82 L.Ed. 374.

For example, in Wallace v. Ganley, 68 App.D.C. 235, 95 F.2d 364, a group of producers sought to enjoin the enforcement of an order regulating milk which was issued by the secretary of agriculture under the Agricultural Adjustment Act as amended in 1935, supra. The order fixed minimum prices to be paid to the producers by the handlers. The producers attacked both the constitutionality of the statute and the validity of the order. It was held that the producers had no standing to maintain the suit as they were unable to show any wrongful act which directly resulted in a violation of their legal rights. So here, although the growers may be able to show certain damage arising from the restrictions imposed upon shippers by the order, they have suffered no legal wrong for the order does not directly affect them in its regula-

tion. Consequently, they are in no position to challenge its validity.

Let a writ of prohibition issue as prayed for by the petitioners.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, J., concurred in the conclusion.



19 Cal.2d 226

BLACKBURN v. HOME LIFE INS. CO. OF NEW YORK.

L. A. 17495.

Supreme Court of California, in Bank.

Dec. 22, 1941.

1. Insurance ⇐520

Under New York Insurance Law, apportionment of divisible surplus of life insurance company must be equitable and policyholders of the same class are entitled to share with equality in dividends. Insurance Law N.Y. § 89.

2. Insurance ⇐146(3)

Uncertainties or ambiguities in insurance contracts are resolved most strongly in favor of insured.

3. Insurance ⇐146(1)

Where there is no ambiguity in insurance policy, courts will indulge in no forced construction against insurer, and policy will be interpreted according to intention of parties as expressed in policy in light of circumstances surrounding execution of policy.

4. Insurance ⇐521

A life policy with an attached rider for disability benefits issued in connection with it constituted a "single indivisible contract", and being different in form and kind from life policies containing no provision for disability benefits was not required to be similarly classified under New York Law for dividend purposes with such policies by the New York mutual insurance company which issued them. Insurance Law N.Y. § 89.

See Words and Phrases, Permanent Edition, for all other definitions of "Single Contract".

5. Insurance ⇐521

In determining whether life policy issued by a New York mutual company, and attached rider stating in its title that rider was "issued in connection with and attached to policy", and providing for disability benefits, constituted single contract so as to permit payment of dividends under New York Insurance Law at lower rate than on life policies not providing for disability benefits, fact that company formerly issued riders stating in title that rider was "made a part of the policy" did not indicate intention of company to separate disability contract from life insurance contract, particularly in view of New York Insurance Law expressly providing that riders should be deemed to be parts of policies. Insurance Law N.Y. §§ 89, 101, subd. 10.

6. Insurance ⇐521

In determining whether life policy issued by a New York mutual company and attached riders providing for disability benefits constituted single contract so as to permit payment of dividends under New York Insurance Law at lower rate than on life policies not providing for disability benefits, that rider was separately executed, and that disability premium was separately stated, and that disability benefits could be discontinued without terminating death benefit of policy, did not show that rider was an independent contract, where separate execution was required by Superintendent of Insurance of New York, and separate statement of disability premiums was allowed by regulations of superintendent. Insurance Law N.Y. § 89.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Howard W. Blackburn, etc., against the Home Life Insurance Company of New York for an accounting and a judgment for the amounts owing to himself and other policyholders, and for declaratory relief. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Arthur Rosenblum and Fred Horowitz, both of Los Angeles, for appellant.

Loeb & Loeb and Herman F. Selvin, all of Los Angeles, and William Marshall Bullitt, of Louisville, Ky., for respondent.

EDMONDS, Justice.

The allegations of the appellant's complaint include the statement that he is suing

on behalf of himself and on behalf of all others similarly situated holding policies issued by the respondent which provide for payment upon death and also for permanent disability benefits. He charges that the respondent has been guilty of unlawful discrimination by calculating and allowing dividends upon such policies at a lower rate than upon those which do not include disability benefits. Because of the respondent's practice in this regard, he asserts that he is entitled to an accounting and a judgment for the amounts owing to him and other policyholders as well as a declaration of the rights of the respective parties. The trial court denied relief, holding that the company's divisible surplus has been equitably apportioned.

Some years ago the respondent, which is a mutual insurance company organized under the laws of New York, issued to plaintiff a policy of life insurance, No. 330,527, providing for a death benefit of $10,000. The semi-annual premium for this insurance is $163.40. At the same time, and in connection with the life policy, there was issued to the appellant what he refers to as an "additional and separate contract" providing for total and permanent disability benefits. By the added provisions, the insurer, for an additional semi-annual premium of $14.10, agreed to pay the appellant $100 monthly and to waive further premium payments upon the life insurance should he become totally and permanently disabled. The agreement to pay disability benefits is stated in what is known as a rider form which the insurer physically and permanently attached to the life insurance policy before its delivery to the appellant.

Subsequently, the insurer issued to the appellant three other policies of life insurance having disability riders, all substantially in form the same as the policy which has been described. Similar policies were also executed and delivered by the insurer to a large number of persons throughout the United States. The appellant states that his $10,000 policy is typical of all the policies and riders involved.

Prior to 1935, the insurer, in computing and paying dividends upon policies, made no distinction between policies providing solely for the payment of death benefits and those carrying the added feature of disability payments. It paid dividends upon each of such policies at the same rate. But in 1935 and 1936, the company adopted the practice of paying dividends at a higher rate upon policies providing for death benefits only than upon those which carried provisions for disability payments. This change was made because the insurer's experience showed that the policies for life insurance only were profitable, but the premiums charged for insurance against disability did not meet its cost. Rhine v. New York Life Ins. Co., 273 N.Y. 1, 6 N.E.2d 74, 108 A.L.R. 1197.

[1] The insurer recognizes that under the New York Insurance Law, Consol. Laws, c. 28, (sec. 89) the apportionment of divisible surplus must be equitable, and policyholders of the same class are entitled to share with equality in dividends. It asserts that the payment of dividends since 1935 has been in accordance with this principle. The appellant's case is based upon the theory that the disability rider attached to a policy of life insurance is a distinct contract, entirely separate from the contract of life insurance. Without the disability rider, the life policy is identical in form and kind with life insurance policies containing no provision for disability benefits, and must, so his argument runs, be similarly classified for dividend purposes.

The parties have even more explicitly posited the question for decision, for they agree that if the life insurance policy and the rider for disability benefits issued in connection with it are two separate and distinct contracts, the dividend classification adopted by the insurer is discriminatory; on the other hand, if they constitute but one integral contract of insurance, the policy is distinguishable from those lacking disability features, and the insurer has equitably apportioned its dividends.

[2, 3] Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; 14 Cal.Jur. 443-445. Where there is no ambiguity, however, courts will indulge in no forced construction against the insurer, and the insurance policy, like any other contract, is to be interpreted according to the intention of the parties as expressed in the instrument in the light of the circumstances surrounding its execu-

tion. Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 P. 872, 23 Am.St.Rep. 460; Maryland Casualty Co. v. Industrial Acc. Comm., 209 Cal. 394, 287 P. 468; 14 Cal.Jur. 446.

Although neither the New York law nor the respondent's charter prohibits it from issuing separate contracts for disability insurance, the uncontradicted evidence is to the effect that no agreements to pay disability benefits have ever been issued by it except in connection with policies of life insurance. Also, such agreements, by their terms, may not continue in force independently of the contracts for death benefits. In accordance with the New York Insurance Law, they have been either "printed in" as one of the clauses of the life insurance policy, or as a "rider" or "supplementary contract" physically and permanently attached to the life policy.

[4] By a single application, the appellant applied for a policy of life insurance "with" disability benefit. The insurer issued the policy as applied for, and the provision for disability benefits was contained in a rider form physically affixed to the policy and captioned, "Contract for Total and Permanent Disability Benefit issued in connection with and attached to Policy No. 330,527 * * * on the life of Howard W. Blackburn". The policy, including the attached rider, describes itself several times, and always in the singular number as one policy. It is conceded that the agreement for disability benefits has no separate existence apart from the life insurance provisions. Appellant could not, by tendering the premium for the disability benefits, only compel the respondent to separately continue its agreement to pay them unless he simultaneously paid the premium upon the life insurance. Also, the rider, standing alone, is incomplete and meaningless. Except by reference to the other provisions of the policy, it is impossible to determine many of the essential terms of the rider, such as the total amount of premium to be waived, the amount of monthly income payable in the event of disability, and the period of grace allowed for premium payment. Both by physical union and in legal effect, the policy and the disability contract constitute a single, unified agreement.

In all essential characteristics, this case presents the same question which has been considered by the New York courts. Deciding in favor of the insurer, which had issued a policy with a provision for disability benefits, the Appellate Division of the Supreme Court declared that it was "a single policy, with both death and disability benefits so interwoven as to constitute a single integral insurance contract". Rhine v. New York Life Ins. Co., 248 App.Div. 120, 289 N.Y.S. 117, 132. The Court of Appeals affirmed the judgment. Rhine v. New York Life Ins. Co., 273 N.Y. 1, 6 N.E. 2d 74, 108 A.L.R. 1197. A later case concerned a policy in substantially the same form as the one held by Blackburn, that is, having the agreement for disability benefits in an attached rider, and the court said: "The theory on which the plaintiff seeks to distinguish this action from the Rhine Case is that the disability benefits pertaining to his life insurance policy are printed on the statutory 'rider form,' entitled 'Supplementary Contract attached to and made a part of' the policy, and pasted therein, whereas, in the Rhine Case, they were printed as an integral part of the policy. The distinction, however, is one of form only. No difference exists between the two methods of including disability benefits in a policy of life insurance." Rubin v. Metropolitan Life Ins. Co., 251 App.Div. 382, 296 N.Y.S. 908, 910, affirmed 278 N.Y. 625, 16 N.E.2d 293; see, also, Barnett v. Metropolitan Life Ins. Co., 258 App.Div. 241, 16 N.Y.S.2d 198; affirmed 285 N.Y. 627, 33 N.E.2d 554; Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273.

[5] The appellant attempts to avoid the controlling effect of these cases by the fact that the respondent has made certain changes in the language of its policy forms. Prior to 1921, the disability riders issued by the respondent contained language similar to the wording used in the rider attached to the policy held by the plaintiff in the Rubin case. They were then entitled, "Supplementary Agreement made a part of the Policy. * * *" After 1921, and during the time in which plaintiff obtained his policy, the rider was changed to read "Contract for Total and Permanent Disability Benefit issued in connection with and attached to Policy No. ———". The appellant argues that the deletion of the words "made a part of" indicates an intention on the part of the insurer to separate the disability contract from the life insurance policy, and particularly to avoid application to the disability contract of

the provision making the policy incontestable after two years. No such legal significance may be attributed to such a trifling change in wording. Moreover, the New York Insurance Law expressly provides that "* * * rider forms * * * shall be deemed to be parts of policies * * *". (Section 101[10].)

[6] The fact that the rider containing the provisions for disability insurance was separately executed does not aid the appellant; this is required by the superintendent of insurance of New York. Nor does the fact that the premium for the disability contract is separately stated and is not combined with the premium for the life policy compel a determination that the insurer made two contracts. True, in the Rhine case the policy exacted a total premium for both death and disability benefits, and the court, in holding the disability clause to be a supplementary and not an independent agreement, relied partially upon the singleness of the premium, stating that a "totality of the promises is given for the total premium". This provision, however, was only one of many which the court considered in construing the policy. Certainly it is not of controlling importance because the regulations of the superintendent of insurance allow an insurer to state separately the premiums for death and disability benefits.

Nor is the disability rider an independent contract because the benefits provided therein may be discontinued by the policyholder without terminating the death benefit provisions of the policy. As stated in the Rhine case, supra, because he may do so, "the disability feature of the policy is indeed severable, but it is severable for the purpose of being terminated, and until the privilege of dropping the disability benefit is exercised * * * the policy with the various promises therein contained is a single policy and may for dividend purposes be dealt with as a whole".

Other minor differences between the Rhine and Rubin policies and the Blackburn policy are pointed to by the appellant as warranting a construction that the insurer issued two separate contracts but they do not support such an interpretation. Also, the cases of Legg v. St. John, 296 U.S. 489, 297 U.S. 695, 56 S.Ct. 336, 80 L.Ed. 345; Southland Life Ins. Co. v. Johnston, Tex.Civ.App., 97 S.W.2d 518; and Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450, 62 A.L.R. 999, relied upon by Blackburn, were decided upon facts wholly different from those which are presented by the record upon this appeal and they are therefore not in point.

The present case is not the usual contest between an insurance company and a policyholder. The respondent, in good faith and in the exercise of a reasonable discretion, has apportioned and paid dividends in a manner which has received the express approval of the superintendent of insurance of New York. The courts of that state have sanctioned the method of classification which it adopted and there is sound reason as well as statutory authority for it.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



LYONS et al. v. BRUNSWICK-BALKE-COLLENDER CO. et al. *

Civ. 13202.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1941.

Hearing Granted Feb. 5, 1942.

Venue ⇐61

Defendant who failed to file demand for change of venue when he filed general demurrer "waived" the right to subsequently demand a change of venue at time of filing amended demurrer. Code Civ.Proc. §§ 396, 396b.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by M. L. Lyons and others against the Brunswick-Balke-Collender Company

* Subsequent opinion 127 P.2d 924.

and others. From an order granting defendant Russell J. Bowell's motion for change of venue to the county of his residence, plaintiffs appeal.

Reversed.

Gibson, Dunn & Crutcher, David P. Evans, and George H. Whitney, all of Los Angeles, for appellants.

O'Melveny & Myers and Pierce Works, all of Los Angeles, for respondent.

McCOMB, Justice.

From an order granting defendant Bowell's motion for a change of venue to the county of his residence, plaintiffs appeal.

These are the essential facts:

Plaintiffs filed a complaint in Los Angeles County naming as defendants among others Russell J. Bowell, a resident of San Mateo County and Matthew J. Dooley, a resident of the city and county of San Francisco. April 29, 1941, defendants Bowell and Dooley filed a general demurrer to the complaint and defendant Dooley filed a motion for a change of venue of the action to the city and county of San Francisco, complying with the requirements of section 396 of the Code of Civil Procedure. At the same time defendant Bowell filed an affidavit of merits in which he consented that the place of trial be changed to the city and county of San Francisco. May 7, 1941, and before any ruling upon the defendant Dooley's request for a change of venue, plaintiffs voluntarily dismissed the action as to such defendant.

May 14, 1941, defendant Bowell served and filed an amended demurrer and also served and filed a demand for a change of venue to the county of his residence, San Mateo County. May 22, 1941, over objection of plaintiffs, the trial court granted defendant Bowell's motion for a change of venue.

This is the sole question necessary for us to determine:

By failing to file a demand for a change of venue when he filed his general demurrer on April 29, 1941, did defendant Bowell waive the right to subsequently demand a change of venue at the time of filing his amended demurrer?

This question must be answered in the affirmative. Section 396b of the Code of Civil Procedure, so far as material here, reads as follows:

"Except as otherwise provided in section 396a, if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, under the provisions of this title, the action may, notwithstanding, be tried in the court where commenced, unless the defendant, *at the time he answers or demurs,* files with the clerk, or with the justice if there be no clerk, an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers." (Italics added.)

It has been held by our Supreme Court that the italicized language in the foregoing code section means that, unless a defendant at the time he *first* appears by answer or demurrer demands a change of venue, he thereby waives his right to have the place of trial changed on the ground that the action has not been commenced in the proper county. (Cook v. Pendergast, 61 Cal. 72, 78; Wadleigh v. Phelps, 147 Cal. 541, 542, 82 P. 200; McNeill & Co. v. Doe, 163 Cal. 338, 340, 125 P. 345; Bell v. Camm, 10 Cal.App. 388, 391, 102 P. 225.)

Pittman v. Carstenbrook, 11 Cal.App. 224, 104 P. 699; Jaques v. Owens, 18 Cal.App. 114, 122 P. 430; Goss v. Brown, 64 Cal. App. 381, 221 P. 683; Gallo v. Boyle Mfg. Co., Inc., 30 Cal.App.2d 653, 86 P.2d 1067; Bloom v. Oroville-Wyandotte Irr. Dist., 34 Cal.App.2d 102, 93 P.2d 164; Lundy v. Lettunich, 50 Cal.App. 451, 195 P. 451; and Smith v. Pelton Water Wheel Co., 151 Cal. 399, 90 P. 932, 1135, are not in point, for in each of the cases just mentioned defendants filed with either their answer or demurrer the necessary papers as required by the statute demanding a change of venue. Likewise Penniman v. Fuller & Warren Co. (1892), 133 N.Y. 442, 31 N.E. 318, is not controlling in the instant case, because it is contrary to the decisions of our own appellate courts mentioned above.

For the foregoing reasons the order granting defendant Bowell's motion for a change of venue is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 658

WILLIAM BEEKLEY REFRIGERATOR TRUCK SERVICE v. GLASER et al.

Civ. 13314.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Rehearing Denied Jan. 20, 1942.

1. Automobiles ⇐20

Where individual owning equipment, including a refrigerator trailer, and tractor, sold it to another without turning over and indorsing the registration slip, the buyer then sold the equipment to defendant, individual who had owned the equipment, took part in forming plaintiff corporation and became a director and majority stockholder thereof, and defendant sold equipment to corporation, plaintiff in action to cancel notes given by plaintiff as purchase price of equipment was "estopped" to repudiate sale to it because individual who had owned the equipment had not turned over and indorsed the registration slip.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

2. Appeal and error ⇐1033(7)

Where additional findings, if made, would support respondents' case and would be adverse to appellant, appellant could not complain of the omission of those facts.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action for declaratory relief by William Beekley Refrigerator Truck Service against Henry Glaser and others for an interpretation and cancellation of two agreements and six notes executed pursuant to the agreements, wherein the named defendant filed a cross-complaint seeking a judgment for the balance due on the notes. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Dwight V. Maurice, of Los Angeles for appellant.

Ray L. Smith, of Los Angeles, for respondent.

R. H. SCOTT, Justice pro tem.

Plaintiff brought an action for declaratory relief, seeking interpretation and cancellation of two agreements and six promissory notes executed pursuant thereto. The agreements related to certain equipment, including a refrigerator trailer and a tractor, sold by defendant Glaser to plaintiff. Defendant Glaser filed a cross-complaint asking for judgment for the balance due on the notes, and recovered judgment therefor. The trial court found that the notes had been executed by plaintiff through its authorized agent, who was secretary-treasurer of the corporation.

The equipment was originally owned by Beekley as an individual. He sold it to one Spitz in August, 1936, but did not endorse and turn over the registration slip. Spitz sold the equipment to defendant Glaser a few days later. Spitz and two others formed the plaintiff corporation in September, 1936. In December, 1936, a majority of shares of the stock was transferred to Beekley, and as new directors he, Huntoon, who signed the notes, and a third party took office. In March, 1937, Glaser sold the equipment to the corporation, taking notes for the unpaid balance on the contract. Plaintiff made substantial payments on the notes and kept the equipment until it was traded in on some other that was new.

Plaintiff now seeks to repudiate the agreement and not to pay the balance of the purchase price on the ground that Beekley had not signed and handed over the registration slip and that Huntoon was not authorized by the corporation to execute the notes. Yet at the time of the purchase by the plaintiff corporation Beekley was its majority stockholder and knew that Glaser could not turn over the registration slip which Beekley himself still retained. The equipment was accepted and disposed of by plaintiff for its own benefit.

[1, 2] Since this is an equitable proceeding initiated by plaintiff, it is apparent from the record that it is estopped to deny its obligation. Any deficiency in the findings as to such estoppel could be supplied on the basis of the admitted facts. Since additional findings, if made, would support defendants' case and would be adverse to plaintiff, it cannot complain of the omission.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.

48 Cal.App.2d 500

NASON v. NASON.

Civ. 2730.

District Court of Appeal, Fourth District, California.

Dec. 16, 1941.

1. Divorce ⇐27(1)

To constitute "extreme cruelty" within divorce statute, the acts must be directed toward the other party and must be committed with a malevolent motive. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Extreme Cruelty".

2. Divorce ⇐27(7)

Where wife went to husband's physician for purpose of ascertaining if he knew of any reason why she should not have a child and physician allegedly informed her that he had made a test and that everything had been all right except for a one plus Kahn, which was not a positive indication of disease, and wife reported to her physician her conversation with husband's physician, anything which wife told her physician regarding her conversation with husband's physician constituted a "privileged communication," as regards husband's right to obtain divorce on ground of extreme cruelty because of alleged great humiliation and grievous mental suffering caused by wife's statement to her physician. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Communication".

3. Divorce ⇐130

In husband's divorce action, where husband's physician admitted that he had told wife that some test used on husband was one plus and wife who was called as husband's witness and not for cross-examination testified that she went to husband's physician to ascertain if he knew reason why she should not have a child, that physician informed her that he had made a test and that everything had been all right except for a one plus Kahn, and that wife went to her own physician the next day and told him what the husband's physician had said to her, the evidence did not entitle husband to divorce on ground of "extreme cruelty." Civ.Code, § 94; Code Civ.Proc. § 2055.

4. Divorce ⇐130

In husband's action for divorce where evidence justified inference that husband drank too much, evidence regarding wife's regulation of husband's eating and drinking was insufficient to support finding of "extreme cruelty" so as to entitle husband to divorce, especially in absence of any evidence of injurious effect upon physical and mental health of the husband. Civ.Code, § 94.

5. Divorce ⇐130

In divorce action, the question whether grievous mental suffering has been inflicted is a pure "question of fact" to be determined from all of the circumstances of each case and not from a part of them. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Action for divorce by Harold H. Nason against Jean M. Nason. From an adverse judgment, plaintiff appeals.

Affirmed.

A. C. Finney and C. B. Smith, both of El Centro, for appellant.

Harry W. Horton, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is a contested action for divorce on the ground of extreme cruelty. At the conclusion of the plaintiff's case a motion for a nonsuit was granted and a judgment entered against the plaintiff, from which he has appealed.

The appellant, who is a druggist, and the respondent, who was a graduate nurse, were married on June 18, 1938. Shortly before their marriage each submitted to a premarital examination, which included a test for venereal diseases. Shortly prior to that the appellant, on the advice of his physician, had taken treatments for a venereal disease which he claims were merely precautionary.

Sometime in January, 1939, the appellant learned that his wife was pregnant. Shortly thereafter, he left her and removed to a hotel. The respondent, who was called as the appellant's own witness and not for cross-examination under section 2055 of the

Code of Civil Procedure, testified that shortly before such leaving the appellant asked her to have an abortion performed and that she replied that it was too late. While the appellant denied that he had thus requested an abortion, in a letter to the respondent's father written on April 25, 1939, after stating the fact that he had "always drunk considerably but while going with Jean toned it down" and referring to the fact that they had quarreled over his drinking, referred to the unborn child and said: "This also has been a very serious difference as I have not wanted children as yet. Jean deliberately deceived me in this, not letting me know until three months when nothing could be done."

After staying away a few days the appellant returned to live with the respondent. Sometime in April, 1930, he learned that the respondent had taken a few doses of salvarsan, which is used in the treatment of syphilis. After receiving this information he wrote the letter to the respondent's father above referred to, saying he wanted a divorce but that the respondent did not want one and giving as the only reasons for his desire for a divorce that the respondent had tried for six months to "transform me into the ideal husband", that she had objected to his drinking and that she had deceived him with respect to the unborn child until it was too late to do anything about it. He testified that early in May he told the respondent that he had lost all affection for her, that he could not go on living with her but that he would remain with her until after the child was born. The child was born on August 18, 1939, and the appellant finally left the respondent on October 7, 1939, and brought this action some two months later.

Two grounds of cruelty on the part of the respondent were alleged in the complaint and are relied upon by the appellant, and the sole contention here is that the evidence with respect to these matters was such that the court erred in entering judgment after motion for nonsuit. The grounds of cruelty thus relied on are: (1) That the respondent had caused the appellant great humiliation and grievous mental suffering by telling her physician, who was a friend of the appellant, that the appellant was suffering from syphilis and by falsely pretending and stating to this physician that she had been exposed to this disease by her husband; and (2) That she had caused him great humiliation and mental suffering by attempting in public places to prevent the appellant from partaking of certain dishes and foods then being served, by attempting to prevent him from taking more than one drink of intoxicating liquor, and by regulating and regimenting his life by dictating what clothes he should wear.

With respect to the first of these charges of wrongful infliction of mental suffering upon the appellant he testified that in April, 1939, in response to certain inquiries he made, his wife informed him that she was taking salvarsan shots given her by her physician; that shortly thereafter he asked her physician why these shots were being given and was told that his wife had informed the physician that she had gone to the appellant's doctor and had by him been informed that the appellant "had a one plus Wasserman"; that he informed this doctor that his own doctor had taken no tests of him since before the marriage; and that the tests were then negative, both as to the Wasserman and Kahn tests. The respondent testified that on the night of the day in February, 1939, when the appellant left her the first time she went to the appellant's physician for the purpose of ascertaining if he knew of any reason why she should not have a child; that this doctor informed her that as far as he knew the appellant's blood was clean and there was no reason why he should not have a child, that he had made a premarital examination and tests for the appellant, and that while he could not discuss the details without the appellant's permission he could tell her that everything had been all right except for a one plus Kahn, which was not a positive indication of syphilis; that she went to her own doctor the next day and told him what the appellant's physician had said to her; that her physician recommended shots of salvarsan as a precautionary measure for the protection of herself and the unborn child; and that she took the shots. This is strongly corroborated by the testimony of the appellant's physician, who testified that the respondent came to him on this occasion "and she was trying to find out the possible reason why Mr. Nason was leaving her"; that he told her there was no reason why she should not have a baby; that he may have told her that the appellant had a one plus Neisserian fixation test; that such tests are used in gonorrhea cases and "if it was a one plus I may have mentioned that result to Mrs. Nason"; that he may not have made himself clear and that "if

it happened that way I am very sorry I did not explain myself"; and that the gist of the matter discussed was that the appellant did not want the respondent to have a child and she wanted to know if there was any reason why she should not.

[1-3] In Dahnke v. Dahnke, 55 Cal.App. 12, 202 P. 894, 895, the court said: "By section 94, Civil Code, extreme cruelty is defined as 'the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage.' The language of the statute would seem to import acts directed toward the other party and with a malevolent motive." The court then remarked that "it is conceivable a case might be imagined which would fall within the meaning of the words without such motive". But we think that no such case is here presented. The charge here is that the respondent falsely told her physician, who was a friend of the appellant, that the appellant was suffering from syphilis and that she had been subjected to danger of infection therefrom. The only evidence of anything in this connection is that of her report to her doctor of her conversation with the appellant's physician. Not only was anything she told her doctor a privileged communication, perfectly justified under the circumstances, but it clearly appears that she made the disclosure only for the purpose of protecting the health of herself and her unborn child, and that, at the most, if the respondent did not correctly report to her doctor what she had been told by the appellant's doctor it was merely an error and one that might easily be made without any wrongful intent. The appellant's doctor admitted that he had told her that some test used on the appellant was one plus and he expressed regret that he had not explained the matter more fully. The only reasonable inference that can be drawn from the evidence is that the respondent had a good reason for doing what she did in going to both doctors, and no inference that she did this wrongfully or with any intention of injuring the appellant or his reputation could reasonably be drawn.

In connection with the charge that the respondent regulated and regimented the life of the appellant with respect to what he might eat and drink and the clothes he might wear, the appellant testified that shortly after their marriage the respondent commenced to tell him what amount he should drink and what things he should eat, "going into the amount of calories I was taking on during the day, and things like that"; that during the fall of the year 1938 they frequently visited another couple; that while they did not do a lot of drinking they would possibly have a highball before a meal; that on these occasions trouble usually came up over the matter of drinking and eating; that quite often his wife would snatch a highball from his hand and either give it back to her hosts or drink it herself; that "when it came to food she would see to it my food was prepared the way she wanted in the kitchen when they were preparing the food and when it was being served at the table she would see to it that the dishes I wasn't supposed to have weren't put where I could get them"; and that she would do this "largely by acting" although she would sometimes say that he had had too many calories. While he testified that his wife would usually allow him to have but one cocktail he further testified that on one occasion at a dinner at the home of a friend, a fruit cocktail was served with just enough brandy in it to give it a flavor and his wife objected to his eating it and embarrassed him considerably and also embarrassed their hosts. On another occasion, while they were having dinner at the International Country Club, after he had had a glass of wine his wife told him he could not have any more and while he was trying to pour another glass she grabbed hold of the bottle, as a result of which some of the wine was spilled, and that there were a lot of people present "which is very embarrassing". He further testified that his wife left standing orders with a restaurant where he frequently ate that he was not to have certain things, that when he had potatoes he was not to get bread, and that he was not supposed to eat certain other things, and that she "enforced those regulations"; that he ate his noon lunch at his drug store; that she brought lunch to him; that he was supposed to drink milk at noon but it had to be skim milk; and that in the presence of the customers his wife would pour the cream off a bottle of milk and pour the rest of the milk out for him "which was rather embarrassing to me because I have reached mature years". He further testified that his wife would lay out his clothes for him instead of permitting him to choose his own clothes from the closet and his own socks and shirts from the bureau drawers, that on one occasion when his brother gave him a watch chain for Christmas she wanted it

exchanged for another chain, and that finally, "rather than to stem the tide" his brother exchanged the chain. The appellant was not asked what effect these embarrassing and humiliating matters had upon his health, but in reply to a question as to its effect upon his "nature and happiness", he replied: "Well, it completely ruined any happiness I had and it has had an influence on my work at the store. I put in long hours and filling prescriptions requires steady nerves and concentration and accuracy, which was hard to do after staying up most of the night arguing and finding fault and the charges of syphilis all caused me to lose my affection completely and confidence."

[4, 5] The evidence justifies the inference that the appellant drank too much, a fact which he admitted in his letter to the respondent's father, and he admitted that he was getting too fat. The matters involved in the second charge of mental cruelty are largely trivial and are entirely insufficient to support a finding of such cruelty within the meaning of the statute, especially in the absence of any evidence of their injurious effect upon the physical and mental health of the appellant. There is no evidence that such regulation of his eating and drinking as appears was not beneficial to the appellant, and a large part thereof seems to have been acquiesced in by him. The only active outburst on the part of the respondent, in grabbing a wine bottle on one occasion, may well be explained by the condition she was in and possibly by the condition he was in. The appellant even complains of a degree of wifely ministration in laying out his clothes which most of us would be glad to obtain. The question whether grievous mental suffering has been inflicted is a pure question of fact to be determined from all of the circumstances of each case and not from a part of them. Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660. After reading all of the record it seems hardly possible that any judge could have considered the evidence sufficient to support a finding of extreme cruelty on the part of the respondent. Having in mind the well-established rules surrounding the granting of nonsuits, no good reason appears why a decision in this case should have been postponed until after evidence was produced on behalf of the defendant; the trial judge had to pass upon the sufficiency of the evidence produced by the appellant; and, in our opinion, in such a case the technical rules of nonsuit did not require the judge to shut his eyes to the obvious or to believe what the appellant's evidence in its entirety shows to be not true.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.



WHITFIELD v. DEBRINCAT. *

Civ. 11602.

District Court of Appeal, First District, Division 2, California.

Dec. 17, 1941.

Rehearing Granted Jan. 16, 1942.

1. Trial ⇐267(3)

The trial court's modification of defendant's requested instruction relating to the statutory duty of a motorist to keep on right half of highway by striking statement that if jury found from evidence that plaintiff failed to comply with the statute and that such failure proximately caused his injuries, plaintiff was guilty of negligence and could not recover was error, where stricken portion was not treated in any of the other instructions. St.1931, p. 2125, § 124.

2. Automobiles ⇐246(2)

The refusal of defendant's requested instruction that the defendant was not required to use highest degree of care in operation of his automobile at time and place of collision was error, especially where the court granted plaintiff's requested instruction that plaintiff at time of accident was not under duty of exercising the utmost or highest degree of care. St.1931, p. 2120, § 113(a).

3. Automobiles ⇐246(24)

Where the trial court granted plaintiff's requested instruction that one who is himself exercising ordinary care has right to assume until the contrary becomes apparent that all other persons using street or highway will obey the law and use ordinary care, the refusal to give defendant's requested instruction that plaintiff was not

* Subsequent opinion 123 P.2d 591.

entitled to assume that others would exercise ordinary care if plaintiff was acting in a negligent manner or was himself violating any of the rules of the road, was error.

4. Negligence ⇐141(8)

Instruction that "contributory negligence" is such an act or omission on the part of an injured party amounting to a want of ordinary care, as concurring or cooperating with the negligent act of a defendant, was "the" proximate cause of the injury complained of, was erroneous as imposing on defendant more of a burden than the law provided.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory Negligence".

5. Appeal and error ⇐1066
Trial ⇐253(4)

In action for injuries sustained in automobile collision, instruction that before plaintiff could recover, it must first appear by preponderance of evidence that defendant was guilty of some act of negligence which contributed proximately to the accident, was prejudicially erroneous because in effect informing jury that defendant would be liable if his acts contributed to the accident although the acts of the plaintiff also contributed thereto.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Albert J. Whitfield against Joseph Debrincat for injuries sustained in an automobile collision. From an adverse judgment, defendant appeals.

Reversed.

John J. Taheny, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco (Archibald D. McDougall, of Sacramento, and A. Dal Thomson, of San Francisco, of counsel), for respondent.

STURTEVANT, Justice.

At about 8:15 p. m. on the evening of July 8, 1933, plaintiff was driving a light Buick automobile in a southerly direction on the Skyline boulevard in San Mateo county. The defendant Debrincat was driving a heavy Buick automobile northerly along said boulevard. At a point about two miles south of the boundary line between San Mateo county and San Francisco the two automobiles collided. To recover damages for injuries sustained in said collision the plaintiff commenced this action. The defendant answered and on the issues framed a trial was had. The verdict was in favor of the defendant. A motion for a new trial was granted. A second trial was had in May, 1935, and the verdict was in favor of the plaintiff. A motion for a new trial was granted and the order was affirmed on appeal. Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960. A third trial was had in July, 1937, which resulted in favor of the defendant. A new trial was ordered and that order was affirmed on appeal. Whitfield v. De Brincat, 35 Cal.App.2d 476, 96 P.2d 156. A fourth trial was had in April, 1940, which resulted in a verdict of $14,000 in favor of the plaintiff. This appeal is from the judgment entered upon said verdict.

At the point where the accident occurred the plaintiff was driving uphill and the defendant was driving down-hill on a grade of about four and one-half per cent. Neither car was traveling faster than thirty miles per hour. Both cars had their lights turned on and each car was seen by the driver of the other at least one hundred feet distant. The roadway was paved and had a white stripe painted along its middle line. The course of the road was very crooked and at about the point of the collision the road described curves in the shape of the letter "S".

Riding in the car with the plaintiff Whitfield was a guest, Madeline Trobock. Riding with the defendant was Joe Grima. Excepting those individuals there was no other eye-witness. There was not a particle of contention on the part of either of the litigants that any other person was responsible for the accident except the plaintiff and defendant. It was the contention of the plaintiff that the defendant was driving on his left-hand side of the road and in a space across the white line. On the other hand, it was the contention of the defendant that the plaintiff was driving on his left-hand side of the road and in a space on his left-hand side of the white line. These two conflicting theories were presented by the attorneys for the respective parties with meticulous care in their opening statements. The evidence introduced by the parties was hopelessly conflicting.

[1] The defendant asked the trial court to give an instruction as follows: "You are instructed that the California Vehicle Act, in effect at the time of the accident complained of, provided that upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway and as close to the right-hand edge or curb of such highways as is practicable, except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, if such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made completely without interfering with the safe operation of any vehicle approaching from the opposite direction; and provided that such overtaking vehicle shall return to the right-hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction, and in no event shall a driver drive to the left side of the center line when approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed, *and if you find from the evidence that the plaintiff, Whitfield, failed to comply with said law, and that such failure proximately caused his injuries, then you are instructed that said plaintiff was guilty of negligence and cannot recover against the defendant.*" (Italics ours.) The trial court struck out the portion we have italicized and then gave the instruction. The defendant contends the modification was error. We think it was. The portion stricken out was a correct statement of the law, it was of the gravamen of the defense, and it was not treated generally nor specifically in any of the other instructions.

The trial court, acting on the request of the plaintiff, gave an instruction as follows: "You are instructed that the plaintiff while in the operation of his automobile immediately prior to and at the time of the accident involved in this case, was not under the duty to exercise the utmost or highest degree of care. The only duty imposed upon plaintiff was that of exercising the care of an ordinarily prudent person acting under like circumstances, and if you should find from the evidence in this case that said plaintiff immediately prior to and at the time of the said accident, was conducting himself while in the operation of his automobile in the same manner that any other person of ordinary care and prudence, acting under like circumstances, would have conducted himself, then said plaintiff was not guilty of contributory negligence." The defendant claims the court erred in giving it because the effect was to tell the jury that the plaintiff was bound to use only ordinary care even though he violated express provisions of the statute by not giving to defendant his one-half of the main traveled portion of the road as nearly as possible. California Vehicle Act, § 124, St.1923, p. 557, as amended by St.1931, p. 2125.

[2] The defendant quotes the first sentence of the instruction last mentioned, given at the request of the plaintiff, and then the defendant complains because the trial court refused one of his instructions which, in part, was as follows: "You are instructed that the defendant Joe Debrincat was not required to use the highest degree of care in the operation of his automobile at the time and place of the accident." The portion quoted from the instruction given at plaintiff's request appears to be a fair statement of the rule stated in section 113, subdivision (a) of the California Vehicle Act. But that rule was applicable to both drivers. Both drivers were therefore entitled to have their acts measured by the calls of said statute. It follows that the trial court erred in not giving the instruction asked by the defendant. The error was enhanced by the fact that the rule was applied to the plaintiff and denied as to the defendant. To that extent the latter did not have a fair trial.

[3] Acting upon the request of the plaintiff the trial court instructed the jury as follows: "One who is himself exercising ordinary care has a right to assume, until the contrary becomes apparent, that all other persons using a street or highway will obey the law and use ordinary care." But it refused to give defendant's requested instruction: "While it is the law that the plaintiff Albert Whitfield had a right to assume that all others, including the defendant, would exercise ordinary care and obey the rules of the road herein defined, he was not entitled to assume that others would exercise ordinary care if at the same time the plaintiff was acting in a negligent or careless manner or was himself violating any of said rules of the road." As stated by the court in Varner

v. Skov, 20 Cal.App.2d 232, 67 P.2d 123, if the first instruction was given the other one should also have been given.

[4, 5] The trial court instructed the jury: "Contributory negligence is defined as such an act or omission on the part of an injured party amounting to a want of ordinary care, as concurring or cooperating with the negligent act of a defendant, was *the* proximate cause of the injury complained of." (Italics ours.) The defendant contends it was not a correct statement of the law. It was not. Morris v. Purity Sausage Co., 2 Cal.App.2d 536, 38 P.2d 193. It imposed more of a burden of proof than the law provided on the defendant. The error did not stop there. The court also instructed the jury: "Before the plaintiff can recover in this action it must first appear by a preponderance of evidence that the defendant was guilty of some act of negligence which *contributed* proximately to the accident." (Italics ours.) It will be noticed that the first one in effect told the jury that contributory negligence, to be a defense, must show that the acts of the plaintiff were the sole cause of the accident and the other instruction, in effect, told the jury the defendant would be liable if his acts contributed although the acts of plaintiff also contributed to the accident. That is not the law and is prejudicial error. Gale v. Helmbacher Forge & Rolling Mills Co., 159 Mo.App. 639, 140 S.W. 77. In that case, 140 S.W. at page 81, the Court of Appeals of Missouri said: "There is evidence in the case tending to show negligence on the part of defendant and evidence tending to show contributory negligence on the part of the plaintiff, but no evidence whatever tending to show that there was any independent cause contributing to the injury. With the evidence in that state, it has been recently held by our Supreme Court to be reversible error to give an instruction using the words 'contributed to cause the injury,' for the reason that such an instruction is indefinite and inconsistent and liable to be very misleading and confusing to the average jury, either causing them to speculate as to unknown causes which might have contributed, with defendant's negligence, to cause plaintiff's injury, or to assume that plaintiff might recover if his injury was caused by his own negligence, contributed to by the negligence of the defendant. Hof v. [St. Louis] Transit Co., 213 Mo. 445, 111 S.W. 1166; Krehmeyer v. [St. Louis] Transit Co., 220 Mo. 639, 120 S.W. 78. Following these controlling authorities, this court condemned similar instructions in the following cases: Schmidt v. [St. Louis] Transit Co., 140 Mo.App. 182, 120 S.W. 96; Wilson v. [United] Railways Co., 142 Mo.App. 676, 121 S.W. 1083; Garrett v. Wabash Railroad Co., [159 Mo. App. 63], 139 S.W. 252 * * *. The reason for the ruling is fully discussed in those cases."

That the errors recited above were highly prejudicial is shown by the physical facts shown by the evidence. As the result of the collision the left front wheel of the defendant's car was broken off and the left hub dropped onto, and commenced to scrape along the highway. The scraping was so violent that scars were made which could be seen months afterward. Those scars or ruts commenced on defendant's right-hand side of the road and followed to the north and west before the defendant could stop his car. Again the plaintiff's car showed that it was hit twice —once immediately behind the front fender and again at the rear end. It was at all times the contention of the defendant that shortly prior to the collision the plaintiff's car was well over the white line on plaintiff's left, that as the cars approached the plaintiff attempted to swerve to his right, that as he did so his car presented its side in front of defendant's car and while in that position the cars collided. The two indentations on the plaintiff's car at least tend to corroborate the defendant's explanation and if his theory is sound it follows that the acts of the plaintiff and not the acts of the defendant, were the proximate cause of the accident.

The defendant assigns some rulings on the admission or rejection of evidence and claims they were errors. He also earnestly contends that the verdict was excessive. In view of the conclusions we have reached above it is not necessary to discuss the latter assignments. But for the other errors hereinabove discussed the judgment is reversed.

NOURSE, P. J., and SPENSE, J., concurred.

48 Cal.App.2d 465

In re BUCHER'S ESTATE.

HARRIS v. MELNIK.

Civ. 13375.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1941.

Hearing Denied Feb. 11, 1942.

1. Judgment ⇐199(3)

In passing upon a motion for judgment notwithstanding verdict, trial court's inquiry begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

2. Wills ⇐341

A motion for judgment notwithstanding verdict for contestant opposing probate of will conceded as true the evidence on behalf of the contestant, with all fair and reasonable inferences to be deduced therefrom, and trial court had no power to weigh the evidence but was bound to view it in the most favorable light in support of the verdict.

3. Wills ⇐341

In will contest, where jury necessarily could have found that a confidential relationship existed between testatrix and one who was proponent and sole beneficiary, trial court, upon proponent's motion for judgment notwithstanding a verdict by which jury specially found that will was procured by undue influence of proponent and sole beneficiary, was presented only with questions whether there was any substantial evidence that proponent was active or participated in procuring execution of will or in its preparation, and whether he unduly profited under its terms

4. Wills ⇐166(12)

Undue influence over a testatrix may be proved not only by indirect evidence but by proof of facts from which undue influence may be inferred.

5. Wills ⇐166(12)

In a will contest on ground of undue influence, contestant is not restricted to bare facts which he may be able to supply, but he is entitled to benefit of all inferences which may legitimately be derived by jury from facts as established.

6. Wills ⇐155(1)

"Undue influence," as used in will contest, is relative, that is, influence which reaches stage of being undue influence is not at all the same in every case, and, accordingly, every case must be viewed in its own particular setting.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

7. Wills ⇐164(3)

In will contest on ground of undue influence, jury was entitled to consider, as part of its setting, whether it was a usual thing for testatrix to bequeath her entire estate to her personal physician, where she had known physician for less than two years and there was no basis for such bounty on part of physician.

8. Wills ⇐166(2)

Evidence was sufficient to present question for jury as to whether will was procured by undue influence of proponent and sole beneficiary, who was personal physician of testatrix, a widow of 59 years of age at time she executed will.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Proceeding in the matter of the estate of Ethel Sherwood Bucher, deceased. Morris Melnik filed a petition for the probate of the will of deceased, which petition was opposed by John M. Harris. From a judgment admitting the will to probate notwithstanding a verdict by which jury specially found that will was procured by undue influence of the proponent and sole beneficiary, the contestant appeals.

Judgment reversed, with instructions.

Moore & Welker, Fred W. Heatherly, and Henry T. Moore, all of Los Angeles, for appellant.

Stanley N. Barnes and Henry Haves, both of Los Angeles, for respondent.

HANSON, Justice pro tem.

This appeal by the contestant, the sole heir at law of decedent Ethel Sherwood Bucher, opposing the probate of her will presents the single question whether there was any substantial evidence upon which a verdict for the contestant might properly be found. By its verdict the jury specially found that the will was procured by the undue influence of Dr. Morris Melnik, the proponent and sole beneficiary of the will. The trial court after the verdict of the jury, upon motion of the proponent, entered judg-

ment admitting the will to probate notwithstanding the verdict.

[1-3] In passing upon such a motion the trial court's inquiry "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury". Juchert v. California, etc., Co., 16 Cal.2d 500, 106 P.2d 886, 888. A motion for judgment notwithstanding the verdict "concedes as true the evidence on behalf" of the contestant, "with all fair and reasonable inferences to be deduced therefrom. * * * The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict." Hunt v. United Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184, 188. In short, the court must disregard conflicting evidence and give contestant's evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn from the evidence. In a case such as this, where it is conceded and where the jury necessarily could have found, that a confidential relationship existed between the decedent and the proponent, the trial court, upon the motion for judgment notwithstanding the verdict, was presented (if such a motion could be entertained—which we do not decide) with only two questions. These questions, presented to it as matters of law, were whether there was any substantial evidence (1) that the proponent was active or participated in procuring the execution of the will or in its preparation, and (2) that he unduly profited under its terms. If there was affirmative evidence on those two points then it was wholly unnecessary for the trial court to consider whether there was or was not additional matters of undue influence shown, as under such circumstances it would be its duty to deny the motion. In re Estate of Lances, 216 Cal. 397, 14 P.2d 768.

As we are of the opinion that the evidence was sufficiently substantial to have permitted the jury to find that there was undue influence practiced upon the decedent in the making of her will, we shall set forth only such evidence as favors the verdict. In short, we mention only those facts which the jury could have found were true, derived either from the testimony as given or properly inferred from the facts and circumstances shown.

The testatrix at the time she made her will was a widow fifty-nine years of age. She was a graduate of Wellesley College. She had been a librarian in the Library of Congress prior to her marriage, and shortly after her marriage was for a time the college librarian of the University of California at Berkeley. Within twenty-two months of the time the decedent, Mrs. Bucher, first met an utter stranger to her, the proponent Dr. Morris Melnik, and engaged him as her personal physician, she had made her will leaving all of her estate to him, although she had paid every bill for medical services as rendered by him and was in no manner indebted to him. Moreover, after the execution of the will and up to her very last illness she likewise was billed and promptly paid every bill rendered by him. By the making of the will in question she caused a revocation of her will made in 1934 together with her 1936 codicil thereto, which had bequeathed and devised all her estate to her relatives and those of her deceased husband. What she knew or did not know about her new will or its contents is not disclosed by any evidence in this record, other than the testimony of the draftsman of the will who was selected for her by the proponent.

On September 7, 1937, proponent sent the testatrix by ambulance from his office to the hospital. The hospital chart indicated she was suffering from essential hypertension, arterioschlerotic heart disease, acute congestive heart failure and from an old cerebral thrombosis. Prior to that and in June, 1936, the proponent, with Dr. Goldsmith giving the anesthetic, operated on her for a goiter. As a result of the operation she suffered a secondary anemia, and on October 11, 1936, had her first stroke. The next month proponent operated on her for gallstones. On July 28, 1937, he again sent her to the hospital for post-operative hypophryopism, hyperchronic anemia and because she was additionally suffering from an old cerebral thrombosis. Within a month after she left the hospital proponent again hospitalized her, but this time because of acute alcoholism. In yet another month she was returned to the hospital, as above stated, on September 7, 1937, where she remained until October 17, 1937. On September 8, 1937, proponent telephoned Mrs. Bucher's apartment house manager that Mrs. Bucher wished her will, which was in her desk, and her safety deposit box key, which was in her bank book, likewise in her desk. He requested that these items be

gathered up by the manager and that he would call for them on the following day. This he did. While calling the preceding day for some toilet articles belonging to Mrs. Bucher, proponent had instructed the manager that if anyone should inquire as to Mrs. Bucher's whereabouts no information was to be given other than to say she was under the doctor's care. He called at the apartment house mailbox for Mrs. Bucher's mail on several occasions.

Six days after Mrs. Bucher was hospitalized at the time in question— and during a period when the nurses had instructions from the proponent not to permit anyone to see her—the attorney, whom proponent selected to draft her will, and who for fifteen years had been the attorney of proponent's father-in-law and the latter's family, saw the testatrix in the hospital and was there introduced to Mrs. Bucher by the proponent. On September 16, 1937, the will was signed by the testatrix in the hospital. The witnesses were the attorney and Dr. Goldsmith, who is the office associate of proponent. Dr. Goldsmith testified, when he gave his deposition prior to the trial, that he did not recall whether Mrs. Bucher had signed the will when he affixed his name as a witness. At the trial he testified positively that both she and the attorney affixed their respective names, in his presence, before he signed it as a witness.

Matters indicative of Mrs. Bucher's condition both immediately prior and subsequent to the execution of her will—which indicate that Mrs. Bucher might easily be imposed upon—were these: She urged her apartment house manager (Mrs. Buckley) to put up her car and ride only in "Yellow Cabs" because there was danger from above, such as air raids. Testatrix followed this statement with the fact that she was making arrangements with the Yellow Cab Company to put a direct telephone line into the apartment. On the second morning in the hospital Mrs. Bucher telephoned Mrs. Buckley, inquiring of her: "Do you think it is going to rain today?" And when Mrs. Buckley replied, "Well, it looks like a lovely day now, Mrs. Bucher", the latter responded: "Well, you know I am going on my honeymoon today. I am going to West Lake Park [Los Angeles]. Do you think there will be an air raid? Do you think it will be safe?"

Some two or three weeks after the will was executed Mrs. Bucher from the hospital telephoned Mrs. Buckley requesting that she call on her. When Mrs. Buckley did so she observed a marked change in Mrs. Bucher. She observed that Mrs. Bucher would lose the thread of her conversation and in doing so would just laugh and remark, "Oh, well, no matter".

Proponent testified that either on the day of the execution of the will or subsequent thereto Mrs. Bucher "very vaguely" told him she was going to remember him in some substantial way. On the trial he said that she had never told him she would remember him substantially.

Shortly prior to Mrs. Bucher's return to her apartment from the hospital on October 17, 1937, the proponent visited the apartment house manager, stating a nurse would return with Mrs. Bucher and that she would need a larger apartment. He requested the manager to reduce the regular rate of the apartment he selected. He placed the request on the basis of Mrs. Bucher's many absences at the hospital. The nurse mentioned was engaged by the proponent. After the nurse had been with Mrs. Bucher some three or four weeks she told Dr. Melnik that she was quitting as she had not understood it was a "mental case" when he engaged her.

In connection with proponent's activities surrounding the execution of the will it is of some significance that when Mrs. Bucher died the nurse handed him a card whereon Mrs. Bucher had written that in case of her death she desired Reverend John Harris, the contestant here, to be notified. Instead of notifying him the proponent personally called the attorney who had drafted the will. The testimony given by the attorney is significant. From it the jury could have inferred that the proponent knew much more about Mrs. Bucher's will than his own testimony would indicate. Summarized, the conversation between proponent and the attorney as given by the attorney is this:

"After this will was signed I retained the original of the will and took it to my office. She never saw it again during her lifetime. I did not at that time leave a copy with her. She didn't want a copy while she was in the hospital. She did not express any hatred or feeling against the Reverend John M. Harris at the time I conversed with her. She told me to notify him if anything happened to her. Dr. Melnik telephoned me at the death; I think it was the day she died or the day after. He said, 'Mrs. Bucher died and the nurse handed me a card—to notify you in the event of her death. What are we supposed to do now?' I said, 'Well, I will

notify her uncle by telegram immediately, to make the necessary funeral arrangements.' Then he said, 'Then what do we do?' I said, 'If there are any documents of any kind in her desk, you gather those up, because under the terms of the will, unless she made a new will, you are the executor of the estate.' He said, 'Well, that is nice of her to appoint me executor. After all, I don't know much about these things. Will her family look after her affairs?' I said, 'Well, you happen to be the sole legatee under the will, unless she drew a new will.' He said, 'What?' He says, 'Say that again'. I said, 'You are the sole legatee under her will, unless she drew a new will.' 'Well', he said, 'that is certainly a surprise to me. She always said she was going to do things for me or surprise me, but I never expected anything like this.' I said, 'That is a fact. Let's get busy now and do whatever is necessary.'"

The proponent denied he had ever seen the copy of the 1934 will. When it was shown that he had written in his own handwriting the name of the attorney he selected, he explained it by saying that when he told Mrs. Bucher the name of the attorney who would come to draw her will he wrote the name for her on the "paper", as she wanted to be sure to remember his name when he called. The jury could infer from this that if the testatrix could not remember the name of the attorney for the space of a few hours her condition was not what it should have been. Moreover, the need for the attorney's name may have seemed unimportant to the jury, as proponent himself introduced the attorney to her when he came.

Prior to her operation in 1936 the decedent had appeared to her close friends to be very healthy. She was accustomed to walk between five and eight miles per day. After the operation she at times had to take the arm of a friend or support herself by furniture in order to move about. She seemed at times to have been unable to walk without assistance and was hesitant in her speech. In July, 1936, she was in a convalescent home. At that time her cousin, Mrs. Marvin (who was not a contestant and who was on the friendliest terms with decedent), came from Riverside to see her, for two reasons: (1) because she had been worrying ever since she saw Mrs. Bucher in August after her operation, and (2) because neither she nor Mrs. Bucher's relatives in the East had heard from her by letter, as was her wont, and all wished to know something about her. Mrs. Marvin having gone to Mrs. Bucher's apartment and being unable to learn her whereabouts, was referred to the proponent by the apartment house manager. She went to his office and was informed that he would not tell her where Mrs. Bucher was. Finally, however, he did tell her, and Mrs. Marvin, with her daughter-in-law, went to the convalescent home and there spent an enjoyable afternoon. Mrs. Bucher insisted on their having dinner with her. In February, 1938, Mrs. Bucher was again sent to the hospital by the proponent for, as he testified, high blood pressure and loss of weight. Her second stroke occurred on December 4, 1939, and on July 7, 1940, she died from a third stroke.

The decedent's letters to the contestant as late as June 16, 1940, disclosed she was on the most cordial terms with him and was concerned as to his financial situation, and offered to assist him by sending him $25 per month for the ensuing year for a little family genealogical research she suggested he do. Her attitude towards her husband's nephew is indicated by the fact that over a considerable period of time, and up to March, 1938, she sent either to him or his mother $150 every two months. When she and her husband had been financially stranded early in their married life this family took them into their own home for a year. As late as 1937 she gave some jewelry to her cousin, Mrs. Elmira Marvin, and the latter's daughter-in-law, Mrs. Eleanor Marvin, living in Riverside. In 1938 her conduct towards the latter changed violently. On one occasion in 1938, when Mrs. Bucher called on her cousin's daughter-in-law, Mrs. Eleanor Marvin, at an apartment in Los Angeles where the latter was living, she demanded that Mrs. Eleanor Marvin and her mother-in-law should not interfere with Dr. Melnik. A witness—the manager of that apartment house—testified that in her opinion it was Dr. Melnik (who was pointed out to her from the witness stand) who brought Mrs. Bucher there, at the time in question, and then left immediately. The doctor testified that Mrs. Bucher told him that she disliked her cousin, Mrs. Marvin. On the other hand, the letters to Mrs. Marvin indicated quite the contrary. The doctor further testified that decedent frequently mentioned matters that showed she was displeased with her family; that on several occasions she told him they were waiting for her money. On the other hand, her letters after the

execution of the will indicate just the reverse was the situation. From the evidence the jury would have concluded that decedent's change of attitude towards her relatives during the time stated was attributable to the proponent.

While the testimony of the proponent gives an altogether different color to the facts, yet we must view the facts as the jury could have viewed them, and as such they are set forth.

The question as to whether the proponent unduly profited by the will is solved by the terms of the will itself. In re Estate of Lances, 216 Cal. 397, 14 P.2d 768. He got thereby the entire estate of the decedent. How large or how little it was we do not know, as the trial court excluded evidence on the point.

[4-6] The remaining question which the trial court had for consideration on the motion was whether the proponent procured the execution of the will or participated in its execution. In determining that question the trial court was not, on the type of motion before it, entitled to weigh the facts of the case. Instead, its duty was simply to determine whether there was substantial evidence of undue influence. In the consideration of that question the trial judge was required to keep in mind that undue influence can rarely be established by direct proof, and that it is not necessary that it be so established. The rule in that respect is that it may be proved not only by indirect evidence but by proof of facts from which undue influence may be inferred. Moreover, a contestant in a case such as this is not restricted to the bare facts which he may be able to supply, but he is entitled to the benefit of all inferences which may legitimately be derived by the jury from the facts as established. 28 R.C.L., sec. 97. Here there was not only evidence from which a jury could infer that the decedent might easily have been imposed upon while in the hospital in her then physical and mental condition, but that a careful groundwork was laid by the proponent for a will, with the terms of that which was executed. Undue influence is relative. Influence which reaches the stage of being undue influence is not at all the same in every case. In one case it takes but little to unduly influence a person; in another case much more. It takes little influence generally in a case where a person is without mentality, intoxicated or under opiates. Accordingly, every case must be viewed in its own particular setting.

[7, 8] In viewing the background of the instant case the jury was entitled to consider, as a part of its setting, whether it is a usual or normal thing for a person to bequeath one's entire estate to one's personal physician, where one has known the physician for less than two years and where there is no basis for such bounty, or any bounty, on the part of the physician. Here the physician was paid for his medical services as he rendered them. When we add to that his activities in connection with the will, his contradictory testimony and the condition of the deceased not only when she went to the hospital but while she was there and after her return as well, the jury was not compelled to indulge in speculation or conjecture; it had circumstantial facts from which it was entitled to determine the true facts and to state those facts by its verdict. It did so here, and its verdict should have been upheld.

The judgment is reversed with instructions to enter judgment upon the verdict as rendered.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 528

MOAR et al. v. PIONEER-LUCKY STRIKE GOLD MINING CO. et al.

Civ. 6650.

District Court of Appeal, Third District, California.

Dec. 17, 1941.

1. Mines and minerals ⇐34

If an agreement for sale of mining claims was an option only, a court could not relieve buyer from default unless there was fraud on part of seller.

2. Vendor and purchaser ⇐143

A purchaser cannot refuse to pay because of defects in title and still keep the property.

3. Mines and minerals ⇐38(15)

In sellers' action against buyer's assignee and its transferee of mining claims to

quiet title on ground of default under sale, evidence that large part of unpaid purchase price had been impounded by what was virtually an agreement between the parties, that sellers permitted defendants to continue in possession, and that transferee had been forced out of mining operations by sellers' acts, sustained finding that there was no default, because delay in payments and cessation of operation of mine were due in part to sellers' actions.

Appeal from Superior Court, Amador County; Pat R. Parker, Judge.

Action by Rudolf Moar and others against the Pioneer-Lucky Strike Gold Mining Company and the Anozira Mining Company to quiet title to mining claims, wherein last-named defendant filed a cross-complaint bringing in other cross-defendants, and actions by the Anozira Mining Company against Rudolf Moar and others for conversion of personalty and for forcible entry and detainer. From judgments, plaintiffs in the first action appeal.

Affirmed.

Andrew L. Pierovich, of Lodi, and Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellants.

Horowitz & McCloskey, of Los Angeles, for respondents.

ROSS, Justice pro tem.

The Pioneer-Lucky Strike Gold Mining Company, a corporation, is referred to herein as "Pioneer" and Anozira Mining Company, a corporation, as "Anozira".

In the trial court three actions were consolidated. The first case was that of Rudolph Moar, Richard Moar, Nick Moar, and A. L. Pierovich, as executor of the estate of Frank Shafter, deceased, against Pioneer and Anozira. This was a quiet title action, and the defendant Anozira cross-complained and brought in other cross-defendants, mainly, James Douglas and James McKenna. The second action is for conversion of personal property, brought by Anozira against the Moars, Pierovich, Douglas and McKenna, and the third action is for forcible entry and detainer, also brought by Anozira against the same persons. In this opinion "the plaintiffs" means the plaintiffs in the first action. The decision as to the second and third actions depends greatly on the suit to quiet title and the main questions herein are connected with the first action.

On July 5, 1932, Shafter, now deceased, and the Moars, made an agreement with T. H. Rosenberger for sale of certain mining claims in Amador county, California. The option price was $55,000, of which $2,500 was paid down. Twelve thousand dollars was to be paid on or before July 5, 1933; $12,000 on or before January 5, 1934; $12,000 on or before July 5, 1934, and $16,500 on or before January 5, 1935. Also it was agreed that 20 per cent royalty on the net smelter or mint proceeds would be paid to plaintiffs each month, with a guarantee of $1,000 minimum per month. Later this agreement was assigned by Rosenberger to Pioneer, through one Horowitz. A supplemental agreement in August, 1932, provided, among other things, that notice by registered mail should be given by the sellers to the buyers of any alleged breach of covenant and that buyers should then have thirty days within which to rectify said breach.

Operations by Pioneer started early in December, 1932. The first month's royalty became due January 10, 1933. In the meantime, it had appeared that there was some litigation pending, a suit by R. I. Irons against the Moars and Shafter, based on a former contract of sale made between them for purchase by Irons of the mining claims. It was claimed that Irons had defaulted in his payments, and also his interest in the claims had been sold under execution for labor claims against him and had been bought in by the plaintiffs herein. The Irons contract, however, was recorded in the county recorder's office of Amador county. There was also on record a contract between plaintiffs herein and Jack Darnell covering an agreed sale of the same claims. The Irons contract was dated July 12, 1930, and the Darnell contract February 26, 1931.

In the first part of January, 1933, because of the Irons litigation, there were negotiations between Pioneer and the plaintiffs which led to the impounding by the American Smelting and Refining Company of the 20 per cent royalty due the plaintiffs on the concentrates shipped by Pioneer to said company. This impounding continued, although there were requests by plaintiffs that Bank of Amador County should be the depositary.

In the meantime, the Irons case was tried in February, 1933, and judgment adverse to

Irons was rendered on May 31, 1933. On March 1, 1933, Irons filed a second suit, including Pioneer as a defendant. Demurrers in that suit were filed but never were determined. In August, 1933, Irons filed a third suit which was tried in January, 1934, in which another judgment was given against him. However, a motion for new trial was granted, (later vacated as to Irons v. Superior Court, 10 Cal.App.2d 523, 52 P.2d 553), and the case was tried again late in 1935 and judgment was again rendered against Irons. In October, 1933, a quitclaim deed from Darnell to the plaintiffs had been recorded, ending litigation against him by plaintiffs.

In January, 1934, a notice of default was given by plaintiffs to Pioneer. In February, 1934, Pioneer assigned all its rights to Anozira. Soon after this plaintiffs filed suit for possession against Pioneer and Anozira. This is referred to in the record herein and in this opinion as the ejectment suit. Later the American Smelting and Refining Company interpleaded in this action, claiming $37,670.66, the total amount in its hands. It had been requested by plaintiffs when this action was commenced to impound, not only the 20 per cent royalty, but all proceeds from concentrate sales to it by Pioneer or Anozira. The mine was closed down in March, 1934, by Anozira because it depended on the proceeds from the smelter to operate.

In 1933, plaintiffs made an agreement with Douglas and McKenna, by which the latter financed all litigation with the understanding that they would get a lease or option from the plaintiffs on these mining claims when the claims of Pioneer, Anozira and Irons had been disposed of.

The suit between plaintiffs and Anozira and Pioneer was tried before a jury in July and August, 1935, as to the issue of possession, and the verdict was rendered in favor of defendants. The court then tried the issue as to disposition of the interpleaded money, and in January, 1936, rendered judgment giving plaintiffs $27,674.03 and Anozira $9,996.63 of this money. The clerk later paid the respective parties these amounts.

However, in January, 1935, another notice of default had been given by plaintiffs to Anozira and Pioneer for alleged failure to make any payments and alleged failure to properly work the mine, etc. At that time no payment had been made except the initial $2,500, but the $37,000 had been paid into court by the operators of the smelter, in the first suit, which was still undetermined. Thirty days was given Anozira and Pioneer to correct their alleged breaches of covenant.

In May, 1935, a lease was given on the mining claims by plaintiffs to Douglas and McKenna, and in June, 1935, plaintiffs and Douglas and McKenna entered the premises, dispossessed Anozira's watchman, took over all the tools and machinery and operated the mine for a time. This is the basis of the conversion and forcible entry actions herein.

On receiving the notice of default in January, 1935, Anozira wrote plaintiffs that it "does hereby tender the entire unpaid purchase price referred to. * * * Will you please advise when and where the cash may be delivered to you, at which time, of course, we will want to receive an instrument of conveyance". This was ignored.

After the judgment in the ejectment suit, which was in January, 1936, the instant quiet title action was commenced on March 9, 1936. On March 30, 1936, Anozira notified the plaintiffs that it would personally tender the unpaid purchase price to them at the Bank of Amador County, in Jackson, California, on April 13, 1936, at 11 a. m. At that time a reprcsentative of Anozira appeared there with $22,500 and tendered it, but was refused.

To turn back briefly, plaintiffs had made an agreement with one Bedford to pay him 10 per cent of the purchase price received by them on this deal, of which they had paid only $500. On the total purchase price of $55,000 Bedford would still have $5,000 due him. He had later assigned this claim to Anozira, which apparently considered that this should be deducted from the amount still due from it to plaintiffs. No point was made on this in the refusal of the tender of April 13, 1936.

The three instant cases were tried twice as consolidated cases. On the second trial judgment was given in January, 1939, quieting the title of plaintiffs, but making it subject to the Rosenberger agreement, and directing a conveyance to Anozira on payment of the $55,000 purchase price, with deductions for the $2,500 down payment, the $27,674.03 received by plaintiffs in the ejectment suit, the $5,000 due on the Bedford agreement, and the amounts and costs awarded to Anozira in the conversion and forcible entry actions, by which Anozira

was given $2,433 for the conversion of its machinery and tools and $4,093.44 damages for the forcible entry and detainer, these judgments being against both the plaintiffs and Douglas and McKenna. The court held the Rosenberger agreement to be valid and subsisting in favor of Anozira.

The determination of the quiet title action directly affects that of the conversion and forcible entry actions. If the judgment establishing Anozira's rights under the Rosenberger contract is correct, the evidence justifies the damages given for the conversion and forcible entry. If the rights of Anozira under this contract had been forfeited, the conversion and forcible entry actions would fail.

[1] Many of the points of law raised by the parties in their briefs need not be considered. Whether the agreement was an option or a conditional sale contract does not matter. If it was an option only, a court could not relieve a buyer from default unless there were fraud on the part of the seller. Briles v. Paulson, 170 Cal. 196, 149 P. 169. Whether the plaintiffs waived any default by accepting the $27,674.03 in the ejectment action or whether the judgment in that action made res judicata the alleged defaults prior to that judgment or only prior to the filing of the complaint need not be passed upon.

The court here found that Anozira was not in default and that any failure to make payments or to do work in the mine was due to the litigation which clouded the title throughout, and to the conspiracy between plaintiffs and Douglas and McKenna which led to some of that litigation with the consequent refusal of the operators of the smelter to pay Anozira any proceeds on its shipments of concentrates, etc. These findings are fully supported and justified by the evidence.

Just as soon as the ejectment suit was finally determined in 1936 Anozira sent its representatives to Jackson to make the personal tender of all unpaid purchase price. It made a tender in open court, also at the trial of the instant actions.

Prior to the 1936 tender a large part of the unpaid purchase price had been impounded by what was virtually an agreement between the parties, although there were variances such as the impounding by the smelter itself instead of using the Bank of Amador County. It was understood that the impounding would continue until plaintiffs could clear their title of the litigation.

In the 1933 agreement between plaintiffs and Douglas and McKenna we read, "It being understood and agreed that title free and clear of all encumbrances to said property, cannot be given and granted unless and until the two actions of R. I. Irons against second parties hereto and the action by said second parties against Jack E. F. Darnell shall have been settled and determined in favor of said second parties". Plaintiffs recognized that their title was clouded and that the impounding of money due was justified, and agreed to it. The first Irons suit did not settle the matter; the other two had to be disposed of. In fact, one of them still had undetermined demurrers on file at the time of the trial herein.

[2, 3] It is true that a purchaser cannot refuse to pay because of defects in title and still keep the property (Garvey v. Lashells, 151 Cal. 526, 91 P. 498), but here plaintiffs permitted defendants to continue in possession so long as the purchase price was being impounded until the determination of the first Irons suit. Probably sufficient receipts would have been impounded to pay the whole purchase price when Irons' claims had been finally disposed of if plaintiffs, with Douglas and McKenna, had not interfered with the impounding plan.

Plaintiffs' claim of forfeiture rests on its notice of default of January, 1935. At that time over $37,000 was being held by the operators of the smelter, Anozira had succeeded to Bedford's claim for $5,000 and Anozira had been forced out of mining operations by plaintiffs' ejectment suit, later adjudged adversely to them, and by their unjustified demands on the smelter. The trial court rightly found that under these circumstances, Anozira was not in default at that time.

The findings of the trial court were that the delay in payments on the purchase price and the cessation later of operation of the mine was due in part to the actions of plaintiffs themselves and their conspiracy with Douglas and McKenna, and that therefore there was no default on the part of defendants. The sole question is whether the evidence supports these findings. We hold that it fully does so.

The judgment in the three consolidated actions is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

MILLER et al. v. DYER et al. *

Civ. 2955.

District Court of Appeal, Fourth District, California.

Dec. 20, 1941.

Hearing Granted Feb. 16, 1942.

1. Specific performance ⇐114(2)

In action for specific performance of contract to exchange real properties, complaint, not alleging that two of defendants had contract with plaintiffs and agreed to convey realty owned by such defendants to plaintiffs, stated no cause of action as against such defendants.

2. Specific performance ⇐114(5)

In action for specific performance of contract to exchange real properties, where it appeared that one of defendants had no title to one of three parcels of realty which defendants agreed to convey to plaintiffs, complaint specifically alleged that owners of such parcel refused to convey it to such defendant, and it also appeared that she was unable to obtain loan on such parcel on terms required by contract and that specific performance thereof would give plaintiffs, property having a value exceeding that to which they were entitled under contract, complaint was insufficient.

3. Exchange of property ⇐8(3)

In action for specific performance of contract to exchange real properties, complaint, alleging that plaintiffs told one of defendants that they needed stated sum before a date within 24 days after execution of contract, that they had no means of getting such sum except through transaction with defendants, and that they would be able to make a deal for other property worth more than such sum, if they obtained it by such date, stated no cause of action for damages for breach of contract, in absence of allegation that such defendant agreed to complete transaction by such date or at any other specific time

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Curtis E. Miller and another against Mabelle M. Dyer and others for specific performance of a contract for exchange of real properties. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Howard F. Shepherd, of Los Angeles, for respondents Dyer.

BARNARD, Presiding Justice.

This is an action for specific performance. Demurrers to a second amended complaint were sustained with leave to amend. The plaintiff declined to amend and a judgment of dismissal was entered, from which the plaintiffs have appealed.

The complaint alleged that the plaintiff Miller owned certain real property in Los Angeles county; that the defendants Hector M. and Elizabeth H. Dyer owned certain real property in Orange county, which is referred to as parcel 1; that the defendant Mabelle M. Dyer owned two other parcels of land in Orange county referred to as parcel 2 and parcel 3; and that on October 17, 1940, the plaintiffs entered into a written contract with Mabelle M. Dyer for the exchange of these properties. It is alleged that by this contract Mabelle M. Dyer agreed to convey parcels 2 and 3 to the plaintiff Miller, to secure a loan of $2,000 on parcel 1 and pay that $2,000 to the plaintiffs, and to convey parcel 1 to plaintiff Wallis subject to said $2,000 incumbrance, and that the plaintiffs agreed to convey to Mabelle M. Dyer the Los Angeles property owned by Miller.

It is then alleged that at the same time defendant Mabelle M. Dyer entered into a written contract with defendants Hector M. Dyer and wife, whereby the latter agreed to convey parcel 1 to Mabelle M. Dyer and she agreed to pay therefor by executing and delivering to them a $3,000 trust deed on the property she was to receive from the plaintiffs. It is further alleged that the plaintiffs and the defendants Dyer entered into an escrow at a bank with appropriate written instructions; that Hector M. Dyer and wife executed and delivered into this escrow, with intention of passing title, a deed conveying parcel 1 to Mabelle M. Dyer; that this deed was returned to Hector M. Dyer and wife for the purpose of making a correction therein; that Hector M. Dyer and wife are now in possession of this deed and refuse to make said correction or redeliver the deed into escrow;

* Subsequent opinion 127 P.2d 901.

that Mabelle M. Dyer executed and delivered a trust deed on parcel 1 to defendant Laguna Federal Savings & Loan Association and arranged to borrow $2,000 on that property; that this loan association refused to make that loan unless $500 was deducted and retained for the purpose of making certain repairs on the property; that this loan association deposited $1,500 with the defendant title company to be held for the benefit of the persons entitled thereto upon the completion of the entire transaction; that in view of this deduction by this loan association Mabelle M. Dyer orally promised to make up this $500 and deposit the same in said escrow; that the plaintiff Miller placed in escrow a deed conveying his Los Angeles property to the defendant Mabelle M. Dyer; and that the defendant Mabelle M. Dyer placed in escrow a deed from herself to plaintiff Wallis covering parcel 1 and another deed from herself to plaintiff Miller conveying parcels 2 and 3.

It is then alleged that the defendants Dyer have repudiated the transaction and refuse to proceed further therewith; that the value of the Los Angeles property which the plaintiffs were to convey to Mabelle M. Dyer is approximately the same as the value of the properties, plus the cash, which she was to transfer to them; and that the plaintiffs told defendant Mabelle M. Dyer that they were in default on a trust deed on another piece of property they owned and needed $1,000 in cash to "reinstate the same", that they must have this cash before November 10, 1940, that this cash must come from the transaction here in question, and that if they received the cash by that date they could carry out another agreement whereby they would secure still other property which was worth $4,000. The prayer is for specific performance and that they recover damages in the amount of $4,000 against all of the defendants Dyer.

[1, 2] It clearly appears that the plaintiffs cannot specifically enforce this contract as against the defendants Hector M. Dyer and his wife since, so far as alleged in the complaint, these defendants have no contract with the plaintiffs and have never agreed to convey parcel 1, which they own, to the plaintiffs. It is equally clear that the contract cannot be specifically enforced as against the defendant Mabelle M. Dyer since she does not own parcel 1, and it is specifically alleged that the owners of that property refuse to convey it to her. It not only appears that Mabelle M. Dyer has not title to parcel 1 and that she cannot specifically perform her contract in this respect, but it also appears that even if she could get the title to parcel 1 she has been unable to obtain the $2,000 loan on that property upon the terms required by the contract, and that specific performance of the contract would give to the plaintiffs property having a value of $500 in excess of that to which they were entitled under the contract.

[3] No attempt was made to allege a cause of action for damages for breach of Mabelle M. Dyer's contract to convey the three parcels in exchange for the property owned by one of the plaintiffs. There is, however, an incidental attempt to allege a cause of action for damages against all of the defendants Dyer on account of not closing the deal by a specific date, although these allegations seem to affect only the defendant Mabelle M. Dyer. It is alleged that the plaintiffs told her that they needed $1,000 before November 10, 1940, that they had no means of getting it other than through this transaction, and that if they obtained it by that date they would be able to make another deal whereby they would obtain other property of the value of $4,000. There is no allegation that she agreed to complete the transaction by November 10, 1940, or at any other specific time, and no cause of action in this regard is stated. It may be observed that in view of the nature of this transaction it would hardly be reasonable to expect the entire transaction to be closed within twenty-four days after the making of the contract, and it is significant that the parties did not undertake to do so. It is unnecessary to go into several other reasons for holding that the complaint did not state any cause of action for damages.

Several other points raised by the respondents in support of the judgment, including misjoinder of parties and improperly uniting two causes of action which are not separately stated, require no consideration in view of what has been said with respect to the controlling questions.

The judgment is affirmed.

MARKS and GRIFFIN, JJ. concurred.

THOMPSON v. COOK et al. *

Civ. 13195.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1941.

Hearing Granted Feb. 11, 1942.

1. Statutes ⇐225½

Where two separate statutes deal with same subject, statute which is specific in nature must govern rather than general statute.

2. Judgment ⇐868(2)

In determining whether notice of motion to revive default judgment, for satisfaction of which judgment debtor's realty was sold under execution to judgment creditor after its conveyance to irrigation district because of debtor's failure to pay water assessments was required, the statute specifically providing for revival of judgment after notice to judgment debtor, if purchaser of debtor's property at sheriff's sale fails to recover possession thereof because it was not subject to execution and sale, rather than statute providing that notice of papers need not be served on defendants not appearing, must govern. Code Civ. Proc. §§ 708, 1014.

3. Judgment ⇐898(2)

A satisfaction of judgment is subject to power of equity to set it aside for fraud or mistake or to vacate it under statute providing procedure for relief from order or other proceeding and for vacation of any void judgment or order. Code Civ.Proc. § 473.

4. Judgment ⇐388

If judgment is to be erased by virtue of legal proceedings and entries usually made by constituted authorities, court is without jurisdiction to make any order with reference thereto, in absence of notice.

5. Judgment ⇐898(4)

Where valid judgment has been wholly satisfied on the records, judgment debtor has interest in such entry and is entitled to notice of any proposed action to defeat such satisfaction.

6. Motions ⇐19

Generally, notice must be given whenever order sought by party may affect adverse party's rights.

7. Judgment ⇐388
Motions ⇐59(3)

All proceedings for relief on account of excusable neglect under statute providing procedure for relief from order or other proceeding and vacation of void judgment or order require notice. Code Civ.Proc. § 473.

8. Judgment ⇐868(2)

In proceedings for revival of judgment after lapse of five years, notice to judgment debtor is indispensable. Code Civ.Proc. § 685.

9. Judgment ⇐868(2)

The statute providing that if purchaser of property at sheriff's sale under execution to satisfy judgment fails to recover possession thereof because it was not subject to execution and sale, court must revive original judgment for amount paid at sale with interest after notice and on motion of such purchaser, authorizes notice as means of enabling court again to acquire jurisdiction of parties. Code Civ.Proc. § 708.

10. Judgment ⇐868(2)

"Notice" to judgment debtor of motion to revive judgment, as required by statute under certain circumstances, means statutory instrumentality of knowledge, the formal process emanating from the source, and served in manner prescribed by statute. Code Civ.Proc. § 708.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

11. Judgment ⇐294

After entry of final judgment, power to change it is gone, except as authorized by rules governing amendments.

12. Motions ⇐19, 36

A litigant cannot be legally deprived of his rights by any proceeding on motion, unless he first receives notice of intended motion and is granted hearing thereon.

13. Constitutional law ⇐309(1)

Under doctrine of "due process of law," a litigant may not properly be the subject of an order entered without his knowledge.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

14. Judgment ⇐868(2)

The statute providing that notice of papers need not be served on defendant not

* Subsequent opinion 127 P.2d 909.

appearing does not control in case of motion to revive default judgment because of conveyance of debtor's property to irrigation district for default in payment of water assessments before execution sale, as such statute obviates necessity of serving notice of intended actions on defaulting parties before, not after, entry of judgment. Code Civ.Proc. § 1014.

15. Execution ⇐222(1), 379, 390

After entry of default judgment, debtor's property cannot be sold under execution until after he is notified by sheriff, he cannot be enjoined from selling property until after receipt of notice of application for injunction and hearing thereon, and he must be cited to appear in court before undergoing examination in aid of execution. Code Civ. Proc. § 692.

16. Judgment ⇐868(2)

The Legislature's intention in enacting statute providing that if purchaser of judgment debtor's property at sheriff's sale fails to recover possession thereof because property was not subject to execution and sale, court must revive judgment for amount paid at sale, with interest, after notice and on motion of such purchaser, was to retain principle of due process unimpaired by requiring that every judgment debtor receive notice of intended motion to revive judgment in such case. Code Civ.Proc. § 708.

17. Judgment ⇐872, 892

A judgment which has been satisfied loses all force and effect, and its revival is a new judgment effective from date of revival.

18. Judgment ⇐868(2)

Under statutory proceeding for revival of judgment erroneously satisfied, defendant should receive no less notice than in independent equity suit to revive judgment. Code Civ.Proc. § 708.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by K. W. Thompson against Marie E. Cook and others on two notes. From an order denying defendants' motion to vacate an order reviving a default judgment for plaintiff, defendants appeal.

Reversed.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellants.

Geo. W. Zent, of Hollywood, for respondents.

MOORE, Presiding Justice.

This action originated on the 21st day of October, 1935, when plaintiff sued to recover from defendants the amount due on two promissory notes. Defendants having defaulted, judgment was entered February 13, 1936, in favor of plaintiff in the sum of $4,012.29 with interest and costs. Execution was issued March 13, 1936, under which the sheriff of Glenn county levied upon certain real property which he sold on the 17th day of August, 1936, to the plaintiff for the amount of the judgment. The writ was returned showing the judgment wholly satisfied.

Some months prior to the execution sale, the property had been conveyed to the Glenn-Colusa irrigation district on account of the failure of the defendant to pay water assessments. In June, 1937, the irrigation district instituted this action against plaintiff and others for the purpose of quieting title to the land in question. Judgment was entered quieting the title to the land in favor of the district. Having incorporated the foregoing facts in his affidavit, plaintiff filed a motion for revival of his judgment and on June 9, 1938, the motion was granted. On October 15th defendants learned of the revival of the judgment and on the 12th of March, 1941, they filed an appropriate motion to vacate the order of revival. Their motion was denied and it is from this order denying their motion that they take this appeal.

[1, 2] In view of the delay in presenting their motion to vacate the order of revival, we might readily conclude to affirm the order if it could be considered voidable only, but in view of our conclusion that the order of revival was made in violation of the doctrine of due process, we must of necessity consider the validity of the proceedings upon which the order of revival was made.

The motion for revival of the judgment was based upon section 708, Code of Civil Procedure, which provides "* * * If the purchaser of property at sheriff's sale, or * * * fail to recover possession * * * because the property sold was not subject to execution and sale, the court

having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest * * *".

That section provides for the revival of the judgment under the circumstances therein enumerated after notice to the judgment debtor. Because the judgment had been entered upon the default of the defendants, plaintiff concluded that he was under no obligation to serve a notice of his intended motion to revive the judgment. He bases his contention upon section 1014 of the Code of Civil Procedure which provides "* * * But where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail".

The determination of this appeal, therefore, must be made according to whether it is controlled by the provisions of section 708 or section 1014. It is a rule of statutory construction that where two separate statutes deal with the same subject the section which is specific in its nature must govern rather than that which is general. Section 708 deals specifically with the subject of the revival of judgments. It must therefore govern under circumstances set forth in that section.

[3-11] The "satisfaction" of a judgment is subject (1) to the power of equity to set it aside for fraud or mistake, or (2) to vacate it pursuant to section 473, Code of Civil Procedure, which provides a procedure for relief from an "order, or other proceeding" and for vacating "any void judgment or order". Gill v. Peppin, 41 Cal. App. 487, 182 P. 815. If a judgment is to be erased by virtue of legal proceedings and of the entries usually made by the constituted authorities, the court is without jurisdiction to make any order with reference thereto in the absence of notice. Likewise where a valid judgment has been wholly satisfied upon the records the judgment debtor has an interest in such entry and is entitled to notice of any proposed action to defeat such satisfaction. The exercise of authority over such judgment without notice is wholly arbitrary. It is the general rule that notice must be given whenever the order sought may affect the rights of the adversary party. McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98. All proceedings under section 473, Code of Civil Procedure, for relief on account of excusable neglect require notice. It is likewise indispensable under section 685 in proceedings for the revival of a judgment after the lapse of five years. Tolle v. Doak, 12 Cal.App.2d 195, 55 P.2d 542. Notice as required by section 708 was authorized as the means of enabling the court again to acquire jurisdiction of the parties. "It means the statutory instrumentality of knowledge—the formal process emanating from the source, and served in the manner, prescribed by the statute." 20 Cal.Jur. 243. "After entry of a final judgment the power to change it is gone (authorities) except as this may be authorized by the rules governing amendments." 14 Cal.Jur. 938.

[12, 13] No litigant can be legally deprived of his rights by any proceeding unless he shall have first received notice of the intended motion and is granted the hearing. Higgins v. Kay, 168 Cal. 468, 143 P. 710. Under the doctrine of due process, it is inconceivable that a litigant may properly be the subject of an order entered without his knowledge. If that were done the facts averred in the supporting papers of his adversary would be established without his contradiction or scrutiny, and it is not unlikely that the court may fail to observe that the affidavit of merits fails to show that the title of the property sold under the execution was worthless. For illustration, in the case at bar, there was no showing in plaintiff's affidavit in support of his motion that the period of equity of redemption as against the sale for delinquent assessments had expired. Neither was it shown that plaintiff could not have redeemed the property from the sale for delinquent assessments and thereby have acquired a clear title. Moreover it is not shown in the affidavits of merit that the plaintiff did not, under the execution sale, acquire valuable rights in the land sold equal to or in excess of the judgment and the delinquent assessments. Nor is it shown that he did not negligently permit valuable rights acquired at the execution sale to be thereafter foreclosed for failure to pay delinquent assessments.

[14-18] Section 1014 does not control in the case at bar. That section relieves the plaintiff of the necessity of serving notice of intended actions as to defaulting parties prior to the entry of judgment. After such entry the defaulting judgment debtor is placed in a new relationship to

the plaintiff. If his property is to be sold under execution he must be notified by the sheriff as provided by statute. Sec. 692, Code Civ.Proc. If he would be enjoined from the sale of his property, he must receive notice and be granted a hearing before the injunction may issue. If he is to undergo examination in aid of execution, he must be cited to appear in court, before such examination may take place. By the provisions of all the sections requiring notice and the construction given them by the courts, we are forced to the conclusion that it was the intention of the legislature, in enacting section 708, to retain unimpaired the principle of due process by requiring that every judgment debtor must receive notice of the intended motion of the plaintiff to revive the original judgment for the "amount paid by such purchaser" where the property sold was not "subject to execution and sale". 34 C.J. 668. When the judgment has been satisfied it loses all force and effect. Its revival is a new judgment and is effective from the date of its revival. Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337, 96 Am.St.Rep. 91; Hitchcock v. Caruthers, 100 Cal. 100, 34 P. 627. While the judgment which has been erroneously "satisfied" may be revived by an independent suit in equity, in the interest of economy and simplicity, the legislature enacted section 708. But there is no indication within or without the section that the defendant should receive any less notice under the statutory proceeding than in a suit at equity.

The order is reversed.

McCOMB, J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. If the order is to be considered as void on its face defendants would unquestionably have the right to have it set aside at any time. The record on the present appeal, however, shows the order to be valid on its face. Where, as in the case now before us, the record of a superior court is silent on the question of service, the presumption is that the court hearing the cause had jurisdiction of the parties. Fletcher v. Superior Court, 79 Cal.App. 468, 473, 250 P. 195. "It is true that where the record is silent as to what was done it will be presumed that what ought to have been done was not only done but rightly done." Steuri v. Junkin, 27 Cal.App.2d 758, 760, 82 P.2d 34, 35.

Although notified in writing on October 15, 1938, of the order made on July 6, 1938, reviving the judgment, defendants did not file their motion to set aside the order of revival until March 12, 1941, nearly three years after the order was entered and the notification to defendants of its entry. Since they sought to set aside an order which is valid on its face they should have filed their motion within a reasonable time. In Smith v. Jones, 174 Cal. 513, 163 P. 890, 891, the summons was returned with an affidavit showing that the copy of the summons and complaint had been served on the defendant Frank F. Fisher on April 9, 1912, in Los Angeles county. The default of Fisher was taken and judgment was entered against him on May 11, 1912. Fisher presented a motion on September 5, 1913, to set aside the default and vacate the judgment on the ground that he had never been served in the action. He filed his affidavit, in which it was set forth that he was not in the state of California during the year 1912 and that he had no knowledge of the pendency of the action until about one year after the rendition of the judgment against him. The motion was heard on this affidavit and the judgment roll in the case, nothing further being presented. The court thereafter made an order setting aside the default and the judgment. On appeal the Supreme Court reversed the order, the court stating: "But in order to invoke the power of the court to set a judgment aside on the ground that it was entered against a party defendant without service of process on him at all, the motion must be made within a reasonable time, or the right to make it is lost, and the party is remitted to an action in equity to have the judgment declared void." The court further held that, notwithstanding the motion was not made under section 473 of the Code of Civil Procedure "it has, nevertheless, been the long-settled rule in this state that in determining whether a motion to set aside a judgment, decree, or order made independent of said section is presented within a reasonable time, the period fixed in said section within which motions under it may be made is the standard or criterion in all cases. And so as to motions such as the one here made, based on the ground that no service of process was made on the defendant, it is expressly held that in no case can the time of making them be extended beyond the time limit specified in section 473 for making similar motions under that sec-

tion." In Thompson v. Thompson, 38 Cal. App.2d 377, 101 P.2d 160, 161, it was held: "A motion to vacate a judgment not void on its face, based either upon statutory grounds or in the exercise of the inherent powers of the court, must be made within a reasonable time, not exceeding the maximum time limited by statute, whether such statute is applicable either expressly or by analogy."

The motion of defendants was not made within a reasonable time. In my opinion the order should be affirmed.



WESTOVER v. CITY OF LOS ANGELES.*

Civ. 13091.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1941.

Hearing Granted Feb. 16, 1942.

1. **Trial** ⇐253(7)

Where an instruction directs a verdict in favor of plaintiff providing the jury finds certain facts to be true, the instruction must embrace all elements necessary to show legal liability of defendant, and to warrant the conclusion that plaintiff is entitled to a verdict.

2. **Automobiles** ⇐273

To establish liability of city for injuries received by automobile occupant as result of being bounced in an automobile which was being driven over a dip in a street, it was necessary that jury find that city had knowledge of the dangerous character of the condition which caused the injuries. Gen.Laws 1937, Act 5619.

3. **Trial** ⇐253(7)

Where automobile occupant was injured as result of being bounced in an automobile which was driven over a dip in a street, instruction that if there was any negligence of driver which proximately contributed to accident and City of Los Angeles violated provisions of 1923 Public Liability Act and thereby created dangerous condition of street and such violation likewise contributed proximately to the accident, occupant was entitled to recover, was a "formula instruction" and erroneous because it did not require finding that city had knowledge of dangerous condition which was the proximate cause of the injury. Gen.Laws 1937, Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Formula Instruction".

4. **Trial** ⇐220

The giving of instructions orally without the aid of written memoranda before any evidence was taken was condemned.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by John A. Westover against the City of Los Angeles for injuries sustained while riding in the back seat of an automobile as result of an alleged dangerous condition in a street. From a judgment for the plaintiff, defendant appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar, Victor P. Spero, and Louis A. Babior, Deputy City Attys., all of Los Angeles, for appellant.

Thomas R. Lynch and Irving E. Read, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintift after trial before a jury in an action to recover damages for personal injuries received by plaintiff as a result of being bounced in an automobile which was being driven over a dip in the highway, defendant appeals. The action was brought under the 1923 Public Liability Act, Stats. 1923, p. 675, Act 5619, vol. 2.

Viewing the evidence in the light most favorable to respondent, the essential facts are:

June 7, 1937, plaintiff was a passenger seated in the back seat of an automobile which was being driven south on Gaffey Street in Los Angeles. At the intersection of Twentieth Street the car struck two dips, which threw plaintiff against the top of the car, injuring his head.

Defendant urges, among other errors, *that the trial court committed prejudicial error in instructing the jury as follows:*

* Subsequent opinion 128 P.2d 350.

"If you find from a preponderance of the evidence that there was any negligence on the part of the driver of the motor vehicle in which plaintiff was riding which proximately contributed to plaintiff's accident, and you likewise find that the defendant city of Los Angeles violated the provisions of the 1923 Public Liability Act, heretofore read to you, and thereby created a dangerous or defective condition of the streets in question, and you further find that its violation of said provisions likewise contributed proximately to the happening of the accident, then I instruct you as a matter of law to find in favor of plaintiff, John A. Westover, and against the defendant, City of Los Angeles, on the issue of liability."

This proposition is tenable and is governed by the following rules of law:

[1] (1) Where an instruction directs a verdict in favor of plaintiff, providing the jury finds certain facts to be true, the instruction must embrace all elements necessary to show legal liability of defendant and to warrant the conclusion that plaintiff is entitled to a verdict. (Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 278, 201 P. 599; Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237.)

[2] (2) To establish liability of defendant under the provisions of Act 5619, supra, it is necessary that the jury find that defendant city had knowledge of the dangerous character of the condition which caused the injury. (Nicholson v. City of Los Angeles, 5 Cal.2d 361, 363, 54 P.2d 725; Whiting v. National City, 9 Cal.2d 163, 165, 69 P.2d 990; Beckley v. Vezu, 23 Cal.App.2d 371, 377, 73 P.2d 296.)

[3] Applying the foregoing rules to the instruction under criticism, it appears that the instruction was a formula instruction and that it omitted one of the essential elements prerequisite to plaintiff's recovering a judgment against defendant, to wit, it did not charge the jury that, as one of the elements necessary for it to find as existing before returning a verdict in favor of plaintiff, it must find that defendant city had knowledge of "the dangerous character of the condition" which was the proximate cause of the injury.

[4] In passing it should be noted that in the instant case before any evidence was taken the trial judge gave the jury instructions relative to the rules of law applicable to the case. Many of these instructions appear to have been given orally without assistance of written memoranda. We have had occasion previously to condemn this practice. (Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 343, 103 P. 2d 188.)

For the foregoing reasons the judgment is reversed.

MOORE, P. J., concurred.

W. J. WOOD, Justice, (concurring specially).

I concur in the judgment. In my opinion the instruction set forth in the majority opinion, although subject to criticism, does not call for a reversal. It will be noted that the jurors were instructed that the city would be liable if they "find that the defendant City of Los Angeles violated the provisions of the 1923 Public Liability Act, heretofore read to you. * * *" In a separate instruction the provisions of the Public Liability Act of 1923 were read to the jurors and they were thereby informed that liability of the city must be predicated upon knowledge on its part of the dangerous character of the premises involved in the accident.

In my opinion a number of serious errors in giving other instructions were committed by the trial court which were of such a nature as to call for a new trial. The court gave the jury the following instruction: "If the city has notice of the dangerous and defective condition, and after giving the city reasonable time within which to repair the condition, it fails so to do, that failure is the proximate cause of the accident then in that event the city is liable." The Public Liability Act provides that after knowledge of the dangerous condition of a street the city is liable if it neglected "for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Section 2. Under the provisions of the act the city could either remedy the defective condition or take such action as would be reasonably necessary to protect the public. The instruction did not inform the jurors that the city would be freed from liability if it did in fact take reasonable precaution to protect the public. The

record discloses that the city took certain steps by the erection of signs to protect the public. Plaintiff claimed, however, that the precautions taken by the city were insufficient. Whether the city took proper steps to protect the public was a question for the determination of the jury, which should have been properly instructed on the point.



48 Cal.App.2d 631

PAPENFUS v. WEBB PRODUCTS CO. et al.

Civ. 2945.

District Court of Appeal, Fourth District, California.

Dec. 20, 1941.

Hearing Denied Feb. 16, 1942.

1. Contracts ⇐266(1)

Where former assets of transferor have been so intermingled with assets of transferee that they cannot be segregated and returned, the transferor cannot rescind the contract under which his assets were transferred.

2. Election of remedies ⇐11

Where a party makes a mistake in "election of remedies", he is not "estopped" by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies" and "Estop".

3. Election of remedies ⇐11

Where remedy of rescission was not available to plaintiff when he instituted former action to rescind contract under which he had transferred assets to defendant and to obtain return to him of assets which he had transferred, the doctrine of "election of remedies" did not bar plaintiff from maintaining action for declaratory relief and to declare a trust in his favor in the assets of defendant.

4. Appeal and error ⇐1099(4)

Where appellate court, determining that remedy of rescission was not available to plaintiff, who had transferred his assets to corporation, made statement that "the corporation apparently holds title to both sets of property in trust for the respective parties", the statement could not be distorted into a definite holding that a trust existed, and did not become the "law of case" in subsequent action by plaintiff to declare a trust in his favor.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of Case".

Appeal from Superior Court, City and County of San Bernardino County; F. A. Leonard, Judge.

Action by D. E. Papenfus against Webb Products Company and others for declaratory relief and to declare a trust in plaintiff's favor. Judgment for defendant, and plaintiff appeals.

Reversed.

John W. Preston and Alfred P. Peracca, both of Los Angeles, and James E. Pawson, of Long Beach, for appellant.

Fred A. Wilson, of San Bernardino, for respondents.

MARKS, Justice.

Plaintiff brought this action for declaratory relief and to declare a trust in his favor in the assets of the Webb Products Company. Defendants had judgment and this appeal followed.

The controversy has been here before (see Papenfus v. Webb Products Company, Inc., 24 Cal.App.2d 559, 75 P.2d 631), in another case in which different issues were presented. Reference is made to the former opinion for a statement of those facts which are not repeated here.

The judgment in the present case is based on the theory that plaintiff elected his remedy in the former action and is precluded from maintaining this action by the judgment then rendered. This is the sole question which we must consider on this appeal.

In the former action plaintiff sought rescission of a contract between himself and defendants and a return to him of the assets he had transferred to the Webb Products Company, Inc., under the terms of the contract executed in 1931. These assets were principally good will of his business, a trade name which was copyrighted, stock in trade, consisting largely of materials used in the

manufacture of products, and secret formulas for the manufacture of those products.

Judgment was rendered against plaintiff in that case on the ground that rescission was a remedy not available to him for two reasons: (1) His former assets had been so intermingled with assets of Webb Products Company, Inc., that they could not be segregated and returned, the stock in trade had been used up and the secret formulas had become known to others and were no longer secret. (2) He was estopped by his conduct to demand a rescission.

[1] Under well-settled rules of law a person cannot rescind a contract when confronted with those facts. Papenfus v. Webb Products Co., supra. It is therefore evident that plaintiff mistook his remedy when he instituted his former action. From that statement it should not follow that he has no remedy which is available to him. To so hold would be to deprive him of former assets of a value of several thousand dollars which he had transferred to Webb Products Company and would permit it to retain the benefit of those assets without adequate compensation. Such is the net result of the judgment in this case which denies plaintiff any relief other than manual possession of a stock certificate issued to him by Webb Products Company in violation of its permit to issue stock and which that company now seems to maintain gives plaintiff neither an interest in any assets or earnings of the corporation nor any voice in its affairs.

[2] In the case of Herdan v. Hanson, 182 Cal. 538, 189 P. 440, 442, the parties entered into a contract for an exchange of properties. After the transaction was consummated plaintiff brought an action for rescission in which a judgment against him had become final. He then instituted a second action for damages for breach of contract in which he recovered judgment. In affirming the judgment and in considering the question of the election of remedies, the Supreme Court said: "It is insisted, upon behalf of appellant, that a party having two inconsistent, concurrent remedies may not pursue both, but must choose between them and, having clearly elected to proceed upon one, is thereby bound and will be estopped from invoking the other. Hines v. Ward, 121 Cal. 115, 53 P. 427. It is, however, equally true that, where a party makes a mistake in election of remedies, he is not estopped by his abortive election from subsequently resorting to and pursuing a remedy to which he was really entitled."

Election of remedies was also considered in Waters v. Woods, 5 Cal.App.2d 483, 42 P.2d 1072, 1075, where it was said: "In the instant case rescission was not available to plaintiffs because they were not in a position to reconvey the walnut grove clear of debt. This being true, it follows that they could not elect between two remedies when the facts of their case made only one of them available. In this connection it should be observed that the doctrine of election proceeds upon the theory that the inconsistent attitude of a party puts his adversary to some disadvantage and the disadvantage must be a real injury, 'such as would, in contemplation of law, amount to a fraud upon the party invoking the estoppel.' Mansfield v. Pickwick Stages, 191 Cal. 129, 215 P. 389, 390; Campanella v. Campanella, 204 Cal. 515, 269 P. 433."

To the same effect are Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am.St.Rep. 84; South San Bernardino Land & Improvement Co. v. San Bernardino National Bank, 127 Cal. 245, 59 P. 699; Campanella v. Campanella, 204 Cal. 515, 269 P. 433, and Restatement of the Law—Contracts, volume 2, page 717.

[3] It is clear that the remedy of rescission was not available to plaintiff when he instituted his former action. As he mistook his remedy in his former action the doctrine of election of remedies cannot bar this action.

[4] As the case must be retried we should notice a contention of plaintiff that our former decision (24 Cal.App.2d 559, 75 P.2d 631, 632) established as the law of the case that defendants held plaintiff's property in trust for him. That issue was not involved on the former appeal. The statement there made that "the corporation apparently holds the title to both sets of properties in trust for the respective parties" cannot be distorted into a definite holding that a trust existed. The use of the word "apparently" prevents such a conclusion.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

48 Cal.App.2d 495

PEOPLE v. SCORE.

Cr. 3522.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1941.

1. Automobiles ⇐339

Where accused was discovered by owner of parked automobile going through contents of glove compartment, without owner's consent, even though accused had no intention of stealing car, he was guilty of felony of "temporarily" depriving owner of the vehicle, since "temporary possession" may be for a day or for less than a minute. Vehicle Code, § 503, St.1935, p. 174.

See Words and Phrases, Permanent Edition, for all other definitions of "Temporarily" and "Temporary Possession".

2. Automobiles ⇐324

Accused discovered by owner sitting in parked automobile and going through glove compartment without owner's consent, after accused had already injured car by prying open cowl thereof, was guilty of a "misdemeanor" under statute providing that anyone wilfully injuring or tampering with vehicle or contents thereof is guilty of misdemeanor. Vehicle Code, § 504, St.1937, p. 617.

See Words and Phrases, Permanent Edition, for all other definitions of "Misdemeanor".

3. Arrest ⇐62

Where owner of parked automobile discovered accused occupying car, which he had damaged, and going through contents of glove compartment, so that he was committing both the felony of temporarily depriving owner of possession thereof, and a misdemeanor of injuring or tampering with car, it was owner's duty, as well as his right, to arrest accused. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617.

4. Criminal law ⇐878(3)

Where evidence disclosed that accused, though not attempting to steal parked automobile, did occupy car in such manner as to deprive its owner of temporary possession, a felony within statute, acquittal on count charging attempted grand theft was not decisive of count charging assault on owner by means of force likely to produce great bodily injury. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617; Pen.Code, § 245.

5. Assault and battery ⇐97

Conviction on count of information charging assault by means of force likely to produce great bodily injury, implied a finding that accused was in the act of committing a crime, since otherwise he could not have been guilty of assault in any degree. Pen.Code, § 245.

6. Arrest ⇐62

Any person, though not an officer, may arrest another for committing or attempting to commit a public offense in his presence. Pen.Code, § 837.

7. Arrest ⇐68

A private person making an arrest is not required to advise offender of his intention to arrest him when latter is actually engaged in the commission of, or in attempting to commit, an offense, or where he is pursued immediately after its commission or after an escape. Pen.Code, § 841.

8. Arrest ⇐70

Where accused was found by owner of parked automobile occupying car and rummaging through glove compartment without owner's consent, it was accused's duty to stand and wait, either to be escorted by owner to magistrate or until arrival of police. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617; Pen.Code, § 849.

9. Assault and battery ⇐55

Where accused, on being discovered by owner of parked automobile occupying car and rummaging through glove compartment instead of permitting himself to be arrested by owner, struck owner in chest and face near eyes with clenched fists, such blows constituted an "assault with force", and justified conviction for "assault by means of force likely to produce great bodily injury," if court believed, from evidence, that force used was likely to produce great bodily injury. Vehicle Code, § 503, and § 504, St. 1935, p. 174, and St.1937, p. 617; Pen.Code, §§ 245, 837, 841, 849.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault by Means of Force Likely to Produce Great Bodily Injury" and "Assault With Force".

10. Assault and battery ⇐95

In prosecution for assault by means of force likely to produce great bodily injury,

determination of the amount of force necessary to produce great bodily injury is for the jury or trier of facts. Pen.Code, § 245.

11. Criminal law ⇐260(11)

Trial court's decision in prosecution for assault by means of force likely to produce great bodily injury that accused did produce such injury when he struck owner of parked automobile who discovered him in automobile tampering with contents will not be disturbed on appeal. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617; Pen.Code, § 245.

12. Assault and battery ⇐95

Whether a fist would be likely to produce great bodily injury within statute relating to assault and battery is to be determined by force of impact, manner in which it was used, and circumstances under which force was applied, which are matters for triers of facts. Pen.Code, § 245.

13. Criminal law ⇐24

In resisting arrest by private person for crime committed in his presence, accused is presumed to have intended the ordinary consequences of his voluntary act. Code Civ. Proc. § 1963.

14. Obstructing justice ⇐3

A person may not add to his crimes when caught in act of committing them by resisting citizen who voluntarily acts in behalf of the state, and if he does so, he will suffer for the ordinary consequences of his act. Code Civ.Proc. § 1963; Pen.Code, §§ 837, 841, 849.

15. Assault and battery ⇐55
Criminal law ⇐24

Where accused, when discovered by owner of parked automobile inside of car tampering with contents, struck owner, who attempted to hold him, and ran away followed by owner who engaged in scuffle with him, during which accused struck owner with his fist, and during the scuffle both fell to ground, accused on top of owner, whose leg was doubled up and broken in two places, accused's guilt was not to be measured solely by the intentional blows applied but he was also liable for the broken leg, under the rule that in resisting arrest he was presumed to have intended ordinary consequences of his voluntary act. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617; Pen. Code, §§ 245, 837, 841, 849; Code Civ.Proc. § 1963.

16. Criminal law ⇐365

In prosecution for assault by means of force likely to produce great bodily injury, the condition of complainant immediately following the assault was a part of the "res gestae", and was properly admitted in evidence. Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestae".

17. Assault and battery ⇐80

In prosecution for assault by means of force likely to produce great bodily injury, it was not incumbent on the people to designate which act, in the course of the continuous struggle, constituted the application of the force that actually caused the injury. Pen.Code, § 245.

18. Assault and battery ⇐92

In prosecution for assault by force likely to produce great bodily injury on owner of parked automobile who discovered accused in car going through contents of glove compartment, evidence that parties engaged in struggle in which accused struck owner and that in continuing struggle after accused ran away both parties fell to ground with accused on top, resulting in breaking owner's leg in two places, sustained conviction. Vehicle Code, § 503, and § 504, St.1935, p. 174, and St.1937, p. 617; Pen.Code, §§ 245, 837, 841, 849.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Marvin Elmer Score was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant was accused by information of two felonies, attempted grand theft (count I) and assault by means of force likely to produce great bodily injury (count II). Tried by the court without a jury, he was acquitted of the first count but was found guilty as charged in the second. His application for probation having been denied, he was sentenced to the state prison for the term prescribed

by law. From the judgment entered September 11, 1941, defendant takes this appeal.

One Louis Lepter, accompanied by his friend Mrs. Adele Fritzel, parked his black Plymouth coupe on Vine street near the intersection with Franklin avenue in Hollywood at about 10:45 o'clock on the evening of April 26, 1941. Upon his return about 11:15 p. m. he found defendant sitting in his car behind the wheel with the right door open and the vent of the cowl pried open. Defendant was searching the glove compartment and going through the papers belonging to Lepter. Lepter requested defendant to leave the car and attempted to hold him when defendant struck at him with his clenched fist, hit him in the face and knocked off his glasses. Defendant then ran about a block with Lepter yelling and trying to hold on to him during which defendant struck him twice with his fists in the chest and face. During the scuffle both went down on the ground, defendant falling on top of Lepter whose leg was doubled up under him as a result of which Lepter suffered a broken tibia and a broken ankle. Lepter shouted to passers-by to catch defendant and they succeeded in doing so. Defendant was held until the arrival of the police who had been called by Mrs. Fritzel.

It is contended by appellant that his striking of Lepter with his fist was not in a manner to, nor did it produce great bodily injury; that there was no unlawful attempt to commit an assault and no present ability to commit a serious injury; that pursuing appellant and trying to hold on to him was the sole cause of complainant's injuries; that there was no legal justification for Lepter's holding appellant; that no force was directed toward the breaking of Lepter's leg, no weapon used; that no crime had been committed by appellant as demonstrated by his acquittal of the charge of attempted grand theft; that appellant acted only in self-defense and endeavored to leave the presence of Lepter; that he used only sufficient force to disengage himself from Lepter when the fall occurred.

[1-3] Appellant ignores entirely the fact of his crime and of the right and duty of complainant to effect his arrest. When a person temporarily deprives the owner of a vehicle of temporary possession even without intent to steal, he is guilty of a felony. Vehicle Code 503, St.1935, p. 174. Under appellant's own testimony he was occupying appellant's car at the time of the latter's return. Temporary possession may be for a day and it may be for less than a minute. For some time at least appellant then and there occupied complainant's car without the latter's consent. Furthermore, appellant was guilty of a misdemeanor committed in the presence of complainant. Any person who wilfully injures or tampers with any vehicle or the contents thereof or breaks or removes any part of the vehicle, or "climbs into the vehicle with intent to commit a malicious injury is guilty of a misdemeanor". Vehicle Code 504, St.1937, p. 617. Upon complainant's discovery of appellant sitting in his Plymouth car, going through the contents of the glove compartment, appellant was in the act of committing a misdemeanor. Also, he had already injured the car by prying open the cowl of it. Finding that appellant had already injured the car and was in the act of committing both a felony and a misdemeanor, it was the duty as well as the right of complainant to arrest appellant. 6 C.J.S., Arrest, § 8, p. 607.

[4, 5] The subsequent acquittal of attempted grand theft is not decisive of the merits of the proof offered in support of the second count. While the evidence shows that appellant was not attempting to steal the coupe, it appears equally clear therefrom that he did occupy the car in such manner as to deprive its owner of temporary possession, a felony. Moreover, the conviction on count II implies a finding that appellant was in the act of committing a crime; otherwise he could not have been guilty of assault in any degree.

[6, 7] Any person, though not an officer, may arrest another for committing or attempting to commit a public offense in his presence. Pen.Code, § 837. A private person making such arrest is not required to advise the offender of his intention to arrest him when the latter is actually engaged in the commission of, or in attempting to commit, an offense or where he is pursued immediately after its commission or after an escape. Pen.Code, § 841.

[8, 9] On finding himself at bay, it was appellant's duty then and there to stand and wait either to be escorted by Lepter to a magistrate (Pen.Code, § 849) or until the arrival of the police. Instead

of doing this, he beat the chest of complainant and struck his face near his eyes with his clenched fists. These blows constituted an assault with force and justified the judgment if the court believed from the evidence that the force used by appellant was "likely to produce great bodily injury". Pen.Code, § 245.

[10-12] The determination of the amount of force necessary to produce great bodily injury is for the jury. The decision of a trial court that the fist of an assailant did produce such injury will not be disturbed on appeal. People v. Nudo, 38 Cal.App.2d 381, 101 P.2d 162; People v. Hinshaw, 194 Cal. 1, 227 P. 156. Whether a fist would be likely to produce such injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied. Such matters are for the triers of fact.

[13-17] Appellant assumes that his guilt should be measured by the fact that the only force he purposed to apply to the complainant was the blows to his body and face. Also, he assumes that this court will determine that such blows were not attended with force likely to produce great bodily injury. But immediately following appellant's batteries he attempted to escape from complainant's custody when the fall occurred and the leg was broken. In resisting arrest appellant is presumed to have intended the ordinary consequences of his voluntary act. Code Civ.Proc. § 1963. The scuffle and the fall were a part of one continuous episode in which appellant first thrust his fist against Lepter, then fell upon his body. This fall caught complainant's leg in such a position as to cause its double fracture. This would not have occurred but for the lawlessness of appellant. The injury suffered by complainant as the result of the fall of appellant's body upon him was caused by a force applied by appellant. He is not to be excused upon the hypothesis that he was endeavoring to escape from the presence of complainant. But for his unlawful act in attempting to evade arrest the fall would not have occurred. Upon being apprehended it was the duty of appellant to submit to the arrest. No person may add to his crimes when caught in the act of committing them by resisting the citizen who voluntarily acts in behalf of the state. If he does so, he will suffer for the ordinary consequences of his act. The condition of Lepter immediately following the assault was a part of the res gestae and was properly admitted. It is not incumbent upon the People to designate which act in the course of a continuous struggle constituted the application of the force that actually caused complainant's injury. People v. Ornelas, 17 Cal.App.2d 608, 611, 62 P.2d 608.

[18] It follows, therefore, that if the judgment was based upon appellant's fall upon complainant, the injuries he actually suffered demonstrate the truth of the charge. But if the judgment was founded upon the finding that the blows administered with appellant's fist were likely to produce great bodily injury to complainant, such finding was properly the function of the trier of the facts and his judgment thereon will not be disturbed.

The judgment is affirmed.

W. J. WOOD, J., and McCOMB, J., concurred.



48 Cal.App.2d 543

LEWIS v. WINFIELD et al.

Civ. 11879.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1941.

1. Equity ⇐39(1)

Where jurisdiction is once attained and the parties have joined issue, equity court will endeavor to dispose of the entire controversy.

2. Appeal and error ⇐1009(1)

In an equity case, judgment should be affirmed if it is within the equities and not a miscarriage of justice.

3. Pleading ⇐406(6)

Where equity court was improperly asked to both affirm and renounce contract whereby plaintiff and defendants agreed to purchase certain real property, but defendants joined issue on the equities, the court was justified in weighing the respective equi-

ties of the parties arising out of their business relations without regard to whether they had effected a legal copartnership or a mere joint adventure.

4. Joint adventures ⇐5(1)

Where plaintiff and defendants entered into contract whereby each party agreed to contribute an equal amount of money or property for purchase, repairing, renovating, and improving property and an equal amount to apply on payment of incumbrances, and then equally divide rents and profits, in an action to determine equities of the respective parties, the $250 contributed by plaintiff in cash for down payment and amounts advanced by plaintiff for monthly payments were proper credits to be allowed the plaintiff.

5. Joint adventures ⇐4(1)

Where plaintiff and defendants entered into contract whereby each party agreed to contribute an equal amount of money or property for purchase, repairing, renovating, and improving property and an equal amount to apply on payment of incumbrances, and then equally divide rents and profits, the agreement did not authorize the defendants who were real estate operators to offset payments made by plaintiff with claim for services rendered as real estate brokers.

6. Joint adventures ⇐5(1)

Where plaintiff and defendants entered into contract whereby each party agreed to contribute an equal amount of money or property for purchase, repairing, renovating, and improving property and an equal amount to apply on payment of incumbrances, and then equally divide rents and profits, in action to determine the equities of the respective parties, claim for compensation for labor furnished by plaintiff who was a painter and plasterer by trade, though not payable until property was sold, should be protected in final judgment.

7. Joint adventures ⇐5(1)

Where plaintiff and defendants entered into contract whereby each party agreed to contribute an equal amount of money or property for purchase, repairing, renovating, and improving property and an equal amount to apply on payment of incumbrances, and then equally divide rents and profits, in action to determine the equities of the respective parties, the judgment should either decree a foreclosure of the venture, after a full accounting, or it should declare that the defendants held an undivided one-half interest in the property for the benefit of plaintiff and determine the respective rights and obligations under the transaction.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by A. V. Lewis against Presley S. Winfield and others for fraud in inception of a contract, for breach of trust, and to quiet title to a one-half interest in real property. From the decree, plaintiff appeals.

Reversed.

Nathan G. Gray, of Berkeley, for appellant.

H. L. Richardson, of Oakland, for respondents.

NOURSE, Presiding Justice.

The plaintiff sued in equity, pleading three causes of action—one for damages for fraud in the inception of a contract, one charging a breach of trust, and one asking that his title to an individual one-half interest in real property be quieted. The case is founded upon an oral contract whereby the parties agreed to purchase certain real property for the sum of $2,500 to repair and renovate the building thereon, and to share equally the expenses and profits therefrom. The trial court found against plaintiff on the charges of fraud and the appeal does not attack that finding. The judgment rested upon the finding that under the contract each party agreed to contribute an equal amount of money or property for the purchase, acquisition, repairing, renovating, and improving said property, and an equal amount to apply on the payment of taxes, liens, and encumbrances, and that they would then equally divide the rents and profits. It was found that plaintiff's right to demand a conveyance of his interest was contingent upon his payment of his share of these charges, but that he had failed over a period of years to do so. Judgment was entered decreeing that upon plaintiff's paying to defendants within thirty days the sum of $360.54 in addition to one-half of all taxes, liens, and penalties, the defendants should convey to plaintiff an undivided one-half interest in the property.

The plaintiff attacks the judgment on three grounds—that it decrees a forfeiture

of partnership property, that it effects a dissolution of a partnership through a money judgment in favor of one against the other, and that it is not supported by the evidence.

It should be noted here that appellant took the inconsistent position of repudiating and affirming the contract in the same action. His charges of fraud run from the inception of the contract, but his suit to quiet title to the real property is founded upon an affirmation of the contract. The parties are in accord that title was not to be conveyed to appellant until he had completed all payments called for by the contract. Both parties agree that these payments were not made. The real dispute between the parties relates to the separate items of credits and expense.

[1-3] In relation to the first two points raised by appellant it would serve no purpose to discuss the power of the court to order either a forfeiture of the partnership interest or a dissolution of the partnership. On the broad principle of equity that where jurisdiction is once attained, and the parties have joined issue, the court will endeavor to dispose of the entire controversy, the judgment here should be affirmed if it is within the equities and not a miscarriage of justice. Though the trial court was improperly asked to both affirm and renounce the contract, the defendants joined issue on the equities and the trial court was justified in weighing the respective equities of the parties arising out of their business relations, without regard to whether they had effected a legal copartnership or a mere joint adventure. It was found upon substantial evidence that both parties agreed to bear an equal share of the expenses, and the major portion of the trial was given over to an effort to ascertain the respective credits and offsets. Manifestly if the conclusion as to what was owing by appellant was correct the only equitable thing to do was to decree that his title to the property was contingent upon his fulfillment of his part of the contract. We have said there is no dispute in the evidence that appellant had not met his obligations. He was not therefore entitled to the relief for which he prayed. But he excuses his derelictions by the showing that respondents had not met their obligations and had made unreasonable demands upon him.

[4-7] In so far as there is error claimed in the special items allowed and rejected, we have carefully examined the transcript and are unable to say that the findings are free from error. At this point we should add these pertinent facts. The appellant was a painter and plasterer by trade; the respondents were real estate operators who, contrary to the original agreement, took title to the property in their own names; the parties are all members of the negro race, and the appellant was not as well versed in business transactions as the respondents; the appellant contributed $250 in cash for the down payment; the respondents paid little or nothing; the appellant paid in cash his portion of some of the monthly instalments, and performed manual labor for repairs; the respondents sought to offset appellant's down payment by contributing their services in making the deal; they collected all the rents from which some monthly instalments and some repairs and taxes were paid, and for which respondents deducted commissions paid to themselves. It does not appear what they paid out of their own funds for these various items. Both parties agree that the statements rendered by each are inaccurate and contain items which are either improper or incorrectly entered. The payment of $250 for the down payment and the amounts advanced for monthly payments are proper credits to be allowed the appellant, but the agreement did not authorize the respondents to offset these with a claim for services rendered as real estate brokers. The claim for compensation for labor furnished by appellant, though not payable until the property is sold should nevertheless be protected in any final judgment. Since the cause has been transformed into an action to determine the equities of the respective parties the judgment should either decree a foreclosure of the partnership, or joint venture, after a full accounting, or it should declare that the respondents hold an undivided one-half interest in the property for the benefit of appellant and find what are the respective rights and obligations under the transaction.

The judgment is reversed.

STURTEVANT and SPENCE, JJ., concurred.

48 Cal.App.2d 673

HODGDON v. HODGDON.

Civ. 2759.

District Court of Appeal, Fourth District, California.

Dec. 22, 1941.

Divorce ⇐164

Where it was represented to superior court that action to modify divorce decree so far as it determined paternity of plaintiff, a minor, was instituted by guardian ad litem for her own benefit and against interest and wishes of minor, and where general guardian had been appointed for the minor and general guardian had been substituted in place and stead of guardian ad litem, judgment modifying the divorce decree was reversed in accordance with stipulation.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Aileen La Mae Hodgdon, a minor, etc. against Samuel William Hodgdon to modify portion of divorce decree determining paternity of plaintiff. From a judgment for plaintiff, defendant appeals.

Reversed pursuant to stipulation.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Charles E. Burch, Jr., of San Diego, for respondent.

PER CURIAM.

This is an appeal from a judgment which modified a decree of divorce rendered by the Superior Court of Los Angeles County, in the case of Samuel William Hodgdon v. Marie Pauline Hodgdon, insofar as that decree determined the paternity of Aileen La Mae Hodgdon, the minor plaintiff here.

At the time of the trial of this action in the court below, Aileen was a little less than fourteen years of age. It was represented to the Superior Court that the action was instituted by the guardian ad litem for her own benefit and against the interest and wishes of the minor. A request was made to that court to reopen the case and continue it until the minor had reached the age of fourteen years so that she could nominate her guardian ad litem and her interests could be properly protected in the litigation. This request was denied.

When the case was first argued before this court, Aileen was almost sixteen years of age. From the record and from undenied statements made in open court, the personal interest of the guardian ad litem in the results of the action, antagonistic to the interests of the minor, seemed apparent, and the question of whether or not the guardian ad litem would properly represent the interests of the minor in the litigation was seriously presented. This question was further pressed in later filings.

A general guardian was appointed for the minor and she was substituted in the place and stead of the guardian ad litem in the Superior Court and here. She is a disinterested party of integrity and has selected a disinterested attorney to represent the minor. It seems that now the interests of the minor will be properly presented in future proceedings.

A stipulation has been filed that the judgment be reversed. This would seem advisable under the circumstances.

The judgment is reversed.



48 Cal.App.2d 856

WHITTED v. BROWN et al.

Civ. 2935.

District Court of Appeal, Fourth District, California.

Dec. 18, 1941.

Appeal and error ⇐766

Where the clerk's and reporter's transcripts were filed in appellate court on June 10, 1941, and nothing further had been filed in appellate court except respondents' notice of motion to dismiss appeal, filed on November 15, 1941, on ground that no printed points and authorities had been filed within 30 days, the motion was granted and appeal dismissed. Rules for the Supreme Court and District Courts of Appeal, rule 1, § 4.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Action by E. G. Whitted against Bert Brown and others. From the judgment, plaintiff appeals.

Appeal dismissed.

King & King, of San Bernardino, for appellant.

Sarau & Thompson and Roy W. Colegate, all of Riverside, for respondents.

PER CURIAM.

The clerk's and reporter's transcripts were filed in this court on June 10, 1941. Nothing further has been filed in this court except the papers in connection with this motion. On November 15, 1941, the respondents filed a notice of motion to dismiss the appeal on the ground that no printed points and authorities had been filed within thirty days as required by Rule I, section 4 of the Rules for the Supreme Court and District Courts of Appeal, together with an affidavit of service of the notice of motion. Before the motion was heard we were informed by counsel for the appellant that the granting of the motion would not be opposed.

The motion is granted, and the appeal is dismissed.



48 Cal.App.2d 680

Ex parte LOROS.

Cr. 2221.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1941.

Habeas corpus ⇐111(1)
Pardon ⇐14

Where petitioner, after having entered guilty plea to misdemeanor charge was sentenced on December 31, 1940, to 100 days' imprisonment in Oakland city jail, but execution of sentence was suspended and she was released on probation on certain conditions which petitioner violated, and on August 14, 1941, petitioner was sentenced to imprisonment in city jail for six months, the second sentence of six months was a nullity under statute, and petitioner, having already served full term imposed by first sentence, was entitled to be discharged from custody thereof, particularly in view of district attorney's concession in writing that petitioner was entitled to discharge. Pen. Code, § 1203.2.

Proceeding in the matter of the application of Hazel Loros for a writ of habeas corpus to secure petitioner's discharge from the custody of the Chief of Police of the City of Oakland.

Petitioner ordered discharged and cash bail ordered returned to depositor thereof.

Edward D. Mabson, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

Petitioner seeks to be discharged from the custody of the chief of police of the city of Oakland, by whom she is imprisoned in the city jail pursuant to a commitment issued by the police court (department one) of said city.

It appears from the record that on December 31, 1940, after having entered a plea of guilty to a charge of misdemeanor, she was sentenced to 100 days imprisonment in the Oakland city jail, but the execution of the sentence was suspended and she was released on probation on certain conditions. Petitioner violated those conditions, and on August 14, 1941, after certain proceedings were had in said court, she was sentenced to imprisonment in the city jail for a period of six months. Thereupon a commitment was issued, and pursuant thereto she was on said last-mentioned date delivered into the custody of the chief of police, and has since been confined in the city jail.

Section 1203.2 of the Penal Code in part provides: "Upon such revocation and termination [of probation] the court may, if the sentence has been suspended, pronounce judgment after said suspension of the sentence for any time within the longest period for which the defendant might have been sentenced, but if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the person shall be delivered over to the proper officer to serve his sentence, less any credits herein provided for".

It is apparent, therefore, that the second sentence of six months' imprisonment imposed on petitioner on August 14, 1941, is a nullity, and since she has already served the full term of imprisonment of 100 days imposed by the first sentence, she is entitled to be discharged from custody thereon. Furthermore, at the time the present proceeding came on for hearing on the merits before this court the district attorney, in writing, conceded that petitioner is entitled to the relief sought.

It is ordered, therefore, that the petitioner be discharged from custody on the charge to which she entered the plea of guilty on December 31, 1940; and it is further ordered that the cash bail of $50 heretofore deposited with the clerk of this court be returned to the depositor thereof.

PETERS, P. J., and WARD, J., concurred.



48 Cal.App.2d 717

In re WOODCOCK'S ESTATE.

WOODCOCK v. SYLVESTER et al.

Civ. 13373.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1941.

1. Insane persons ⇐33(2)

Where record on appeal from order appointing a guardian for the estate of an alleged incompetent person did not show person's absence at time first fixed for hearing of petition on which guardian was appointed, and order appointing guardian recited that petition "came on regularly to be heard", if person's presence was required at time in question, the reviewing court was required to presume that she was there or that a sufficient excuse for her absence was shown. Probate Code, § 1461.

2. Appeal and error ⇐712

The reviewing court could not consider the argument based on a point referred to which did not appear in the record.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceedings in the matter of the estate of Nellie E. Woodcock, an incompetent person. From an order appointing a guardian for her estate, Nellie E. Woodcock appeals, opposed by Vernace F. Sylvester and others, as respondents.

Affirmed.

Hugh G. Maddox, of Long Beach, for appellant.

Roland Maxwell, of Pasadena, for respondent Vernace F. Sylvester.

SHAW, Justice pro tem.

[1] The appellant here is the incompetent person above named, and she appeals from the order appointing a guardian for her estate. In support of her appeal she presents but two contentions. The first is that at the time first fixed for hearing of the petition on which the guardian was appointed she did not appear in court nor was any physician's certificate of her inability to appear presented, and the court thereupon lost jurisdiction over her. As far as appears from the record, nothing was done at this time, except to continue the hearing to a later time. At the later time appellant was present and the matter was heard and taken under submission. Following the submission the order appointing a guardian was made. While section 1461 of the Probate Code provides that the alleged incompetent person "must be produced at the hearing" on the petition for appointment of a guardian or physical inability of such person to attend must be evidenced by a physician's certificate, we see nothing to require either of these alternatives to be complied with until the hearing actually proceeds. However, the point is not before us for decision. The record on appeal does not show the absence of the appellant at the time in question, and the order appointing a guardian recites that the petition "came on regularly to be heard." If appellant's presence was required at the time in question, we must presume that she was there or a sufficient excuse for her absence was shown. Guardianship of Waite, 1939, 33 Cal.App.2d 315, 91 P.2d 620.

[2] Appellant's other point is that before the petition was heard she placed all her property in the hands of a trustee to administer for her benefit, and therefore no guardian of her estate was necessary. But

the fact referred to does not appear in the record; hence we cannot consider the argument based upon it.

The order appealed from is affirmed.

YORK, P. J., and WHITE, J., concurred.



48 Cal.App.2d 551

PEOPLE v. HOLQUIN.

Cr. 3515.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1941.

1. Rape ⇐51(1)

Evidence *held* sufficient to sustain conviction of rape as against contention that prosecutrix' testimony was so incredible and improbable as to be unworthy of belief.

2. Criminal law ⇐1159(4)

In rape trial, prosecutrix' testimony cannot be said to be inherently improbable merely because it contains contradictions or inconsistencies.

3. Criminal law ⇐1159(4)

To justify reversal of conviction for crime because of incredibility of testimony on which based, improbability of such testimony must be so obvious as to leave court no recourse, without self-stultification, except to reverse judgment.

4. Criminal law ⇐1159(4)

To justify reversal of conviction for crime because of incredibility of testimony on which based, it is not sufficient that such testimony contains unusual circumstances.

5. Criminal law ⇐742(1)

It is jury's peculiar and exclusive province to determine whether witness has sworn falsely.

6. Criminal law ⇐742(1)

In rape trial, it is jury's duty to determine whether they will believe or disbelieve prosecutrix, though her testimony contains contradictions and is contradicted by other witnesses.

7. Criminal law ⇐1144(18)

On appeal from conviction of rape, appellate court must accredit to trial judge's decision denying new trial a familiarity with witnesses and their testimony and assume that he acted with understanding and regard for jury's function, though prosecutrix' testimony contained glaring inconsistencies and contradictions.

8. Criminal law ⇐1160

On appeal from conviction of crime, appellate court will override jury's and trial court's conclusions because of incredibility of complaining witness' testimony only where such testimony is uncorroborated and so obviously and inherently false and unbelievable that reasonable minds may not differ with respect to its character.

9. Criminal law ⇐1160

For testimony which effected conviction of crime by jury, with trial court's approval, to justify reversal of judgment on ground of incredibility of testimony, it should clearly appear that verdict was result of passion and prejudice.

10. Rape ⇐54(2)

In trial for rape, testimony of prosecutrix' husband and police officers as to prosecutrix' condition on their arrival at her home after crime, evidence that she reported incident immediately after its occurrence and testimony as to presence of scratches on defendant's face and tear in his shirt, as testified to by prosecutrix, corroborated her testimony and rendered apparent inconsistencies therein innocuous.

11. Criminal law ⇐1137(8)

Where accused's counsel promptly stipulated that state's witness had not previously been on stand after fact of reporter's absence during his previous testimony was brought to trial court's attention and did not object to repetition of witness' testimony, accused could not demand reversal of conviction on ground that court erred in allowing witness to testify for second time.

12. Criminal law ⇐1186(4)

Where accused's attempted flight, as related by state's witness, was not denied by accused, error, if any, in allowing such witness to repeat his testimony, first given during reporter's absence, was not prejudicial to accused. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Tony S. Holquin was convicted of rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondents.

MOORE, Presiding Justice.

This is an appeal from the order denying a new trial and from the judgment of conviction, after a verdict of guilty of rape.

The victim was a young married woman eighteen years of age. Appellant had called at the home of the prosecutrix about 9:30 a. m. on May 20, 1941. Her husband had departed for his work at an early hour and she had lain down for additional repose. She opened the door at the time appellant knocked and he entered stating that he desired to borrow $1 from her husband. He stated on entering her apartment that he had had a fight with a lady and was going to Mexico. He seated himself at the foot of her bed while she sat at the head of it. After they had talked about ten minutes, she stood up. He grabbed her and forced her on to the bed and committed the act of sexual intercourse. She protested and resisted with all her might, but to no avail. When she screamed, he put his hand on her mouth. She tore his shirt and scratched his face, during the time that he applied force in order to consummate his diabolical act. After his crime he stated that he was sorry and asked her forgiveness. She followed him from her apartment downstairs and immediately asked the landlady to call the police. A party was waiting for appellant in an automobile in the street. Together they drove away. She called her husband by telephone and he arrived at 10:45 a. m. Upon his arrival he found her excited and nervous, her hair disheveled, waiting for him at the front of the apartment house. He telephoned the police who responded at 11:30 o'clock and they found her condition as that described above and conveyed her to the hospital for examination. The husband then accompanied the officer in search of appellant and they found him in the company of the husband's brother about 4 o'clock in the afternoon. The officers observed that he had scratches on his neck and that his shirt was torn in the front as had been related by his victim. On the way to the police station, appellant jumped from the automobile, ran across Broadway and was caught one block away.

Appellant admits the act of sexual intercourse but maintained that it was with the consent of the prosecutrix. He denied receiving the scratches at her hands.

[1] The primary ground for appeal is that the verdict is contrary to the evidence and that the story of the prosecutrix is so incredible and improbable that this court should declare it unworthy of belief. In support of this contention, appellant points out that within five minutes of his arrival, the prosecutrix informed him that she was pregnant and had been for two months; that she testified that he did not choke her; that upon his arrival she left the front door unlocked; that although she professed to having been fearful, yet she did not attempt to escape through the back door; that while she had known him only four months that she did not like him and always avoided his presence; that she did not tell him to leave but at the time of his departure she followed him downstairs as she was suspicious of him during the entire ten minutes before he removed her clothes and attacked her.

Notwithstanding the circumstances pointed out as favorable to his contention, there is nothing in the testimony of the prosecutrix to impose upon the credulity of the court or jury. She was a small woman, weighing only 98 pounds while appellant weighed 170 pounds. She made a complaint immediately; she called for her husband; she had the police summoned; she was excited, nervous and her hair was disarranged. Her conduct in dealing with appellant upon his entry into her room was well calculated to convince the jury that she was fearful of appellant and that, in all probability, she calculated that although she feared him, yet since he was her husband's friend, she might best dispose of his presence by quiet friendliness and by informing him of her condition. But the tear in his shirt and the scratches on his face, reported by the prosecutrix to the police, were found when they arrested him five hours later.

[2, 3] It cannot be said that the testimony of a prosecutrix is inherently improbable merely because it contains contradictions or inconsistencies. To justify a reversal because of the incredibility

of the testimony, its improbability must be so obvious as to leave the court no recourse, with self-stultification, except to reverse the judgment. People v. Becker, 140 Cal.App. 162, 35 P.2d 196; People v. Amadio, 25 Cal.App. 729, 145 P. 151.

[4-6] It is not sufficient that the testimony contains unusual circumstances. People v. Collier, 111 Cal.App. 215, 226, 295 P. 898. It is the peculiar and exclusive province of the jury to determine whether a witness has sworn falsely. Although the testimony of the prosecutrix contains contradictions and although her testimony be contradicted by other witnesses, it is still the duty of the jury to determine whether they will believe or disbelieve the prosecutrix. People v. Becker, supra.

[7-9] But, even though the testimony of the prosecutrix contains glaring inconsistencies and contradictions, the appellate court must accredit to the decision of the trial judge a familiarity with the witnesses and their testimony and that in denying a new trial he acted with understanding and with a regard for the function of the jury. Those instances in which the appellate court have overridden the conclusions of the jury and the trial court are where the testimony of the complaining witness is uncorroborated and it is so obviously and so inherently false and unbelievable that reasonable minds may not differ with respect to its character. People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238, 240. For testimony which has effected a conviction by a jury with the approval of the trial court "to justify a reversal of a judgment on that ground it should clearly appear that the verdict is the result of passion and prejudice." Ibid. People v. Lewis, 18 Cal.App. 359, 123 P. 232.

[10] The testimony of the husband and the police officers in describing the condition of the prosecutrix upon their arrival at her home; the fact that she reported the incident immediately following its occurrence; the presence of scratches upon appellant's face and the tear in his shirt,—all these corroborated the young woman's story and render innocuous the apparent inconsistencies of the prosecutrix's testimony.

[11, 12] The assignment that the trial court erred in allowing the police officer Meza to testify for a second time is without support. It appears that when the officer first testified the reporter was absent. When that fact was brought to the attention of the court, appellant's counsel promptly stipulated that the witness had not been on the stand before. There was no objection to his repeating his testimony. If it was error for him to do so appellant consented to it at the time and he cannot therefore demand a reversal on that ground. People v. Casey, 79 Cal.App. 295, 306, 249 P. 525; People v. Pettinger, 94 Cal.App. 297, 301, 271 P. 132; People v. Stone, 199 Cal. 610, 623, 250 P. 659; People v. Ho Kim You, 24 Cal.App. 451, 462, 141 P. 950. Moreover, the attempted flight of appellant as related by the officer Meza on the stand was not denied by appellant. No prejudice therefore could have resulted if he had repeated his story twice. Constitution, art. VI, § 4½; People v. Ho Kim You, supra.

The judgment and the order denying a new trial are affirmed.

W. J. WOOD, and McCOMB, JJ., concurred.



DOUILLARD et al. v. WOODD.

Civ. 13082.

District Court of Appeal. Second District, Division 2, California.

Dec. 19, 1941.

Hearing Granted Feb. 16, 1942.

1. Appeal and error ⇐931(1)

On appeal from a judgment for plaintiffs, evidence was viewed in the light most favorable to the plaintiff.

2. Wills ⇐741

Evidence sustained finding that legatee agreed to divide her special legacy among heirs of decedent in the same proportion as the residue of decedent's estate was directed to be distributed by the residuary clause of decedent's will if heirs would not contest will, and that there was sufficient "consideration" to support the agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

* Subsequent opinion 128 P.2d 6.

3. Novation ⇐1

Where heirs agreed to permit will to be probated without contest provided legatee would agree to divide her special legacy among them in the same proportion as the residue of decedent's estate was directed to be distributed by residuary clause, instruments putting into effect the original agreement of the legatee with the heirs did not constitute a "novation" of the original agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

4. Wills ⇐741

In an action to enforce a contract for distribution of an estate in accordance with an agreement whereby legatee agreed to divide her special legacy among heirs of decedent in certain proportions, exclusion of testimony pertaining to discussions relative to division of the residue of the estate, and having no bearing upon either the issue of whether an agreement had been made between legatee and heirs, or as to whether there was a novation which affected the alleged agreement was not error.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Emile A. Douillard and others against Melanie D. Woodd to enforce a contract for distribution of property of an estate. From a judgment for the plaintiffs, defendant appeals.

Affirmed.

Fred W. Heath and Daniel A. Knapp, both of Los Angeles, for appellant.

Thomas Higgins, Jr., and J. M. Clements, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to enforce a contract for the distribution of property of an estate, defendant appeals.

[1] The evidence being viewed in the light most favorable to plaintiffs (respondents), the essential facts are:

August 23, 1937, Emily S. Donahue died leaving surviving her three children, Melanie D. Woodd (defendant) and Emile Douillard and Frank Douillard (plaintiffs), and two grandchildren, Raymond F. Puissegur and Juliette Evans (plaintiffs). Decedent left a will by which she bequeathed to defendant $10,000 and after making certain other small bequests left the residue of her estate as follows:

"¼ to Melanie D. Woodd, Emile A. Douillard and Frank T. Douillard; ⅛, each, to Raymond F. Puissegur and Juliette Evans."

July 10 and 11, 1937, defendant had a conversation with plaintiffs herein, in which she promised them that, if they would not contest the will and permitted it to be administered, as soon as she received her legacy of $10,000 and the estate was settled, she would divide the legacy among the plaintiffs in the same proportions that they were to receive the residue of decedent's estate. Plaintiffs did not contest the will of decedent and on May 5, 1938, the following agreement was signed by plaintiffs and defendant:

"MEMORANDUM OF AGREEMENT

"Defendant's Exhibit A

"The undersigned, legatees of Emily S. Donahue, deceased, hereby agree:

"That the property to be distributed to us as residuary legatees shall be divided among us as follows:

"Emile Douillard shall receive the property at 2025½ W. 28th St. subject to sale agreement at net amount due April 30, 1938. Money to equalize his one fourth.

"Frank Douillard shall receive the two beach properties at $5500. Money to equalize his one fourth.

"Melanie D. Woodd shall receive the building at 1824 S. Vermont at $15600.00 and will pay to the Estate the difference to equalize her share. She will buy the flats at 1732 S. Vermont at $500.00 paying the estate net $375.00 and waiving any participation.

"Raymond Puissegur shall receive Louis Douillard's property subject to the sale contract he holds at value 4/30. The buoy property subject to sale contract at value April 30. San Luis Obispo 3 lots at net $150.00 Improvement bonds at $452.24. Balance in cash to equalize his share.

"Juliette Evans shall receive

"The Harry Stadelmann note at balance due April 30, 1938.

"The Frances Stadelmann note at balance due April 30, 1938.

"Balance in cash to equalize her share.

"A complete agreement shall be drawn and signed by us in accordance with the foregoing.

"Dated May 5, 1938.

"(Signed) EMILE A. DOUILLARD
FRANK T. DOUILLARD
JULIET S. EVANS
RAYMOND FRANK PUISSEGUR
MELANIE D. WOODD"

October 19, 1938, plaintiff Juliette Evans signed the following receipt:

"In the Matter of the Estate of Emily S. Donahue, Deceased No. 170205

"Legatee's Receipt for Distributive Share on Mutual Partition and Division of Estate Properties

"Pursuant to the provisions of the will duly admitted to probate the undersigned Residuary Legatee, pursuant to agreement with all other residuary Legatees, agrees to partition as follows:

"Juliet S. Evans share as Residuary Legatee	$5955.01	
Credits:		
Property pro rate—⅛ of $34,327.17	5955.01	
Cash—adjusted to April 30, 1938—⅛ of $10,817.23	1352.15	
Receipts H. H. Stadelmann note	177.90	
Receipt Frances Stadelmann contract	123.75	
Interest—Savings Acct.	10.31	
Total credits	$5955.01	
Deductions:		
California Inheritance tax as agreed	20.22	
Cash advances a/c Legacy	350.00	
H. H. Stadelmann note	1385.00	
Frances Stadelmann contract	2359.20	
Reserve deposit for taxes ⅛ of $200	25.00	4139.42
Balance Due in Cash at 9/27/38		1815.59

"Receipt of cash in the sum of $1815.59 and transfer of H. H. Stadelmann deed of trust note and deed to Lot 46 Tract 4499 subject to contract of sale, to Frances Stadelmann are hereby acknowledged and accepted, in full settlement, payment and release of all claims against said estate as legatee or otherwise, and against the executrix save and except the right to receive any unused part of the $25.00 tax reserve, which is to be returned to me as soon as the collector of Internal Revenue has released the property of the Estate from further tax claim.

"Dated October 19—1938

"(Signed) Juliet Evans"

On September 27, 1938, an order was made settling the final account and for distribution of the estate according to the terms of the will.

Defendant relies upon the following propositions for reversal of the judgment:

First: There is no substantial evidence to sustain the trial court's finding that

(a) Defendant agreed to divide her special legacy of $10,000 among the heirs of decedent, in the same proportion as the residue of decedent's estate was directed to be distributed by the residuary clause of decedent's will;

(b) There was sufficient consideration to support the agreement just mentioned.

Second: The agreements of May 5, 1938, and October 19, 1938, supra, constituted a novation of the prior agreement which the court found defendant had entered into with plaintiffs.

Third: The court committed prejudicial error in sustaining objections to certain evidence offered by defendant which defendant alleges would have tended to prove a novation.

[2] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence taken in connection with the inferences which the trial judge may have properly drawn therefrom to sustain the findings of fact and the facts set forth above. For example, plaintiff Puissegur testified that on July 10, 1937, he had a conversation with defendant, at which time defendant said that decedent had made a will and had given her a special legacy of $10,000, to which Mr. Puissegur replied that both he and his sister Mrs. Evans would contest the will unless there was a division made of the special legacy of $10,000. Defendant then said that she would divide the extra $10,000 which she received as a special legacy among the heirs if none of them contested the will. Further discussion of the evidence is unnecessary (see In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720).

[3] Defendant's second proposition is likewise untenable. The agreements which defendant urges constituted a novation referred solely to the residuary clause of decedent's will and merely tended to put into effect the original agreement of defendant with plaintiffs, whereby they agreed to permit decedent's will to be probated without contest, providing defendant would agree to divide her special legacy among them.

[4] Defendant's final proposition is likewise without merit. The questions to which the trial court sustained objections pertained to discussions relative to the division of the residue of the estate and had no bearing upon either the issue of whether an agreement had been made between defendant and plaintiffs or as to whether there was a novation which affected the alleged agreement.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



ALEXANDER et al. v. STATE PERSONNEL BOARD et al. *

Civ. 13040.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Rehearing Granted Jan. 20, 1942.

1. Officers ⇐72(1)

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and statute then in effect authorized petitioners to apply for a rehearing before board within 30 days after receiving a copy of decision, and petitioners permitted five months to elapse after receiving copy of decision before a petition for rehearing was filed with board, the petition was not effectual for any purpose and perfunctory denial of petition by board added no vitality to it. St.1937, p. 2107, § 173.

2. Courts ⇐90(1)
Officers ⇐103

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before courts will act, and this rule is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under doctrine of "stare decisis", and binding upon all courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Stare Decisis".

3. Officers ⇐103

Where an administrative remedy is provided by statute and administrative procedure prescribes a rehearing before administrative body, the rule of "exhaustion of remedies" will apply in order that administrative body may be given an opportunity to correct any errors that it may have made before resort may be had to courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Exhaustion of Remedies".

4. Mandamus ⇐169

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and statute then in effect authorized petitioners to apply for a rehearing before board within 30 days after receiving a copy of decision, and petitioners permitted five months to elapse after receiving a copy of decision before filing a petition for rehearing with board, and such petition was not filed until after petitioners had filed a petition in superior court for writ of mandate to review board's decision, dismissal of latter petition was proper. St.1937, p. 2107, § 173.

5. Constitutional law ⇐318

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and petitioners had not filed a petition for rehearing with board, as was authorized by statute, before petitioners filed petition in superior court for a writ of mandate to review board's decision, and matters of procedure or evidence affecting petitioners' rights could have received consideration by entire board upon petition for rehearing, petitioners could not complain that proceedings before board deprived petitioners of "due process of law" in that board admitted testimony contrary to

* Subsequent opinion 124 P.2d 338.

rules of evidence and that there was never any determination by a quorum of board. St.1937, p. 2107, § 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Mandamus ⇐13

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and statute afforded petitioners opportunity for rehearing before board, if there was any deficiency in evidence introduced before board, or any weight to that evidence which was offered but excluded, the board should have been given opportunity to hear other testimony or to reverse its decision before petitioners applied to courts for relief by mandamus to review board's decision. St.1937, p. 2107, § 173.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceedings by Arthur H. Alexander and another against the State Personnel Board of the State of California and others, to review a decision of the Board discharging petitioners from their positions as employees of the state of California and for other relief. From a judgment of dismissal, petitioners appeal.

Affirmed.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

R. H. SCOTT, Justice pro tem.

Petitioners appeal from judgment of dismissal of their fourth amended petition for writ of mandate, entered following order sustaining demurrer without leave to amend. It was sought to review a decision of respondent personnel board discharging petitioners from their positions as employees of the State of California. In the action they also sought an order of reinstatement and back salaries.

The judgment of the trial court must be upheld because petitioners had failed to exhaust their administrative remedies before instituting this action and were not entitled to a writ of mandate.

The chronological record shows the omission which was fatal to petitioners' case:

On July 12, 1938, complaints against petitioners were filed with the State Personnel Board charging petitioners with incompetency, inefficiency, dishonesty, discourteous treatment of the public, failure of good behavior, wrongful behavior and other acts alleged to be incompatible with and inimical to the public service of the state. Petitioner Alexander had held the position of petroleum production inspector with the State Land Commission. Petitioner Sturzenacker had held the position of chief of the Division of State Lands, with the same commission.

On August 23, 1938, respondent State Land Commission suspended petitioners from their respective positions, and this order has not been vacated.

On September 26, 1938, hearings on the petitioners' cases were commenced before respondent State Personnel Board.

On April 8, 1939, a copy of the board's findings, conclusions of law and decision adverse to petitioners was mailed to, and two days later was received by, petitioners' counsel.

On April 11, 1939, the decision was entered on the official roster of state employees.

On April 21, 1939, the findings, conclusions and decision were entered in the minutes of the board.

On July 5, 1939, this petition for writ of mandate was filed.

On September 11, 1939, petitioners filed with the board a petition for rehearing in their case. It was denied at a meeting of the board held ten days later.

Petitioners assert that the demurrer to their fourth amended petition for a writ of mandate was sustained upon the sole ground that they had not petitioned for a rehearing by the board before they filed their petition for the writ of mandate.

[1] The State Civil Service Act in effect during the period under consideration made provision for filing of charges against state employees and hearings thereon. Section 173, subdivision c, of the act St.1937, p. 2107, provides in part: "Rehearing. Within thirty days from and after receipt by him of a copy of the decision rendered by the board in a proceeding under this section, the employee or the appointing power may apply for

a rehearing by filing with the board a petition in writing therefor." This petition, on notice to the parties affected, must be granted or denied within sixty days. If it is granted the case is set down for further hearing. Whether the time within which such application for rehearing must be made be calculated from the date of service on petitioners herein of a copy of the board's decision or from the date of entry of the decision in the minutes of the board, it is obvious that more than thirty days, in fact about five months, had elapsed before the petition for rehearing was filed with the board. Not being within the time provided by law, it was not effectual for any purpose and the perfunctory denial by the board added no vitality to it.

[2-4] "Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. * * * It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. * * * Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts. * * * where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made." Abelleira v. District Court of Appeal, 17 Cal.2d 280, at pages 292, 293, and 302, 109 P.2d 942, 949, 132 A.L.R. 715. This rule is grounded in experience and reason. The instant case illustrates its validity and justice.

[5] Petitioners make complaint concerning the proceedings before the personnel board, and assert that they were of such a nature that they deprived petitioners of their rights without due process of law. It is alleged that by reason of various matters, the essential ones of which are set forth below, "there is not and never has been any determination by respondent Board, or a quorum of respondent Board, or by any unprejudiced or impartial members of said Board upon the merits of the charges" against them. It is alleged that the evidence was taken partly before the entire board of five members, partly before less than five members and partly by having one of its members act as referee and report to the board. Prejudice is charged against one board member. It is claimed that an attempt at hasty and ill-advised action evidenced prejudice on the part of two others. Testimony is alleged to have been admitted contrary to rules of evidence. Hearings are said to have been unduly extended, even requiring attendance on a legal holiday, and counsel for petitioners were hurried beyond reason at their sessions before the referee. It is finally claimed that petitioners were required to argue the case before the whole board prior to the time when the transcript of 3,000 to 4,000 pages and 152 exhibits was completed. It is at once apparent that upon petition for rehearing matters of procedure or evidence affecting the substantial rights of petitioners could have received consideration by the entire membership of the board. At that time it appears they would have had the official transcript of the evidence, and if in any respect it failed to support their decision an opportunity would have been afforded to supplement the testimony or to modify their decision.

[6] Appellants in their brief assert: "There is no question as to the meritoriousness of petitioners' application for judicial relief in this matter." Our attention has not been directed by appellants to any portion of the record in this case in which they allege either (1) that there was not sufficient competent and legally admissible evidence to support a finding by the personnel board that the charges against them were true, or (2) the substance or effect of any defense testimony which would avail against that produced against them and which they were actually precluded by the board from presenting in their own behalf. If there was any such deficiency in the evidence introduced, or any weight to that offered and excluded, the personnel board should have been given an opportunity to call for or permit other testimony or to reverse its decision.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 440

ELLIS et al. v. AMERICAN FEDERATION OF LABOR et al.

Civ. 11845.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1941.

1. Associations ⇐1, 10

A member of an unincorporated association may not be suspended or expelled and a subordinate body may not be suspended or its charter revoked without charges, notice and hearing, even though the rules of the association make no provision therefor.

2. Trade unions ⇐7

Although constitution of national labor association gave president power to suspend and to revoke charter of city central labor union, a purported suspension of charter of central labor council of city without notice or hearing was void notwithstanding it was only a suspension pending a hearing.

3. Associations ⇐1, 7

Generally, before appealing to the courts the remedies within an association must be exhausted, but such rule does not apply where the attempted action is void because the member or subordinate body has been denied "due process of law" of notice and hearing.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

4. Trade unions ⇐7

Action to enjoin president of national labor association from suspending charter of central labor council of city was not prematurely brought and the fact that a part of the feared action had taken place in the suspension of the charter without notice or hearing only strengthened the right of members of labor unions represented by the central labor council to relief.

5. Injunction ⇐1

The purpose of a suit for injunctive relief is to prevent threatened action.

6. Action ⇐65

In an action for injunction the issues are to be determined on the basis of the situation as it exists at the time of the trial, not at the time of bringing the action.

7. Trade unions ⇐7

Court determining that charter of central labor council of city could not legally be suspended or revoked without hearing would not determine whether the central labor council was guilty of any conduct which would justify suspension or revocation of its charter after proper notice and hearing, since it would be improper to substitute a hearing in court for hearing that the council was entitled to have within the organization to which it belonged.

8. Injunction ⇐135

Generally, granting or refusing to grant a temporary injunction lies in the sound discretion of trial court.

9. Trade unions ⇐7

In action against national labor association and officers and representatives thereof to enjoin suspension or revocation of charter of central labor council of city, where it appeared from affidavit submitted by defendants that the charter had been suspended without notice or a hearing, and injury to members of labor union, whose delegates formed the council, was clear and unmistakable and no corresponding damage to defendants from compelling them to follow the procedure required by law was apparent, refusing to grant a temporary injunction was an abuse of discretion. Code Civ.Proc. § 526, 2nd subds. 5, 6; Civ.Code, §§ 3390, 3392, 3423.

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action for injunction by T. Ralph Ellis and others against American Federation of Labor and others. From an order refusing to grant a temporary injunction, plaintiffs appeal.

Reversed.

Joseph F. Di Maria, of San Jose, for appellants.

I. B. Padway, of San Francisco, for respondents.

DOOLING, Justice pro tem.

This is an appeal from an order refusing to grant a temporary injunction. The order to show cause why a temporary injunction should not issue was heard on the verified complaint and certain affidavits. The plaintiffs are members of three separate unincorporated labor unions of Santa Clara

county suing in a representative capacity. The defendants, other than American Federation of Labor, are officers and representatives of that national association.

It appears from the complaint that the Central Labor Council of Santa Clara county is an unincorporated association consisting of delegates from the various local unions of Santa Clara county belonging to the American Federation of Labor, including the local unions of which plaintiffs are members; that because of the fact that two competing sets of delegates from one of the member local unions had presented themselves to the Central Labor Council that council had ordered a special election for delegates held in said local union and that one of the two sets of delegates had again been elected at such special election; that thereupon defendant Meyer Lewis as personal representative of defendant William Green, the president of the American Federation of Labor, notified the Central Labor Council at its first meeting held thereafter not to seat such delegates until he could conduct an investigation and that at such meeting the council refused to seat such delegates; that at its next meeting, held one week later, the council seated such delegates; that defendant Lewis had declared that if the delegates were seated he would "jerk the charter" of the Central Labor Council; that after the seating of the delegates defendants Daley and Davies removed the charter of the Central Labor Council and that such conduct among labor bodies is commonly understood to presage and foretell a revocation of the charter of the body concerned; and that no charges have been made against the labor council or its officers, no notice of any has been given, and no opportunity afforded said council or its officers to answer any charges or to provide a hearing before taking action upon the question of revocation of its charter.

Upon the hearing of the order to show cause affidavits for both parties showed that without notice or hearing of any kind defendant Green had suspended said council and ordered that it hold no further meetings until such time as he could investigate and render a decision in the matter of its conduct in seating the delegates above referred to, and that pursuant to such order of suspension the charter had been removed.

In justification of these actions defendants cite article VI, section 6 of the constitution of the American Federation of Labor: "The president shall be authorized and empowered to discipline State Federations of Labor, City Central Labor Unions, and Local and Federal Labor Unions, including authority to suspend and/or expel any officer or member thereof, and/or to suspend and/or revoke their charter subject first to an appeal to the Executive Council and thereafter to the next regular convention immediately following. The president with the approval of the Executive Council shall likewise have authority and be empowered to safeguard and protect and if necessary take immediate charge of all equities and properties tangible or intangible, acquired and/or possessed by State Federations of Labor, City Central Labor Unions and Local and Federal Labor Unions or their subsidiaries or agents, whenever or however such equities and/or properties may be jeopardized through disobedience to the constitution, laws, rules and requirements of the American Federation of Labor or for any other reason or cause deemed imperative by the President and the Executive Council, and shall hold the same in trust as provided by the laws of the American Federation of Labor."

[1] It will be observed that this section provides for no charges, notice or hearing. It is settled, however, in this state and elsewhere that a member of an unincorporated association may not be suspended or expelled, nor a subordinate body suspended or its charter revoked, without charges, notice and a hearing, even though the rules of the association make no provision therefor. Taboada v. Sociedad Espanola, 191 Cal. 187, 215 P. 673, 27 A.L.R. 1508; Knights of Ku Klux Klan v. Francis, 79 Cal.App. 383, 249 P. 539; Grand Grove, etc., v. Garibaldi Grove, etc., 105 Cal. 219, 38 P. 947; Id., 130 Cal. 116, 62 P. 486, 80 Am.St.Rep. 80; Supreme Lodge, etc., v. Los Angeles Lodge No. 386, 177 Cal. 132, 169 P. 1040; Gallaher v. American Legion, 154 Misc. 281, 277 N.Y.S. 81; 19 Cal.Jur., p. 472; 10 C.J.S., Beneficial Associations, § 50, p. 293.

Respondent argues, however, that the suspension in this case was justified without notice or hearing because it was only a suspension pending a hearing. No authority is cited in support of this argument and we have found none. It is to be observed that the section above quoted gives no specific authority to suspend without notice pending a hearing. Instead the power is given "to suspend and/or revoke their charter, subject first to an appeal, etc." It would be a novel procedure to

provide an appeal from an order of suspension which was merely a step in an orderly trial. It is also to be noted that no distinction is made between the power to suspend and to revoke. The president is empowered in the same terms to do either. It would do violence to the language of the section to construe it as providing for suspension without notice or hearing as a first step in determining whether there should be a suspension or revocation after a hearing.

[2] Having determined that the purported suspension of the charter was void for want of notice and a hearing, certain other points made by respondent must be dealt with.

[3] While it is the general rule that before appealing to the courts the remedies within the association must be exhausted, this is not the rule where the attempted action is void because the member or subordinate body has been denied the due process of notice and a hearing. Schou v. Sotoyome Tribe, No. 12, 140 Cal. 254, 73 P. 996; Hampton v. Supreme Lodge, 161 S.C. 540, 159 S.E. 923; Swaine v. Miller, 72 Mo. App. 446, 454; Hall v. Supreme Lodge Knights of Honor, D.C., 24 F. 450; Malmsted v. Minneapolis Aerie, 111 Minn. 119, 126 N.W. 486, 137 Am.St.Rep. 542; Langnecker v. Trustees of Grand Lodge, 111 Wis. 279, 87 N.W. 293, 55 L.R.A. 185, 87 Am.St.Rep 860.

[4-6] The action was not prematurely brought. The very purpose of a suit for injunctive relief is to prevent threatened action. The fact that it developed on the hearing that a part of the feared action had been taken in the suspension of the charter without notice or hearing only strengthened the plaintiff's right to relief. "In an action for injunction the issues are to be determined on the basis of the situation as it exists at the time of the trial, not at the time of bringing the action." Collins v. Sargent, 89 Cal.App. 107, 114, 264 P. 776, 779.

The undenied allegations of the verified complaint sufficiently show property rights of the local unions in the Central Council to justify the interposition of the courts. "Something more than mere membership in a voluntary association is embraced in this case. It involves the life of the organization known as Local 263, with its funds and property, its associations and reputation, and all the rights and privileges of its members. * * * Their right to enjoy whatever advantages membership in this union would bring them in their calling could not be taken away by the unlawful action of the general executive board. In our opinion property rights are involved and equity will assume jurisdiction to protect them." Barbrick v. Huddell, 245 Mass. 428, 435, 436, 139 N.E. 629, 631.

[7] This court will not undertake to inquire at this time whether the Central Labor Council committed any breach of its obligations to the American Federation of Labor or was guilty of any conduct which would justify the suspension or revocation of its charter after proper notice and a hearing. The very purpose of such hearing would be to determine those facts. Having determined that its charter may not legally be suspended or revoked without a hearing, it would be improper to substitute a hearing in this or the trial court for the hearing that the Central Council is entitled to have within the federation to which it belongs.

It is argued that this is not a proper case for injunctive relief. Respondent cites section 526, 2nd subdivisions 5 and 6 of the Code of Civil Procedure and sections 3423, 3390 and 3392 of the Civil Code. We do not see the applicability of the sections. It is true that Code of Civil Procedure, section 526, 2nd subdivision 5, prohibits the granting of an injunction "to prevent the breach of a contract * * * the performance of which would not be specifically enforced." But similar rights to those asserted here have more than once been specifically enforced in this state by resort to the writ of mandate. Otto v. Journeymen Tailors' Protective & Benevolent Union of San Francisco, 75 Cal. 308, 17 P. 217, 7 Am.St.Rep. 156; Taboada v. Sociedad Espanola, supra.

[8, 9] It is the general rule that the granting or refusal to grant a temporary injunction lies in the sound discretion of the trial court. In this case, however, we are of the opinion that the denial of the injunction was an abuse of discretion. It appeared from the affidavit submitted by defendants themselves that the charter had been suspended without notice or a hearing. The injury to plaintiffs was clear and unmistakable and no corresponding damage to defendants from compelling them to follow the procedure required by law was apparent. Under such circumstances the in-

junction should have been granted. Isert v. Riecks, 195 Cal. 569, 234 P. 371.

The order denying a temporary injunction is reversed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 596

FRATES v. GHIRARDI.

Civ. 6560.

District Court of Appeal, Third District, California.

Dec. 19, 1941.

Rehearing Denied Jan. 17, 1942.

Hearing Denied Feb. 16, 1942.

1. Automobiles ⇐173(5)

Under statute providing that operator of vehicle used for purpose of rendering assistance to other vehicles shall, when the rendering of assistance necessitates the obstruction of any portion of the "highway", place warning signals on the highway, the quoted word is not restricted to the main-traveled portion of the right of way. Vehicle Code, § 586.5, St.1935, p. 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Highway".

2. Automobiles ⇐245(17)

Where tow automobile was parked off the traveled portion of highway with headlights burning, and headed toward approaching traffic on that side of the roadway, and driver of an approaching automobile who was blinded by headlights of the tow automobile became confused and lost control of his automobile which overturned, whether the tow automobile was an "obstruction of any portion of the highway" within provision of Vehicle Code requiring placing of warning signals on the highway, was for jury. Vehicle Code, § 586.5, St.1935, p. 192.

See Words and Phrases, Permanent Edition, for all other definitions of "Obstruction of Any Portion of the Highway".

3. Appeal and error ⇐1067

Where plaintiff relied on cause of action charging defendant with negligence in parking his tow automobile while he was engaged in assisting a disabled automobile on highway, near paved portion thereof in such manner as to obstruct a portion of highway, without placing warning signals thereon as provided by Vehicle Code, and question concerning whether defendant violated the codal provision at time of accident was a direct issue, refusal of requested instruction properly presenting the issue was prejudicial error. Vehicle Code, § 81, St.1937, p. 617; § 83, St.1935, p. 98; § 586.5, St.1935, p. 192.

ROSS, J., pro tem., dissenting.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Ray Frates against A. R. Ghirardi for injuries sustained in an automobile accident. Judgment was for the defendant. From an order granting new trial to the plaintiff, the defendant appeals.

Affirmed.

Rehearing denied, ROSS, Justice, pro tem., dissenting.

Butler, Van Dyke & Harris, of Sacramento, for appellant.

William A. White, of Sacramento, for respondent.

THOMPSON, Justice.

This is an appeal from an order granting a new trial after a judgment had been rendered in favor of the defendant in an automobile casualty case. The new trial was granted because of the failure by the court to give to the jury an instruction offered by plaintiff under section 586.5 of the Vehicle Code, St.1935, p. 192, to the effect that a tow car while engaged in rendering assistance to another vehicle is required to display warning signals on the highway when his machine is thereby obstructing any portion of the highway. No similar instruction was given to the jury.

The defendant owned and operated a tow car in connection with his garage in Truckee. On September 27, 1939, at 8 o'clock in the evening, he was engaged with his tow car in rendering assistance to a disabled machine on the westerly side of the highway two and one-half miles south from Cisco Grove in Nevada county. It was then dark. At that point the highway extends in a slight curve northerly and southerly. At the time of the accident the tow car was parked on the westerly side, parallel with the highway, within eight feet of the westerly edge of

the paved portion. His headlights were burning. He was then engaged in attaching his tow car to the disabled machine. His machine was on the left side of the paved portion, headed toward the approaching traffic on that side of the roadway.

The plaintiff was riding as a guest in an automobile which was being driven by Willis T. Deilaney southerly along that highway. As he approached the scene of the accident Deilaney was blinded by the headlights of the tow car. He was driving on his proper side of the paved portion at the rate of about forty or fifty miles an hour. He was confused when he suddenly observed the headlights of the tow car on his right. He thought the car was approaching on its proper side of the highway, and he turned to his right to pass that car. When his tires ran off the paved portion he realized that the tow car was parked or traveling on the westerly side beyond the paved portion. He suddenly swerved back to avoid striking the parked automobile and lost control of his machine, skidding across the pavement and overturning behind the tow car, seriously injuring the plaintiff.

This suit for damages was commenced against the driver of the tow car. The complaint contained two causes of action. The first cause charged the defendant with negligence in parking his car on the left side of the highway near the paved portion, headed toward approaching traffic, with his headlights burning. The second cause charged the defendant with negligence consisting of parking his tow car while he was engaged in assisting a disabled automobile on the highway near the paved portion in such a manner as to obstruct a portion thereof, without placing warning signals thereon, as provided by section 586.5 of the Vehicle Code. The cause was tried with a jury. The jury returned a verdict against the plaintiff. Judgment was rendered accordingly.

The court granted plaintiff's motion for a new trial on the ground that his proposed instruction number 7 was erroneously refused. No other similar instruction was given to the jury. That instruction was drawn in the language of section 586.5 of the Vehicle Code, and includes the definition of a "highway" found in section 81 of the Vehicle Code, as amended by St.1937, p. 617. The rejected instruction reads in part:

"Every tow car or motor vehicle used for the purpose of rendering assistance to other vehicles shall * * * when rendering aid or assistance to any vehicle on the highway and such rendering of assistance necessitates the obstruction of any portion of the highway * * * [place warning signals on the highway of a character and in the manner described in the act and according to the rules of the Motor Vehicle Department].

"You are further instructed that there is an 'obstruction of any portion of the highway' within the scope of such law when, in the course of a tow car or other motor vehicle rendering assistance to a disabled vehicle, it becomes necessary for either of said vehicles to obstruct any way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel."

From the order granting a new trial the defendant has appealed.

The question on appeal is: Was the plaintiff prejudiced by the refusal to give to the jury the foregoing instruction?

We are of the opinion the plaintiff was prejudiced thereby, and that the trial court properly granted a new trial on that account.

The plaintiff certainly relied on his second cause of action which charged the defendant with negligence in failing to place upon the highway warning signals as required by Section 586.5 of the Vehicle Code, while his tow car was engaged in rendering assistance to a disabled machine, in the process of which the vehicles were obstructing a portion of the highway. The third paragraph of that section reads:

"The operator of such a motor vehicle used for the purpose of rendering assistance to other vehicles shall, when the rendering of assistance necessitates the obstruction of any portion of the highway, place warning signals on the highway in such a manner as the department may prescribe."

Section 81 of the same code defines a highway as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel."

The plaintiff specifically pleaded the violation of the statute which might constitute negligence per se. His attorney told the jury in his opening statement of the case that he relied on that charge and

expected to prove that the defendant obstructed a portion of the highway in assisting a disabled automobile and failed to place the warning signals as required by law. Two witnesses testified that no warning signals were placed at the scene of the accident. Mr. Deilaney was asked, "Q. As you came down the road, * * * were there any warning signals of any kind on the road?", to which he replied, "There was not." Catherine Deilaney was asked, "Q. Did you or did you not observe any flares or signs or lights along the road immediately preceding the tow truck?", to which she replied, "There were none." The plaintiff fortified his reliance on that issue by offering the challenged instruction, which was refused. The question as to whether the defendant violated the provisions of section 586.5 was a direct issue at the trial of the case.

Section 83 of the Vehicle Code defines "roadway" as "that portion of a highway improved, designed or ordinarily used for vehicular travel." The definition of "highway", § 81, Vehicle Code, is clearly distinguishable from that of "roadway". There is no ambiguity in the distinction between these portions of a right of way. "Roadway" is restricted to the paved, improved or main-traveled portion of the right of way, § 83, Vehicle Code, while "highway" includes that space "of whatever nature * * * open to the use of the public for purposes of vehicular travel," § 81, Vehicle Code, as well as the paved, improved, or main-traveled portion of such right of way. Clearly, then, the language of section 586.5, which provides that a tow car when rendering assistance to a disabled machine thereby obstructs "any portion of the highway" shall place warning signals, etc., is not susceptible of such a construction as to restrict "highway" to the paved, improved, or main-traveled portion of the right of way. If the legislature had intended to limit the duty on the part of the operator of a tow car in the placing of warning signals, only when the tow car obstructed the paved, improved, or main-traveled portion thereof, it would have been a simple matter to have so plainly stated. Section 584 of the Vehicle Code, pertaining to vehicles which become disabled while on the highway (an emergency situation) clearly designates "the paved or improved or main traveled portion" in designating that part of the highway intended.

[1,2] We conclude that "highway" within the meaning of section 586.5 is not restricted to the main-traveled portion of the right of way. It does not necessarily follow that the tow car was an obstruction of a portion of the highway within the meaning of section 586.5. This is a question for the jury and their conclusion is dependent upon a consideration of the language of section 81 of the Vehicle Code "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." It is possible that the jury might conclude that this portion of the highway, eight feet from the concrete area, is not to be considered "a way or place * * * open to the use of the public for purposes of vehicular travel." The condition and location of this particular portion of the roadbed is an important consideration in this respect. It should be stated, however, that the tow car was parked in an open stretch of the right of way and not in a space provided for viewing the scenery.

[3] Plaintiff's instruction number 7, embodied the language of section 586.5 of the Vehicle Code, and, as stated, also included the definition of "highway" found in section 81 of that code. The instruction was properly drawn so as to present the issue to the jury. If the jury concludes that defendant's tow car was parked upon the "highway" within the meaning of said section 81, the physical presence of the tow car would be an "obstruction" within the meaning of section 586.5, and the only remaining consideration for the jury would be the question as to whether the failure to place "warning signals" as required by said section (negligence per se) constituted the proximate cause of the accident.

For the reasons heretofore assigned the new trial was properly granted.

The order is affirmed.

TUTTLE, J., concurred.

ROSS, Justice pro tem. (dissenting).

I dissent from the majority opinion herein.

By its special verdict in this case the jury found that the defendant was not negligent in the parking of his tow car, and a general verdict was expressly waived and judgment entered in favor of defendant. The motion for a new trial was granted solely because of the failure

to give said instruction No. 7, and the question here is, as stated by appellant in his opening brief:

"In a case where a tow car rendering assistance to a disabled vehicle was doing so off the traveled portion of the highway, within an area exclusively maintained, used and intended for parking purposes, without either actually obstructing the free flow of travel along the highway or necessitating any such obstruction, was it proper to instruct a jury concerning the law requiring placing of warning signals by a tow car rendering assistance under conditions necessitating an obstruction of the highway?"

Respondent contends that, notwithstanding the tow car was off the main traveled portion, it was on the highway, and that whether or not it was obstructing the highway was a question for the trial court. Any contention that the tow car was obstructing the highway by its lights only was determined adversely to respondent by the verdict of the jury.

Admittedly "highway" means "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel" § 81, Vehicle Code, while "that portion of a highway improved, designed or ordinarily used for vehicular travel" is the "roadway". § 83, Vehicle Code.

The tow car was on the highway, but it was not obstructing any portion of the highway as contemplated by section 586.5 of the Vehicle Code. It was occupying space, but so would any vehicle, tow car or otherwise, which might lawfully park in said space while the occupants viewed the mountain scenery. If a car lawfully parked in the parking space has a flat tire and another pleasure car parks near it and the occupants assist in changing the tire on the first car, there would be no obstruction of the traffic. Under the same circumstances, however, the majority opinion would mean that a mechanic in a tow car would have to put out his warning signals before he changed the tire.

Section 586.5 of the Vehicle Code is contained in chapter 13 of division IX, which chapter is entitled, "Stopping, Standing or Parking", and is devoted to offenses which come under that heading. Among other things vehicles are prohibited from parking on the paved or improved or main traveled portion of the highway. § 582, Vehicle Code. Exception is made for a disabled vehicle § 584, Vehicle Code, a tow car for which proper warning signals have been placed, § 586.5, Vehicle Code, and a commercial vehicle, disabled, and for which proper flares or signals have been placed. § 590, Vehicle Code, as amended by St.1937, p. 620.

The provision for warning signals in section 586.5 therefore applies only to cases where, without them, the tow car would be illegally parked, and the "obstruction of any portion of the highway" in said section has reference to such illegal parking.

In this case the tow car was parked with its nearest part at least eight feet from the edge of the pavement or main traveled portion of the highway. Conceding that it was taking up space on the highway, it was not obstructing any portion of the highway within the meaning of section 586.5 of the Vehicle Code. Instruction No. 7, concerning said section 586.5, was inapplicable to the facts here and was properly refused and the order granting a new trial was erroneous, and should be reversed.



48 Cal.App.2d 574

SLOSS v. GENERAL MOTORS ACCEPTANCE CORPORATION et al.

Civ. 13167.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1941.

Hearing Denied Feb. 16, 1942.

1. Appeal and error ⇐930(1)

On defendant's appeal from judgment for plaintiff after trial by jury, evidence was viewed in light most favorable to plaintiff.

2. Sales ⇐481

In automobile salesman's action against assignee of conditional sales contract covering automobile which salesman had purchased from his employer for damages for conversion of automobile, where salesman

had delivered to employer a supplemental agreement that in event of termination of salesman's employment the full amount outstanding on contract should automatically become due, evidence sustained finding that salesman was owner and entitled to possession of automobile on date when assignee's employee took possession thereof. St.1937, p. 260, § 2920(b).

3. Trover and conversion ⇐40(4)

In action for damages for conversion of plaintiff's automobile, testimony that defendant's agent told plaintiff on date when agent took possession of automobile that if it was not turned over to agent a warrant would be obtained for plaintiff's arrest and that plaintiff thereafter turned automobile over to agent sustained finding that defendants converted automobile to their own use while it was in plaintiff's possession.

4. Sales ⇐481

The statute providing that every employment is terminated by extinction of its subject was not applicable in automobile salesman's action against assignee of conditional sales contract covering automobile which salesman had purchased from his employer for damages for conversion of automobile, although salesman had delivered to employer a supplemental agreement that in event of termination of salesman's employment the full amount outstanding on contract should automatically become due, where employer had not ceased to do business and had not discharged salesman. St. 1937, p. 260, § 2920(b).

5. Sales ⇐481

In action for conversion of automobile which plaintiff had purchased from his employer under a conditional sales contract, where plaintiff had delivered to employer a supplemental agreement that in event of termination of plaintiff's employment the full amount outstanding on contract should automatically become due, plaintiff's testimony that he claimed unemployment insurance from a certain date did not overcome direct testimony of plaintiff and employer that plaintiff had not severed his connection with employer.

6. Trover and conversion ⇐40(6)

In action for conversion of plaintiff's automobile, which was taken from plaintiff's possession in Los Angeles County, testimony that the Los Angeles delivered price of a new automobile such as the one in question was $1,185, which did not include extra equipment, the value of which according to testimony was $120, supported finding that reasonable value of automobile was $1,200.

7. Trover and conversion ⇐40(6)

In action for conversion of plaintiff's automobile, the fact that a blue book showed that value of automobile was $963.80 was not conclusive upon jury but was merely evidence of value of automobile.

8. Trover and conversion ⇐61

In action for conversion of plaintiff's automobile, testimony that plaintiff had paid $170 in cash plus the fact that plaintiff was deprived of use of his automobile for several months supported finding that plaintiff suffered actual damages in amount of $200 as result of conversion.

9. Sales ⇐481

In automobile salesman's action against assignee of conditional sales contract covering automobile which salesman had purchased from his employer for damages for conversion of automobile, fact that assignee had threatened salesman with arrest if he did not return automobile supported finding that assignee was guilty of oppression, fraud and malice in the conversion.

10. Master and servant ⇐330(3)

In automobile salesman's action against assignee of conditional sales contract covering automobile which salesman had purchased from his employer, a dealer, for damages for conversion of automobile, testimony sustained findings that assignee's employees were acting within scope of their employment at the time of and during conversion of automobile and that assignee authorized or ratified the conversion.

11. Trover and conversion ⇐61

In automobile salesman's action for damages for conversion of his automobile, the fact that salesman was wrongfully deprived of automobile, which he used in his business, under threat of arrest and that jury found that salesman had suffered actual damages in amount of $200 supported jury's award to salesman of $1,000 punitive damages.

12. Evidence ⇐522

In action for damages for conversion of plaintiff's automobile, where one of the issues was the damage which plaintiff suffered as result of being deprived of automobile, testimony by one experienced in au-

tomobile rental business respecting reasonable rental value of an automobile such as that owned by plaintiff was admissible.

13. Appeal and error ⇐1170(9)

Where, on defendant's appeal, examination of instructions given to jury disclosed that defendant's claims of errors therein were hypertechnical, and none of the alleged errors was prejudicial against defendant, the District Court of Appeal was bound to disregard errors, pursuant to mandate of constitution. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by T. J. Sloss against General Motors Acceptance Corporation and others to recover damages for the conversion of an automobile. From a judgment for plaintiff, defendant General Motors Acceptance Corporation appeals.

Affirmed.

A. J. Getz, of Los Angeles, for appellant.

Sprague, McClanahan, Goddard & Hunt, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial by jury in an action to recover damages for conversion of an automobile, defendant General Motors Acceptance Corp. appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent) the essential facts are:

April 12, 1940, plaintiff was employed by a Mr. Clifford T. Nutt, a Buick automobile dealer, as a salesman. Plaintiff entered into a conditional sales contract with Mr. Nutt, whereby he agreed to purchase a 1940 Buick automobile to use as a demonstrator. The down payment of $311.19 represented an approximate discount of $200 and about $100 cash paid by plaintiff. The balance was to be paid in installments of approximately $35 per month. Two installments of $35 each were paid by plaintiff.

In connection with the execution of the conditional sales contract, plaintiff executed and delivered to Mr. Nutt a supplemental agreement which provided in effect that, in the event of the termination of his employment, voluntarily or involuntarily, the full amount outstanding on the conditional sales contract should become automatically due and payable. Immediately after they were executed, the conditional sales contract and supplemental agreement were sold, assigned and transferred for a valuable consideration to defendant General Motors Acceptance Corporation.

July 10, 1940, said defendant through its agent entered the place of business of Mr. Nutt, the conditional vendor heretofore mentioned, and repossessed all of the automobiles in his place of business by reason of appropriate documents which it held. July 11, 1940, at about 8:15 a. m., said defendant through its agent demanded of plaintiff the balance due on his conditional sales contract or the possession of his automobile. Plaintiff refused to comply with either alternative, at which time defendant's agent stated that he must have the car by 5:00 o'clock or he would swear out a warrant against plaintiff for concealing property. About 5:00 o'clock of the same day plaintiff delivered the automobile which was the subject of the conditional sales contract to defendant's employee. Thereafter said defendant offered to return to plaintiff the automobile but plaintiff refused to accept it.

Said defendant relies for reversal of the judgment on these propositions:

First: The evidence is insufficient to support the following findings of fact:

(1) "That prior to and on or about July 11, 1940, and at all times hereinafter mentioned, the plaintiff was the owner and entitled to the possession of that certain 1940 Model Buick Eight-cylinder, Four Door Sedan Touring Automobile; Model Number 41, Motor Number 43921508, Serial Number 23713993."

(2) "That on or about said date of July 11, 1940, in the County of Los Angeles, State of California, and while said automobile was in the possession of the plaintiff, defendants, and each of them took and carried away said automobile and converted the same to their own use and refused to return the same to the plaintiff."

(3) "At the time of said taking and conversion by defendants, the aforesaid automobile was of the reasonable value of $1200.00, and that the reasonable value of the use of said automobile is $10.00 per day."

(4) "That as a result of said taking and conversion of said automobile as aforesaid, the plaintiff has been damaged in the sum of $200.00."

(5) "That in the taking and conversion of said automobile the defendant was guilty of oppression, fraud and malice."

(6) "That at the time of and during all of the happenings, transactions and events herein set forth, the defendants Sowell Slack, III, and E. G. Worth, and each of them, were acting within the course and scope of their employment."

(7) "That the defendant General Motors Acceptance Corporation, a corporation, authorized or ratified the alleged conversion of said automobile."

(8) "That the plaintiff be awarded the sum of $1,000.00 as punitive damages."

Second: The trial court erred in overruling appellant's objection to the following question:

"Q. Calling your attention to the month of July, 1940, can you tell us from your experience in the automobile rental business what would be the approximate rental value per day of a 1940 Buick four-door trunk sedan, Model No. 41?"

Third: The trial court committed prejudicial errors in instructing the jury.

Defendant's first proposition is untenable. An examination of the record discloses substantial evidence considered in connection with the inferences which the trial jury may have reasonably drawn therefrom to sustain each and every finding of fact set forth above.

[2] (1) There was received in evidence the conditional sales contract under the terms of which plaintiff received possession of the Buick demonstrator. Plaintiff testified that he did not quit his employment with Mr. Nutt and Mr. Nutt testified that he did not at any time discharge plaintiff. Further Mr. Nutt testified that he never went out of business. The evidence discloses in addition that on the 17th of July, 1940, Mr. Nutt resumed his relationship with defendant as a local distributor of its automobile. This evidence sustains finding No. 1, supra.

[3, 4] (2) There was testimony that defendant's agent told plaintiff on July 11 that, if the car was not turned over to them, a warrant would be obtained for plaintiff's arrest and that thereafter plaintiff turned the car over to defendant's agent. The foregoing evidence sustains finding No. 2 supra. Therefore, since Mr. Nutt never ceased to do business, section 2920(b) of the Labor Code, St.1937, p. 260, which provides in part as follows: "Every employment is terminated by any of the following: * * * (b) Extinction of its subject" was inapplicable to the present case.

[5] Plaintiff's testimony that he claimed unemployment insurance from July 10, 1940, and that in a certified claim to the State Labor Commissioner he answered the question, "Date of quitting or discharge:" with "July 10, 1940," does not overcome the direct testimony of plaintiff and Mr. Nutt that plaintiff in fact had not severed his connection with Mr. Nutt. This testimony merely raised a conflict in the evidence which the trial jury determined in plaintiff's favor. It may be that the State Labor Commissioner has a cause of action against plaintiff for filing a false claim. That, however, is a matter for the State Labor Commissioner and is not an issue in the instant case.

[6, 7] (3) There was testimony that the Los Angeles delivered price of a new demonstrator such as the one here in question was $1185. This price did not include extra equipment, the value of which according to the testimony was $120. This testimony supports finding No. 3 supra that the reasonable value of the automobile was $1200. The fact that the Kelly Blue Book showed the value as $963.80 was not conclusive and binding upon the jury but was merely evidence of the value of the car.

[8] (4) The testimony that plaintiff had paid $170 in cash plus the fact that plaintiff was deprived of the use of his car for several months amply supports the finding that plaintiff was damaged in the sum of $200, as set forth in finding 4, supra.

[9] (5) The fact that defendant threatened plaintiff with arrest if he did not return the car supports finding No. 5, supra.

[10] (6) and (7) The testimony disclosed that Mr. Slack was the credit manager for defendant and had charge of repossessions; also that Mr. Worth was employed under him and that he instructed Mr. Worth to go to Mr. Nutt's place of business. The foregoing evidence sustains findings No. 6 and 7, supra.

[11] (8) The facts that plaintiff was deprived wrongfully of his automobile which he used in his business under threat of arrest and that the jury found plaintiff had suffered actual damage in the sum of $200,

support the jury's award to plaintiff of $1000 punitive damages.

[12] Defendant's second proposition is without merit. One of the issues in the instant case was the damage which plaintiff suffered as a result of being deprived of his automobile. One element of damage is the reasonable rental value of an automobile of the same kind. Therefore, such testimony was admissible.

[13] Defendant's final proposition is without merit. An examination of the instructions given by the court to the jury discloses that the claims of errors are all hypertechnical and none of them prejudicial to any of the rights of the defendant. Hence, we are compelled to disregard them pursuant to the mandate of the State Constitution, article VI, section 4½.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 674

BAYLIS v. BAYLIS.

Civ. 2949.

District Court of Appeal, Fourth District, California.

Dec. 22, 1941.

Rehearing Denied Jan. 20, 1942.

1. Divorce ⇐286

In husband's divorce suit, statements in letter to plaintiff from his parents that they were handing him third interest in certain properties, "both in payment of all earning that may be due you * * * and as a gift of love", and that "you have received some wages, but not your full earned compensation" for work done in connection with such properties, and recital of consideration in deed conveying such interest to him, presented at least a conflict of evidence on question whether such conveyance was a gift or was made for valuable consideration, so as to preclude appellate court from disturbing trial court's finding that such interest was community property.

2. Appeal and error ⇐996

Where facts established by evidence reasonably permit opposing inferences therefrom, appellate court will not disturb trial court's finding adopting one of such inferences and rejecting the other.

3. Appeal and error ⇐1010(1)

The District Court of Appeal cannot disturb trial court's fact findings substantially supported by evidence in record on appeal.

4. Divorce ⇐286

In husband's divorce suit, where evidence in record on appeal from interlocutory judgment for wife on her cross-complaint substantially supports trial court's finding that husband's interest in property conveyed to him by his parents was community property, appellate court need not consider question of statutory presumption that wife had community interest in such property because of its acquisition during coverture or effect of wife's presentation of evidence on such question as dispelling presumption. Civ.Code, § 164.

5. Divorce ⇐308

The word "may" in provision of interlocutory divorce judgment for wife that husband "may" visit with and take spouses' minor children with him on alternate weekends and "may" take and keep such children for stated periods imports that such order is permissive only, and does not affect provision in judgment that wife shall have sole custody and control of children, so that their maintenance remains husband's obligation under order for their support by him.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

6. Divorce ⇐308

A provision in interlocutory judgment granting wife divorce that husband's interest in community property should be subject to lien to secure his payment of allowance to wife for their minor children's maintenance was proper.

7. Divorce ⇐308

In divorce decree, allowance to wife for maintenance of spouses' minor children may be made a lien on husband's property.

Appeal from Superior Court, San Bernardino County; O. K. Morton, Judge Assigned.

Action for divorce by John Baylis against Eleanor Parsons Baylis, who filed a cross-complaint for divorce. From certain portions of an interlocutory judgment for cross-complainant, plaintiff appeals.

Affirmed.

Fred A. Wilson, of San Bernardino, and Willis Sargent, of Los Angeles, for appellant.

Karl King and Martin J. Coughlin, both of San Bernardino, for respondent.

WEST, Justice, pro tem.

This is an appeal by plaintiff and cross-defendant from certain portions of an interlocutory judgment of divorce. Plaintiff instituted the action alleging, so far as pertinent to this appeal, that certain property was the community property of the parties, but not including in the statement the interest in real estate hereinafter referred to. He further prayed for custody of the two minor children of the parties. A cross-complaint for divorce was filed in which it was alleged that the parties held as community property, in addition to the community property listed in his complaint by the plaintiff, an undivided one-third interest in certain property upon which is located a mountain resort known as Pinecrest. Defendant also asked custody of the children and for a suitable award for their support and maintenance. Plaintiff answered the cross-complaint denying that the interest in the Pinecrest property was community, alleging that it had been conveyed to him as a gift; that he had subsequently conveyed it back to his parents who were the original grantors; and that he had no interest therein. The case was tried and upon submission the court entered judgment granting an interlocutory decree of divorce to cross-complainant awarding the custody of the minor children to respondent with the provision that appellant pay, until further order, the sum of $75 per month for their support. Under the decree also there was a provision that appellant might keep the children with him for one month out of each year. It was also adjudged that the one-third interest in the Pinecrest property was community property. As a part of the decree it was declared that upon entry of the final decree of divorce the judgment should award appellant and respondent each an undivided one-sixth interest in the Pinecrest property and its appurtenances; that the one-sixth interest of appellant should be subject to a lien to secure the award for the support of the children; and that the final decree should order the appointment of a receiver to take possession of the interest of the parties in the Pinecrest property for a period of ten years in order to carry out the provisions of the judgment so far as the support of the minor children was concerned.

No attack is made upon the decree insofar as it adjudges that respondent is entitled to a divorce or insofar as the awarding of custody of the minor children is concerned. Appellant does contend that the court's finding that the one-third interest in Pinecrest was community property is not supported by the evidence and further that there was error in requiring appellant to furnish support for the minor children during the period when they should be in his custody.

It appears from the record that appellant's parents had for many years owned and operated a mountain resort upon certain real property of which the premises herein called Pinecrest is a major portion. Appellant had worked at the resort continuously since about 1918 and was at the time of the trial assistant manager of the enterprise. In 1925 he and respondent were married. Their first child was born shortly before the appellant's thirty-first birthday which occurred on April 8, 1927. On the occasion of the birthday celebration, appellant's father handed to him a letter which read as follows:

"Dear John:

"You have now reached the age of 31 years, you are happily married, have a son of great promise, whom we all love and admire and have great hopes for, it would appear that you have reached a place in your life from which you are to advance to a career for yourself.

"We are impressed with this fact by your stability of habits, the selection of proper companions, your application to business, and the excellent manifestations of well balanced judgment on business matters at issue.

"It is our desire at this time to hand over to you that which we have held in abeyance, awaiting this period & condition of your life, & which we have been holding as a trust. As you know your individual efforts have been concentrated for 15 years on Pinecrest.

"It is true you have received some wages but not your full earned compensation as

mentioned. We have reserved this in trust until now, and now while we are all in full health and working vigor and can join hands in unified effort the enterprise that will belong equally to us all can go on to completion.

"In fulfillment of this intention on this your birthday anniversary we are handing you a full (⅓) individual interest in all the Pinecrest properties, both in payment of all earning that may be due you, unaccounted & unenumerated and as a gift of love.

"We know you will aid in its development & share in its liabilities & operation and on this occasion we extend to you our congratulations and love

"Affectionately

"J. N. Baylis Your father

"Elvira L. Baylis Your Mother."

No comment or explanation was offered by either of appellant's parents at the time of the presentation of the letter. It appears that under date of April 1st, 1927, a grant deed had been executed by the parents by the terms of which there was conveyed to appellant the undivided one-third interest hereinbefore referred to. This deed was acknowledged by the grantors on April 7th, 1927, and recorded April 9th, 1927. The instrument was in the ordinary form of grant deed and recited that it was given "in and for a valuable, adequate and sufficient consideration, the receipt of which is hereby acknowledged." At the trial appellant testified that he had not given any consideration for the conveyance and that the interest transferred to him was a gift from his parents. Respondent denied any knowledge as to whether or not any community earnings went into the acquisition of the property. Appellant's father was called as a witness and testified that appellant was the owner of a one-third interest in the property but he was not asked, nor did he testify, concerning his intention with respect to the conveyance. The other grantor, appellant's mother, did not appear as a witness. It is the contention of appellant that the evidence indicates that the property was conveyed to him as a gift and that the court's finding that it was community property was without foundation. Respondent urges not only that there was ample evidence that the conveyance was made for a valuable consideration and was therefore not a gift, but she also relies upon the disputable presumption raised by section 164 of the Civil Code that property acquired during coverture is community property, and maintains that no evidence was adduced at the trial to dispel this presumption. Appellant, in response to this last contention of respondent, urges that since respondent offered proof by the introduction of the letter and deed in evidence, she has deprived herself of the benefit of the presumption.

[1-5] An examination of the letter of April 8th discloses that language was employed which was not only consistent with the theory of a gift to appellant, but was also consistent with a recognition of the payment of some consideration for the conveyance. The statement, "both in payment of all earning that may be due you, unaccounted & unenumerated and as a gift of love," in ordinary construction connotes at least in part the discharge of an obligation, while the words, "It is true you have received some wages but not your full earned compensation," equally do not import an entire lack of valuable consideration. Taken with the recital of consideration contained in the deed, we believe the foregoing excerpts of the letter, to say the least, present a situation of conflict of evidence. The rule is well settled that where the facts established are such as to reasonably permit opposing inferences to be drawn therefrom and the trial court has adopted one and rejected the other, an appellate court will not disturb the finding. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. We must say that appellant's contention with respect to the separate character of the property, in the light of all the circumstances surrounding the conveyance, is not without force, but this is a court of review only and there being evidence in the record giving substantial support to the findings under attack, this court is not at liberty to disturb such findings. Durrell v. Bacon, 119 Cal.App. 31, 5 P.2d 961. In view of what has just been said we think it unnecessary to consider either the question of the presumption that respondent had a community interest in the property because of its acquisition during coverture, or the effect of respondent's presentation of evidentiary matter as dispelling that presumption. So far as the other point to be considered is concerned, viz., the propriety of the order for support to be paid during the period when appellant might have the children with him, it is sufficient to say that the judgment provides that "plaintiff may visit with and take said children with him on

every alternate week-end thereafter," and again that "plaintiff may take and keep said children" for periods set forth. The word "may" as used in the judgment, imports that the order is permissive only and in no way affects the provision that respondent "shall have the sole custody and control of the minor children." The proper interpretation of the judgment in this regard is that a privilege only is conferred upon appellant of which he may avail himself or not as he may choose. The maintenance of the children, including the providing of proper clothing, of permanent shelter, and of the incidentals necessary to their welfare still remains, under the order, the obligation of respondent. At such time in the future as any actual change in the order of custody may be made, the order with respect to payment of support may be considered in the trial court. We fail to see that there was any abuse of discretion in the order as made.

[6, 7] So far as the judgment requiring appellant to furnish security for the payment of the allowance for the maintenance of the children is concerned, it is clear that the court acted properly. In a decree of divorce such allowance may be made a lien upon the husband's property. Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; McKannay v. McKannay, 68 Cal.App. 701, 230 P. 214.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.



48 Cal.App.2d 635

HORSMAN et al. v. MADEN.

Civ. 11873.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1941.

Rehearing Denied Jan. 21, 1942.

1. Appeal and error ⇐927(3), 989

On appeal from judgment of dismissal entered after motion for nonsuit was granted, the District Court of Appeal would accept as true the evidence most favorable to plaintiffs and would disregard conflicts in the evidence.

2. Husband and wife ⇐273(12)

In action by deceased husband's executors against surviving wife to quiet title to property which was acquired as community property and which executors asserted remained community property at time of husband's death, and which wife asserted was her separate property by reason of transfers constituting executed gifts to wife, executors' evidence was sufficient to require denial of wife's motion for nonsuit.

3. Husband and wife ⇐273(12)

In action by deceased husband's executors against surviving wife to quiet title to property acquired as community property and claimed by wife as her separate property by reason of transfers constituting executed gifts to wife, allegation in complaint that husband and wife orally agreed at time of transfer that property should remain community property was "surplusage", and absence of evidence to prove such agreement did not justify granting of motion for nonsuit, where complaint also alleged that property was at all times community property, and proof of such fact required only a showing that husband did not intend to make gift to wife or to change status of property.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

4. Husband and wife ⇐262(1)

The presumption that property acquired by married woman by written instrument is her separate property is not conclusive between husband and wife, but is disputable. Civ.Code, § 164.

5. Husband and wife ⇐249

Property may be regarded as community property regardless of whether record title stands in name of husband or of wife or in names of both husband and wife, and courts are invested with full power to determine status of any such property.

6. Evidence ⇐230(2, 3)
Husband and wife ⇐266

Where it is claimed that written instrument executed by husband to wife constituted gift to wife and changed status of community property to that of separate property of wife, question of husband's intention in executing instrument is the controlling question, and in determining such intention,

declarations of husband, made either before or after execution of instrument, are admissible, whether or not made in presence of wife.

7. Appeal and error ⇐1056(1)

In action by deceased husband's executors against surviving wife to quiet title to property which was acquired as community property, and which executors asserted remained community property at time of husband's death, and which wife asserted was her separate property by reason of transfers constituting executed gifts to wife, exclusion of evidence of husband's declarations that he had no intention of making gift to wife or of changing status of property to separate property of wife, was prejudicial error.

8. Appeal and error ⇐866(1)

On appeal from judgment of dismissal entered after granting of motion for nonsuit, reviewing court would not determine issues of fact, and would only consider questions of law whether granting of motion for nonsuit and exclusion of certain evidence was error.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by John W. Horsman and others, as executors of the last will of Emile Maden, deceased, against Marcella Maden to quiet title to real and personal property and for an accounting. From a judgment of dismissal after motion for nonsuit was granted, the plaintiffs appeal.

Reversed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellants.

Williamson & Wallace, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiffs, as executors of the last will of Emile Maden, deceased, brought this action against defendant, the widow of said deceased, seeking to quiet title to certain real and personal property and to obtain an accounting with respect to such of the property as had been disposed of by defendant. The cause was tried by the court sitting without a jury and, at the close of plaintiffs' case, the court granted defendant's motion for a nonsuit and entered a judgment of dismissal. Plaintiffs appeal from said judgment.

The controversy involved the issue of whether the property in question was the community property of Mr. and Mrs. Maden or the separate property of Mrs. Maden at the time of the death of Mr. Maden in 1939. The complaint alleged that the property was acquired as community property and that it remained community property at all times. The answer admitted that practically all of the property was acquired as community property but alleged that such property became the separate property of defendant by reason of certain transfers.

It appears from the evidence that Mr. and Mrs. Maden were married in 1914 and that certain real property together with certain stocks and bonds were acquired as community property during their married life. Some of the property was acquired in the name of Mr. Maden while other property was acquired in the names of both Mr. and Mrs. Maden. Said parties kept their securities in a joint safe deposit box and they also kept funds in joint bank accounts.

In the latter part of 1933, domestic difficulties arose after Mr. Maden had become interested in another woman. Mrs. Maden removed said securities from said joint safe deposit box and retained them in a safe deposit box of her own. She also withdrew all funds in the joint bank accounts amounting to approximately $8,500. She left a note in the joint safe deposit box reading "Dearest Emile: I am taking charge of our possessions as I want to save you from yourself. Remember I love you dearly and know that I will always be your best friend. Marcella."

Thereafter the parties attempted a reconciliation and took a three months' cruise to the Orient. Mrs Maden retained possession of the securities. No permanent reconciliation resulted and, after their return from the Orient, the parties separated. Disputes arose over the matter of the support of Mrs. Maden. Apparently the dividends on the stocks were being sent to Mr. Maden and it was Mrs. Maden's desire to have the stocks transferred into her name in order that she would receive the dividends directly. Mrs. Maden testified that she requested such transfer as a matter of precaution for both herself and Mr. Maden. Mrs. Maden threatened to bring suit and to create a scandal unless the securities were so transferred. In October, 1934, Mr. Maden met his wife at the bank, endorsed the securities and per-

mitted her to retain them. He also agreed to give Mrs. Maden $100 per month from his salary. In 1935, he also executed and delivered to her a deed to their home, title to which had previously stood in both their names, but he told her not to record said deed. Mrs. Maden did record the deed in 1937, however, and she testified she did so because she "thought it was better business to record it". The parties were never divorced and Mr. Maden made a will shortly before his death declaring all of said property to be community property and purporting to dispose of it as such.

Upon the trial, it was the theory of plaintiffs that there had been no intention upon the part of Mr. Maden to make a gift or to change the status of said property to separate property of Mrs. Maden and that said property therefore remained the community property of the spouses at the time of Mr. Maden's death. It was the theory of defendant that said transfers constituted executed gifts to Mrs. Maden and that said property was her separate property at all times after said transfers had been made. It appears that there was no written agreement between the parties concerning the status of said property and that there was no recital in any of the transfers stating that the property was transferred to Mrs. Maden as her separate property.

In support of their case, plaintiffs called several witnesses including Mrs. Maden, who was called under section 2055 of the Code of Civil Procedure. Plaintiffs endeavored to show by the declarations of Mr. Maden, made both before and after the transfers, that Mr. Maden had no intention to make a gift or to change the status of said property to the separate property of Mrs. Maden and that Mr. Maden had always treated the property as community property. Objection was made to the introduction of such evidence and practically all evidence of said declarations was excluded by the trial court. Some evidence covering such declarations was stricken out upon motion. Repeated offers were made and repeated objections were sustained. The view of the trial court was expressed as follows: "Here the question of intent on the part of the donor is not involved on the trial of this case at all." And finally the trial court said, "There is no use talking any further, counsel. This is a point where we have to stop. There will be no further testimony of any kind, oral or in the form of written declarations by the deceased, conveyed to this witness or anybody else, relative to the conversations occurring after the transactions with his wife."

On this appeal, plaintiffs contend that the trial court erred in granting the motion for nonsuit and that the trial court committed prejudicial error in its rulings excluding evidence of the declarations of the deceased which tended to show that he had no intention of making a gift to defendant or of changing the status of the property to separate property of defendant. In our opinion, both of these contentions must be sustained.

[1, 2] The rules governing the determination of the motion for nonsuit are too well settled to require elaboration here. 9 Cal.Jur. 551, sec. 35 et seq. Accepting as true the evidence most favorable to plaintiffs and disregarding conflicts, we are of the view that plaintiffs produced sufficient evidence to require the denial of said motion. Despite the rulings refusing admission to certain evidence, some of the evidence given by defendant herself together with evidence given by other witnesses was sufficient to show that there was no intention on the part of the deceased to make a gift to defendant or to change the status of the property; that the transfers were requested by defendant for the protection of both parties; and that the deceased made the transfers after expressing his trust in the defendant and his faith that defendant would respect his interest in the property.

[3] We believe that the error in granting the motion for nonsuit may have been caused in part through the presence of a certain allegation in one of the counts of the complaint. It was alleged in the first count of the complaint, which count related to the securities, that said securities were at all times, including the time of the death of the deceased, the community property of the deceased and the defendant. But it was also alleged that, at the time of the transfer of said securities into the name of defendant, there was an oral agreement between the spouses that said securities should remain the community property of the spouses. Under the authorities hereinafter cited, the last-mentioned allegation may be treated as surplusage. The allegation that the property was at all times the community property of the spouses was the allegation of the ultimate fact and the proof of that fact required only a showing that there was no

intention on the part of the deceased to make a gift to defendant or to change the status of said community property to the separate property of defendant. Upon the trial, defendant testified that no oral agreement was made as alleged. Plaintiffs were deprived of the testimony of deceased because of his death. It appears probable from a reading of some portions of the record that the trial court was of the view that the failure to prove an express oral agreement, as alleged in said first count, was fatal to plaintiffs' case. Again, the error may have arisen from the apparent belief of the trial court that it was acting as though the entire case had been submitted to it and that it was determining a question of fact rather than of law. In making its ruling the trial court said, "I am not necessarily deciding this matter on the technical theory that the plaintiffs have failed to make out a prima facie case * * *". And further, "I am entitled to judge of evidence and its weight and value from the impressions made by witnesses. It is my duty to scrutinize the witnesses and determine from my conception of them what I see and hear from their lips, and judge their actions and appearance, the quality of the testimony they are offering".

[4] But in any event the error of the trial court in ruling upon the admissibility of evidence would require a reversal of the judgment. We are dealing here with a situation in which the property in question was admittedly acquired with community funds and in which it is claimed by defendant that said property became the separate property of defendant by virtue of executed gifts by the deceased. While there is a presumption that any property acquired by the defendant by an instrument in writing became her separate property, Civ. Code, sec. 164, such presumption is not conclusive between the parties but is disputable. Salveter v. Salveter, 206 Cal. 657, 275 P. 801; In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534.

[5-7] Property may be regarded as community property regardless of whether the record title stands in the name of the husband or of the wife or in the names of both the husband and the wife, and the courts are invested with full power to determine the status of any such property. Salveter v. Salveter, 206 Cal. 657, 275 P. 801; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777. And where it is claimed that an instrument in writing, executed by the husband to the wife, constituted a gift to the wife and changed the status of community property to that of separate property of the wife, the question of the intention of the husband in executing such instrument becomes "the all-important and controlling question". Ruiz v. Dow, 113 Cal. 490, 45 P. 867, 869; see, also, Fanning v. Green, 156 Cal. 279, 104 P. 308; In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534. In determining this question of intention, the declarations of the alleged donor, made either before or after the transfer, are admissible and such declarations need not have been made in the presence of the adverse party. Ruiz v. Dow, supra; In re Estate of Hall, 154 Cal. 527, 98 P. 269; O'Dea v. Hibernia Savings & Loan Society, 119 Cal.App. 622, 7 P.2d 318; In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239. These last-mentioned authorities demonstrate the error of the trial court in excluding evidence of such declarations and our review of the record convinces us that such error was prejudicial to plaintiffs.

The only authorities cited by respondent which come reasonably close to approaching the problem presented here are Miller v Brode, 186 Cal. 409, 199 P. 531, and Dale v. Dale, 87 Cal.App. 359, 262 P. 339. These cited cases are clearly distinguishable, however, as each of the instruments involved in said cases expressly recited that the property was conveyed to the wife as her separate property. We may further state that respondent's brief is based upon the premise that "the only issue in the case" was "whether or not there was an express oral agreement at the time of the transfer". As above stated, we do not believe that the allegation, found in one count of the complaint, that there was an oral agreement between the spouses at the time of the transfer was an essential allegation under the authorities hereinbefore cited. Proof that there was no intention on the part of the husband to make a gift or to change the status of the property was all that would have been required to sustain a finding, in conformity with the allegations of the complaint, that the property was at all times the community property of the spouses. Proof that there was an oral agreement at the time of the transfer would have been helpful to plaintiffs but it was not essential to make out their case. The allegation relating to the existence of such oral agreement should therefore have been treated as surplusage and the mere absence

of evidence to prove such oral agreement did not justify the granting of the motion for nonsuit.

[8] It is probably unnecessary but we deem it appropriate to state that this court should not be understood as indicating any view with respect to the ultimate determination of the issues of fact which may be presented in this controversy. The only questions before us on this appeal are the questions of law above discussed.

The judgment is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.



48 Cal.App.2d 721

In re WOODCOCK'S ESTATE.
BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. FARMERS & MERCHANTS TRUST CO. OF LONG BEACH.

Civ. 13374.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1941.

1. Executors and administrators ⇐20(10)

Where superior court rejected petition for letters of administration of appellant, claiming to be nominee of deceased's surviving widow, in favor of one filing petition for letters of administration, claiming to be duly appointed guardian of estate of surviving widow, District Court of Appeal would presume, in support of the order, that no proof that appellant's nomination was genuine was made, in absence of evidence taken at the hearing. Probate Code, § 422.

2. Executors and administrators ⇐20(10)

Where on record it appeared that appellant, seeking letters of administration, came within class of persons ranked tenth in list of those entitled to such appointment by Probate Code, and it also appeared that respondent came within same class, superior court had discretion to appoint either applicant as administrator, and its action in appointing respondent as administrator would not be disturbed. Probate Code, §§ 422, 425, 426.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceeding in the matter of the estate of George W. Woodcock, deceased. The Bank of America National Trust & Savings Association and the Farmers & Merchants Trust Company of Long Beach both filed a petition for letters of administration on deceased's estate. From an order appointing Farmers & Merchants Trust Company of Long Beach as administrator, the Bank of America National Trust & Savings Association appeals.

Affirmed.

Hugh G. Maddox, of Long Beach, for appellant.

Roland Maxwell, of Pasadena, for respondent.

SHAW, Justice pro tem.

The appellant filed a petition for letters of administration on the estate of George W. Woodcock, deceased, claiming to be the nominee of his "surviving widow" Nellie E. Woodcock and filed therewith a document purporting to be signed by her renouncing her right to letters and nominating appellant as administrator. Thereafter respondent filed a petition for letters of administration on the same estate, claiming to be the duly appointed guardian of the estate of Nellie E. Woodcock, surviving wife of said deceased. The two petitions came on for hearing together and the court made an order granting that of respondent.

[1, 2] Appellant's sole point is that by reason of the nomination of the widow it was entitled, under section 422 of the Probate Code, to be appointed as administrator, and that the court erred in refusing so to appoint it. We have before us no record of the evidence taken at the hearing, and without such record we cannot assume that the purported nomination was shown to be genuine, but must presume, in support of the order, that no such proof was made. Appellant claims no other special right to the appointment. On the record before us it may be within the class of persons ranked tenth, in the list of those entitled to such appointment, by section 422 of the Probate Code, that is, "any person legally competent." But respondent ap-

pears to be also within this class, even if the effect of its appointment as guardian of the widow, under section 426 of the Probate Code, was superseded by the appeal therefrom discussed in the briefs. On this view of the case the court had discretion to appoint either applicant, Probate Code, section 425, and no reason appears for disturbing its exercise of such discretion.

The order appealed from is affirmed.

YORK, P. J., and WHITE, J., concurred.



48 Cal.App.2d 408

LLOYD v. KLEEFISCH.

Civ. 11652.

District Court of Appeal, First District, Division 1, California.

Dec. 11, 1941.

1. Appeal and error ⇐1001(1)

The District Court of Appeal was without power to interfere with jury's verdict which was supported by ample evidence and inferences therefrom.

2. Executors and administrators ⇐221(5)

Evidence sustained judgment for personal services performed for decedent, on ground that plaintiff took care of decedent and acted as his companion, chauffeur, nurse, etc., with the expectation and understanding that services would be paid for.

3. Work and labor ⇐4(2)

Where services are rendered by one person from which another derives benefit, a presumption arises from proof of services rendered that the person benefited was bound to pay what they were reasonably worth, although there was no express contract to pay therefor.

4. Work and labor ⇐4(2)

Where services are rendered by one person to another who is not related to the first person and the services are accepted, the law not only implies a promise to pay for the services, but implies that such promise is to be performed at termination of the services.

5. Limitation of actions ⇐50(2)

Where law implies promise to pay for services rendered decedent at termination of the services, and the services are rendered continuously until decedent's death, cause of action for the services does not arise until the day of decedent's death, and statute of limitation does not bar any part of the period of continuous services.

6. Limitation of actions ⇐50(2)

Cause of action for personal services performed in taking care of decedent and acting as his companion, chauffeur, nurse, etc., until his death, with the expectation and understanding that the services would be paid for, accrued on the death of the decedent, and the claim for services performed prior to two years before decedent's death was not barred by limitations.

7. Limitation of actions ⇐46(5)

Where one is to render services and is to be paid upon death of person benefited, cessation of service caused by the capricious or wrongful acts of the person obligated to pay does not operate to prevent the contract from being a continuous one, within rule that the statute of limitations starts to run from date of termination of the services.

8. Limitation of actions ⇐50(2)

The statute of limitations did not begin to run against cause of action for services rendered decedent during his lifetime under agreement that the services would be paid for, until death of the decedent, where the plaintiff was at all times willing to perform the services, notwithstanding temporary cessation of the services for six-month period without fault of the plaintiff, and caused by wrongful temporary discharge of the plaintiff by the decedent.

9. Frauds, statute of ⇐44(3)

An oral agreement to pay for services performed for decedent in taking care of the decedent and acting as his companion, chauffeur, nurse, etc., was not rendered unenforceable by provision of the statute of frauds requiring agreement which by its terms is not to be performed within one year from the making thereof, to be evidenced by writing subscribed by the party to be charged. Civ.Code, § 1624, subd. 1.

10. Frauds, statute of ⇐44(3)

The provisions of the statute of frauds requiring an agreement that by its terms

is not to be performed within one year from making thereof to be evidenced by writing subscribed by the party to be charged does not apply to contracts express or implied for rendition of services for an indefinite period of time, payment to be made at the termination of the relationship. Civ.Code, § 1624, subd. 1.

11. Frauds, statute of ⇐49

In order to fall within condemnation of provision of statute of frauds, relating to agreements not to be performed within a year from the making thereof, the contract must be such as to be incapable of performance within the one-year period. Civ. Code, § 1624, subd. 1.

12. Frauds, statute of ⇐138(4)

In action to recover on quantum meruit for services performed for decedent in taking care of the decedent and acting as his companion, chauffeur, nurse, etc., the provision of the statute of frauds requiring writing for validity of an agreement which by its terms is not to be performed during the lifetime of promisor, or an agreement to devise or bequeath any property or to make any provision for any person by will, was inapplicable. Civ.Code, § 1624, subd. 6.

13. Payment ⇐65(6)

Although it is essential for plaintiff in action against administrator for services rendered to plead nonpayment, the negative averment need not be proved by the plaintiff, and burden of proof to show payment rests on defendant.

14. Payment ⇐73(1)

In action for reasonable value of services performed for decedent in taking care of him and acting as his companion, chauffeur, nurse, etc., defendant administrator failed to sustain burden of proving that the services performed had been paid for by the decedent.

15. Appeal and error ⇐974(1)
Trial ⇐349(2)

Submission of special interrogatories to jury except in certain limited cases is discretionary with the trial court, and the discretion will not be interfered with unless an abuse is shown. Code Civ.Proc. § 625.

16. Trial ⇐349(2)

In action for reasonable value of services performed for decedent in taking care of him and acting as his companion, chauffeur, nurse, etc., the action of the trial court in refusing to submit special interrogatories concerning exact terms of the alleged agreement, and the reasonable value of the services rendered and other matters, was not abuse of discretion. Code Civ.Proc. § 625.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Marion Lloyd against H. J. Kleefisch, as administrator with the will annexed of the estate of Manley B. Haskell, deceased, to recover alleged reasonable value of services rendered by plaintiff to deceased, at his special instance and request. From an adverse judgment, defendant appeals.

Affirmed.

Zimdars & Warren, of San Francisco, for appellant.

W. P. Caubu, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff, after her claim therefor had been rejected, brought this action against defendant as administrator with the will annexed of the estate of Manley B. Haskell to recover the sum of $22,770, alleged to be the reasonable value of services rendered by plaintiff to the deceased at his special instance and request. It is alleged in the complaint that the services described therein "were rendered during all of said time by said plaintiff with the understanding, expectation and agreement between said plaintiff and said Manley B. Haskell that said Manley B. Haskell would compensate said plaintiff for said services in money to and in the amount of the reasonable value thereof upon the termination of said services, at or before the death of said decedent". Plaintiff also alleges that she has not been paid. The services, according to the complaint, were rendered from July 22, 1929, to January 1, 1935, and from July 1, 1935, to October 22, 1939, the last date being the day upon which decedent died. The answer denied the material allegations of the complaint; alleged that any services rendered by the plaintiff to decedent were fully paid for by decedent; that the alleged contract was barred by the statute of frauds and by the statute of limitations. On these issues the cause proceeded to trial before a jury. The jury brought in a verdict for plaintiff in the sum of $10,000. From a judgment

based on that verdict defendant prosecutes this appeal.

[1] Appellant urges that the evidence is insufficient to sustain either the implied finding of the jury that a contract existed, or the implied finding that under any such contract the services were not to be paid for until termination of the services. After reading the record we are of the opinion that, so far as the sufficiency of the evidence is concerned, this is a typical fact case. Had the jury brought in a verdict in favor of appellant there is ample evidence and inferences therefrom that would have supported such a verdict. But there is also ample evidence and inferences therefrom to support the contrary verdict. Under such circumstances, this court has no power to interfere with the judgment.

Disregarding conflicts in the evidence, and indulging in all reasonable inferences to support the judgment, the record shows the following: In 1929 Manley B. Haskell was seventy-eight years of age. He was a man of some means, with property holdings in Illinois. He lived at a hotel in San Francisco. He had suffered for many years from a stomach ailment, and at times was apt to be cross and irritable. His daughter lived in the southern part of this state and her health was such that she could not travel. Haskell had no other relatives in this part of the state. Starting in July of 1929 the plaintiff, then Mrs. Teltz, began to render many services for him. Appellant's witnesses, as well as those of respondent, testified at length concerning the extent and nature of these services. No useful purpose would be served by recounting them in detail in this opinion. Suffice it to say that the respondent acted as a companion; took care of his clothes and linen; acted as his chauffeur; cooked and provided special foods; acted as his secretary; acted as his nurse during his illnesses; supervised his dinner parties, and generally performed those personal services requested by him. For the two or three years prior to Haskell's death respondent visited Haskell daily and spent more and more time with him. During his last illness respondent stayed at the hospital and Haskell would accept food from none but her. During the hotel strike Haskell left the hotel where he was living, and, for several months, lived with respondent and her husband. On another occasion when he was ill he left the hotel in order to live with, and be cared for, by respondent.

Under the provisions of section 1880, subdivision 3, of the Code of Civil Procedure, respondent could not testify as to the arrangement, if any, under which these varied services were rendered, but she produced several witnesses who testified that Haskell told them that, "I have promised her that if she will take care of me as long as I live I will see that she is taken care of"; that he had promised respondent that he would take care of the mortgage on her home; that he had stated, "I will see that she is well taken care of"; that he would provide for her; that Marion (respondent) did not have to worry, that he would take care of her; that he would remember her. To many people he expressed his gratitude towards respondent for the services rendered by her. That it is a reasonable inference from the record that these services were not intended to be gratuitous is so apparent that appellant states in his reply brief that: "Appellant has tried to be fair and considerate with plaintiff, and, even now, in a spirit of utmost fairness and liberality and to adjust this matter, would consent to a judgment in respondent's favor for a liberal allowance for the last two years prior to decedent's death, as to which the presumption of payment raised by the statute of limitations would not apply."

[2, 3] There can be no doubt that the evidence offered and the reasonable inferences therefrom support the implied finding of the jury that these services were rendered with the expectation and understanding that they would be paid for. In a case closely parallel to the instant one on its facts, the court in Seib v. Mitchell, 10 Cal. App.2d 91, at page 94, 52 P.2d 281, at page 282, stated: "An express contract need not necessarily be proved, but 'it is sufficient if from the facts and circumstances it reasonably can be inferred that compensation was in the view and contemplation of the parties.' Mayborne v. Citizens' Trust & Sav. Bank, supra [46 Cal.App. 178, 188 P. 1034]. When services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a 'presumption of law which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth.' Moulin v. Columbet, 22 Cal. 508, 509."

[4, 5] It is also urged that the cause of action pleaded is barred by the statute of limitations, with the exception of that part of the claim which arose during the last two years preceding the death of Haskell, and that there was no evidence that the decedent promised to pay upon his death. This is not the first time such a contention has been made in similar cases. The law is well settled that when services are rendered by one person to another who is not related to him, and such services are accepted by that person, the law not only implies a promise to pay for the services, but implies that such promise is to be performed at the termination of the services. The rule is clearly stated in Lauritsen v. Goldsmith, 99 Cal.App. 671, 675, 279 P. 168, 170, as follows:

"It is also contended by respondents that a cause of action upon quantum meruit would be barred by the statute of limitations with the exception of that part of the claim which arose during the last two years preceding the death of decedent. It has been held, however, under facts similar to those in this case, that the law not only implies a promise to pay, but implies the promise to pay at the termination of the services, so that the cause of action does not arise until the day of the death of decedent and the statute of limitations does not bar any part of the period of continuous services. Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 562; Mayborne v. Citizens Trust & Sav. Bank [supra], 46 Cal.App. 178 at page 189, 188 P. 1034; Warder v. Hutchison [supra], 69 Cal.App. 291, at page 296, 231 P. 563."

[6] There are many case supporting the rule that where there is an express or implied promise to pay on the termination of the services the statute of limitations does not start to run until the termination of the services—in the instant case upon the death of Haskell. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Burr v. Floyd, 137 Cal. App. 692, 31 P.2d 402; Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904.

[7, 8] Appellant urges, however, that the services were not here continuous—that, according to the pleadings and to the admitted facts, there was a break in the services in the first six months of 1935 during which no services at all were rendered by respondent. It is urged, therefore, that the statute of limitations at least bars any claim for services rendered prior to 1935. The facts surrounding this temporary cessation of the services were that when respondent first started to perform services for Haskell she was married to a man by the name of Teltz. She divorced Teltz in 1933 and on December 31, 1934, she married Wyn Harold Lloyd. Haskell opposed her marriage to Lloyd and for the first six months of 1935 he refused to have respondent perform any services for him. The evidence shows that during this period respondent was willing and able to continue the performance of the services and that in July of 1935 Haskell asked her to continue with the services. The trial court submitted to the jury the question as to whether the temporary cessation of the services was without fault on the part of the respondent and further instructed that, "if you find that the cessation was caused by a wrongful temporary discharge by Mr. Haskell, and if you find that he requested a resumption of such services and the plaintiff complied with his request, then I instruct you that this temporary cessation in rendering services by her did not break the terms of her expectation and their understanding, if any, and her services are to be taken as having been continuously rendered". These instructions embody a complete and correct statement of the law. Where a person is to render services and is to be paid upon the death of the person benefited, cessations in service caused by the capricious or wrongful act of the person obligated to pay do not operate to prevent the contract from being a continuous one within the rule that the statute of limitations starts to run from the date of termination. This was one of the points decided in Seib v. Mitchell, supra, where at page 94, of 10 Cal.App.2d, at page 283 of 52 P.2d, it is stated: "Defendant contends that the larger part of the sum claimed is barred by the statute of limitations, basing this contention upon the finding of the court that during part of the plaintiffs did not render services and that 'such cessation of services was without fault of the plaintiff and was caused by the wrongful temporary discharge by the deceased.' This contention cannot be upheld. The contract was for continuous services from 1917 until the death of Mrs. Herbst. The court found that plaintiffs were at all times ready, able, and willing to perform the services. The finding of 'the wrongful temporary discharge' was tantamount to a holding that deceased, during the periods of cessation of services, did not desire the assistance of plaintiffs, especially in view of the fact

that after each cessation of services plaintiffs were again requested by deceased to resume their ministrations to her, and they did in fact on each occasion render further services. The statute of limitations did not begin to run until the death of Mrs. Herbst." See, also, Burr v. Floyd, supra.

[9-12] Appellant likewise urges that the alleged contract is invalid under the statute of frauds. Civ.Code, sec. 1624, subs. 1 and 6. The complete answer to this contention is to be found in Mayborne v. Citizens Trust & Savings Bank, 46 Cal.App. 178, at page 189, 188 P. 1034, at page 1039, as follows:

"We think there is no more merit in the contention that the contract herein was invalid by reason of subdivision 1 of section 1624, Civil Code, which requires 'an agreement that by its terms is not to be performed, within a year from the making thereof' to be evidenced by writing, 'subscribed by the party to be charged.' This rule does not apply to contracts, either express or implied, for the rendition of services for an indefinite period of time and payment to be made at the termination of the relationship. Dougherty v. Rosenburg, 62 Cal. 32; Kutz v. Fleisher, 67 Cal. 93, 7 P. 195; Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am.Rep. 17; Raynor v. Drew, 72 Cal. 307, 13 P. 866; Bank of Orland v. Finnell, 133 Cal. 475, 65 P. 976; Stewart v. Smith, 6 Cal.App. 152, 91 P. 667. To fall within the condemnation of the statute the contract must be such as to be incapable of performance within one year. Manifestly we have no such situation here.

"Indeed, the proper view of this case, as we understand it, is that the services were performed without any express agreement as to compensation, but with the expectation and understanding that at some time in the future, probably on the death of Mr. Dutton, the plaintiff would be paid the reasonable value of her services.

"Nor do we think that subdivision 7 [now subdivision 6] of said section, requiring a writing for the validity of an agreement 'which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will,' applies to a case like this for recovery upon a quantum meruit."

[13, 14] The next contentions of appellant center around the question of whether the services here involved were paid for by Haskell prior to his death. Appellants call attention to evidence produced by them that Haskell, in 1929, loaned Mr. Teltz, then married to respondent, some money to use in his business, and that Teltz subsequently became bankrupt, resulting in a loss to Haskell of $12,500. There was no evidence that this was other than a business transaction between Haskell and Teltz, and certainly there is no evidence that this money was loaned on condition that respondent would render services to Haskell, or that the services subsequently rendered were intended by either Haskell or respondent as repayment of that debt. There was also evidence that Haskell, when he lived with respondent and her husband during the hotel strike and during one of his illnesses, paid respondent for his room and board. Payments were also made to her for the room and board of a relative of Haskell's. Appellant also produced in evidence the divorce complaints in Teltz v. Teltz and Lloyd v. Lloyd, in neither of which did respondent list her rights under the contract with Haskell as community property. While this evidence offers some support to respondent's contention that the services rendered may have been paid for by Haskell, they do not conclusively establish that fact if the burden of proof to show payment was on appellant. Appellant recognizes this fact, and urges that since nonpayment must be pleaded by a plaintiff in a case like this, and was in fact pleaded by plaintiff, the burden of proof on the issue rests on the plaintiff. The trial court instructed that the burden of proving payment rested on defendant under the affirmative allegations of his answer. In our opinion, that was a correct statement of the law. While it is essential for a plaintiff in an action against an administrator for services rendered to plead nonpayment, the cases are clear to the effect that this negative averment need not be proved by the plaintiff, and that the burden of proof to show payment rests on defendant. In Hurley v. Ryan, 137 Cal. 461, 70 P. 292, the action was against an administrator for services rendered a decedent. The complaint properly averred nonpayment. The defendant denied this allegation, and, as did appellant in the instant case, averred payment. On defendant's appeal it was urged there was no evidence of nonpayment. In disposing of this contention the court stated, 137 Cal. at page 462,

70 P. at page 292: "The principle was clearly stated and fully considered in Melone v. Ruffino, 129 Cal. 514, 62 P. 93, 79 Am.St.Rep. 127, that 'where the plaintiff has proved the existence of a debt sued on —at least within the period of statutory limitation—the burden of proving payment is on the defendant'. It was also held that the averment of nonpayment, while 'necessary to make the complaint perfect upon its face,' need not be proved by plaintiff. 'The question,' it was said, 'is not one of pleading, but of evidence; not what must be alleged, but where the burden of proof lies.' In cases of actions on claims against an estate, the rule may sometimes place the administrator at a disadvantage. But this disadvantage is about equally balanced by the provisions of section 1880 of the Code of Civil Procedure, which disqualifies parties and assignors of parties to an action, as witnesses, upon a claim or demand against the estate of a deceased person, 'as to any matter of fact occurring before the death of such deceased person.'" See, also, Stuart v. Lord, 138 Cal. 672, 72 P. 142; McKay v. McKay, 184 Cal. 742, 195 P. 385; San Pedro Lumber Co. v. Kreis, 111 Cal.App. 466, 295 P. 890; Dickey v. Kuhn, 106 Cal.App. 300, 289 P. 242; Wakeman v. Green, 98 Cal.App. 50, 276 P. 387; Atkinson v. Adkins, 92 Cal.App. 424, 268 P. 461.

[15, 16] Appellant also complains of the refusal of the trial court to submit certain special interrogatories to the jury on several of the issues. Appellant requested that the jury specially find the exact terms of the agreement between Haskell and respondent; the reasonable value of the services from July 22, 1929, to March 22, 1932; from March 22, 1932, to December 31, 1934; from July 1, 1935, to October 22, 1939, and several other matters. If special interrogatories were required as a matter of law in the instant case, in nearly every jury case the litigants would be entitled to special interrogatories on every issue presented. That is not the law. The submission of special interrogatories to the jury, except in certain limited cases, of which this is not one, is discretionary with the trial court, and such discretion will not be interfered with unless an abuse is shown. Sec. 625, Code of Civ.Proc.; 24 Cal.Jur., p. 904, sec. 155. No abuse of discretion appears in the present case.

Certain objections to the instructions given and refused are made. Most of the refused instructions contain incorrect statements of the law. We have examined the charge. It was full, fair, complete and correct.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.



48 Cal.App.2d 556

STROUD et al. v. HANSEN et al.

Civ. 13213.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1941.

1. Appeal and error ⇐1056(1)
Witnesses ⇐216

In action for injuries sustained by six-year-old child when struck by automobile while crossing street, refusal to permit police officer, who interviewed motorist for purpose of making a report for police department, to testify as to statements made by motorist to him on ground that matter was privileged because report was required by statute was error, but was not prejudicial where question itself as asked did not indicate that answer to it would be favorable to plaintiff, and plaintiff did not make any offer to prove that proposed answers would have been advantageous to them. Vehicle Code, §§ 484, 488, St.1935, pp. 172, 173.

2. Witnesses ⇐216

The only reports, made under the Vehicle Code, which are confidential, are those made so by the section of the Vehicle Code making accident reports confidential, and, to make a statement "privileged" and inadmissible, it must come within express terms of the section. Vehicle Code, § 484, 488, St.1935, pp. 172, 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged".

3. Appeal and error ⇐1031(4)

Prejudicial error will not be presumed in excluding evidence unless question to which objection has been sustained shows

affirmatively that the answer would elicit proof favorable to party making inquiry and that it bears upon a material issue.

4. Appeal and error ⇐205

A ruling excluding evidence will not be reviewed unless it appears that party who asked question thereupon made an offer of what he intended to prove, or that question itself, as asked, indicated that answer to it would be favorable to party who asked the question.

5. Trial ⇐194(7)

An instruction that testimony was undisputed that child struck by automobile was attempting to cross street at a point other than the crosswalk at the intersection and at a point other than that of an unmarked crossing was warranted under trial court's authority to comment upon the evidence, where all testimony introduced by plaintiff except that of child injured showed that at time of impact she was in center of street at about 70 feet south of intersection. Vehicle Code, § 562, St.1935, p. 188; Const. art. 1, § 13.

6. Appeal and error ⇐930(2)

Jurors are presumed to possess common intelligence and to have considered instructions as a whole.

7. Trial ⇐228(1)

The trial court is not required to state in one instruction all of the law with reference to issues involved, but rather all instructions must be read together.

8. Trial ⇐295(1)

If instructions when read together harmonize and fairly state the law, a verdict will not be disturbed on ground of error in giving or in refusing instructions.

9. Automobiles ⇐217(3)

The confused hesitancy of a pedestrian crossing a city street outside of a crosswalk is not the "yielding of right of way" required by Vehicle Code, but rather point at which pedestrian must stop in order to maintain a safe position and to allow vehicular passage must be clearly outside course of travel of approaching automobile. Vehicle Code, § 562, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Yielding of Right of Way".

10. Appeal and error ⇐1170(9)

In action for injuries sustained by six-year-old child when struck by automobile while crossing street, where standard of care required of a child was fully explained to jury, instructions on question of contributory negligence, which stated that it was duty of plaintiff as an ordinary prudent person to look in direction in which injury was to be anticipated and to cross on the alert, and that crossing a street between intersections a pedestrian must observe greater care than at established crossing, did not constitute prejudicial error. Const. art. 6, § 4½.

11. Trial ⇐260(8)

In action for injuries sustained by six-year-old child when struck by automobile while crossing street, plaintiffs' requested instructions with respect to care required of adult persons when they see children upon highway were properly refused, where it appeared that requested instructions were merely enlargements of and arguments made upon instructions that were given.

12. Trial ⇐253(7)

Unless an instruction directing a verdict for plaintiff embraces all conditions necessary to establish liability of defendant, it is erroneous and should not be given.

13. Appeal and error ⇐1031(6)

The burden was upon appellants to make an affirmative showing that they had been prejudiced by rulings or instructions of trial court. Const. art. 6, § 4½.

14. Appeal and error ⇐1031(6)

Where appellants failed to carry burden of showing that they had been prejudiced by trial court's rulings or instructions, relief would be denied. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County.

Action by Joseph Alvin Stroud and another against Donald Robert Hansen and another for personal injuries to a minor in an automobile accident. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Fred M. Riedman, of Long Beach, for appellants.

Crider, Runkle & Tilson and Robert Ford, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiffs appeal from a judgment after verdict in an action for damages for personal injuries to a minor.

The complaint alleges that Sharon Stroud, six years of age, while walking across Magnolia avenue near its intersection with 20th street, in the city of Long Beach, was run down by an Oldsmobile driven by Donald with the consent of his father, Harold T. Hansen. Serious bodily injuries are alleged to have been suffered by Sharon as the proximate result of the declared negligence of the driver of the automobile.

The accident occurred at about 4:30 p.m. on March 30, 1940, just after Sharon and her companion, Joyce Jacobs, 8 years of age, had left Larkin's Grocery Store, situated at the southeast corner of the intersection. After leaving the store the two children attempted to cross Magnolia street from its east curb at a point about 70 feet south of 20th street. They proceeded in a westerly direction. As they were arriving at a point near the center of Magnolia, defendant's automobile approached them. Joyce escaped, reached the west curb in safety, while Sharon, apparently excited, hesitated and was struck by the Oldsmobile as a result of which she was knocked some distance suffering sorely from the impact. The speed of the car at the time the driver came in view of the two children was about 30 miles per hour, according to Donald's testimony. The skid marks made by the tires upon the application of the brakes and until the car came to a stop were in excess of 66 feet in length. The course along which the girls attempted to cross Magnolia was about 70 feet south of the intersection of 20th street.

Appellants claim that prejudicial errors were committed by the court as follows:

(1) Sustaining the objection to an inquiry of the officer who interviewed Donald for the purpose of making a report for the police department; (2) giving certain instructions and refusing to give other instructions.

[1-4] The ruling of the court in sustaining objection to the inquiry made of the police officer was error. Section 484 of the Vehicle Code, St. 1935, p. 172, requires the driver of a vehicle involved in an accident resulting in injuries to cause a written report to be made of such accident. Section 488 provides that no such report shall be used as evidence in any trial arising out of such accident. But it was not a report so provided to be made that was offered but rather the testimony of the officer as to the statements made by the driver to him. No evidence of the facts that occurred at the time of a vehicular accident is privileged. Only those reports are confidential which are so made by section 488 of the Vehicle Code. To make a statement privileged and inadmissible it must come within the express terms of the section. Dwelly v. McReynolds, 6 Cal.2d 128, 131, 56 P.2d 1232; Inouye v. McCall, 35 Cal.App.2d 634, 636, 96 P.2d 386. However appellants are not in a position to complain of the court's ruling. Neither did the question itself as asked indicate that the answer to it would be favorable to plaintiff nor did they make any offer to prove that the proposed answers would have been advantageous to them. Prejudicial error will not be presumed in excluding evidence unless the question to which objection has been sustained shows affirmatively that the answer would elicit proof favorable to the party making the inquiry and that it bears upon a material and relevant issue. Such ruling will not be reviewed unless it appears that the party who asked the question thereupon made an offer of what he intended to prove. Thompson v. Buffums', Inc., 17 Cal.App.2d 401, 62 P.2d 171; Newman v. Sunde, 23 Cal.App.2d 332, 335, 73 P.2d 260; Snowball v. Snowball, 164 Cal. 476, 129 P. 784; Grandy v. Southern Pac. Co., 9 Cal.App.2d 441, 49 P.2d 1127.

[5] Complaint is made that the court erred in instructing the jury that the testimony was undisputed to the effect that plaintiff was attempting to cross the street at a point other than the crosswalk at the intersection and at a point other than that of an unmarked crosswalk. Where a pedestrian is not crossing in a crosswalk, the driver has the right of way. Veh.Code, sec. 562. All the testimony introduced by appellants except that of Sharon shows that at the time of impact she was in the center of Magnolia avenue at a point about 70 feet south of 20th street. Such was the testimony of the witness Larkin who saw Sharon going through the air; of the witness McCormick who saw the two girls leave the curb 70 feet south of the intersection; of Joyce Jacobs who fixed the point of their leaving the easterly curb at about 70 feet south of 20th street; of officer Houghton who testified that on his arrival Sharon lay in Magnolia avenue 80 feet south of 20th street. Furthermore the skid marks

of defendant's car did not begin until the car had reached a point 18½ feet south of the extended curb line on the south side of 20th street. In view of this proof, the testimony of Sharon was not sufficiently clear or positive to warrant the judge in presenting the issue as to whether the child attempted to cross Magnolia within a cross-walk. The instruction was warranted under the court's authority to comment upon the evidence. Const., art. I, sec. 13.

Complaint is made that the instructions given by the court upon the question of contributory negligence were confusing. Those instructions which appellant criticized (defendant's 4, 16 and 35) in substance state that it was the duty of plaintiff an ordinary prudent person to look in the direction from which danger was to be anticipated and to continue on the alert, and that in crossing a street between intersections a pedestrian must observe greater care than at established crossings. The criticized instructions might have been omitted but they do not misstate the law. They contain nothing contradictory of Baji* instructions 103 and 59 which at plaintiff's request the court gave and which read as follows:

"Baji No. 103: A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for her actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Sharon Stroud, and whether her conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience under the same or similar circumstances."

"Baji No. 59." "A person who, without negligence on his part, is suddenly confronted with unexpected and imminent danger, either to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger, under the same circumstances. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinary prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

[6-8] The standard of care required of a child having been explained to the jury in Baji 103, it is presumed that they possess common intelligence and that they considered the instructions as a whole. Douglas v. Southern Pac. Co., 203 Cal. 390, 396, 264 P. 237. A trial court is not required to state in one instruction all of the law with reference to the issues involved. All instructions must be read together and each must be considered in connection with all. If they harmonize and fairly state the law the verdict will not be disturbed. Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438; Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303.

[9, 10] Some of the testimony indicates that when Sharon reached a point near the center of Magnolia avenue she stopped. Appellants contend that Sharon yielded the right of way to the Oldsmobile and that the court's instruction in regard to yielding the right of way was therefore unnecessary and was calculated to becloud the issues. Upon a careful scrutiny of the testimony of the adult persons who witnessed the accident, it is rather to be inferred that the child confusedly hesitated when she saw the approaching car. Such hesitancy is not the yielding required of the pedestrian crossing a city street outside of a cross-walk. The point at which the pedestrian must stop in order to maintain a safe position and to allow vehicular passage must be clearly outside the course of travel of approaching motor cars. All of the instructions given by the court, as reported in appellant's brief, with reference to contributory negligence of a person crossing a street outside of a cross-walk required the same degree of caution of both pedestrian and driver. But they emphatically imposed upon the driver the duty to be "alertly conscious of the power of his ma-

*Taken from the book of approved jury instructions prepared by the Superior Court of Los Angeles County.

chine and of its capability to project any negligence into a serious consequence" and required that his caution be adequate to the responsibility imposed upon an operator of any vehicle to exercise ordinary care. From any view of the case we are unable to ascertain any prejudice that plaintiffs might have suffered by reason of the instructions with reference to contributory negligence. Smith v. Brown, 102 Cal.App. 477, 481, 283 P. 132; section 4½ of article VI of the Constitution.

Appellants inserted in their brief three answers given by the operator of the Oldsmobile for the purpose of showing that he was 18 feet south of the corner when he first saw the children; that he was traveling at from 27 to 30 miles per hour when he reached the south line of 20th street. From this they argue that certain instructions which they say they requested to be given with respect to the care required of adult persons when they see children upon the highway should have been given. They concede that the following instructions were given:

"It is ordinarily necessary to exercise greater care for the protection and safety of young children than an adult person who possesses normal and mature faculties, one should anticipate thoughtlessness and impulsiveness in the conduct of a young child; one dealing with children must anticipate ordinary behavior of children."

"You are instructed that it is the duty of an operator of an automobile to operate the same at such rate of speed and in such manner as will enable him to retain control over the same, and to reasonably stop it or check its speed in the event it is necessary to do so. (Botti v. Savill, 68 C.A.D. 926, 928 [97 Cal.App. 524, 275 P. 1029].)"

[11, 12] The foregoing instructions considered in connection with Baji instructions 59 and 103 fully declare the law applicable to the situation presented by the facts of this case. The instructions which appellants say were rejected are merely enlargements of and arguments made upon the quoted instructions. Each of the nine instructions which were rejected can be thus characterized while one of them undertakes to direct a verdict for plaintiff without making any reference to possible contributory negligence and without having defined negligence or proximate cause. Unless an instruction directing a verdict for plaintiff embraces all conditions necessary to establish the liability of a defendant, it is erroneous and should not be given. Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 614, 300 P. 487; Douglas v. Southern Pac. Co., supra. The refusal to give such instructions as those denied by the court, having to do with the conduct of a motorist where he observes children at play upon a highway, could not result in a miscarriage of justice. Conner v. East Bay Municipal Utility Dist., 8 Cal.App.2d 613, 619, 47 P.2d 774, 48 P.2d 982.

Having been pointed to no evidence from which it might be determined that there was a miscarriage of justice because of the giving or refusing of any of the instructions designated it would be improper to interfere with the verdict of the jury. "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Const., art. VI, sec. 4½.)

[13, 14] Although the reporter's transcript contains 120 pages the amount of the evidence actually inserted in appellant's brief could have been included in less than two pages of such transcript. The burden is upon appellants to make an affirmative showing that they have been prejudiced by the rulings or instructions of the trial court. Wallace v. King, 27 Cal.App.2d 174, 80 P. 2d 523. Appellant having failed to carry the burden by pointing out the evidence that might support their contention, relief must be denied. Etienne v. Kendall, 202 Cal. 251, 259 P. 752.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

48 Cal.App.2d 481

HICKS v. SCOTT et al.

Civ. 12667.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1941.

Hearing Denied Feb. 11, 1942.

1. Carriers ⇐414

A railroad sleeping car passenger, pulling another passenger from upper berth, may be held liable jointly with sleeping car company for resulting injuries to such other passenger as against contention that offending passenger's liability is for willful assault and battery, while company's liability rests on negligence in not properly watching car and going to injured passenger's rescue, as each liability is based on breach of legal duty, which is a tort, and injuries would not have happened without either breach.

2. Appeal and error ⇐193(2)

In personal injury suit, a defendant filing no demurrer to complaint is in no position on appeal to raise point that he cannot be held liable jointly with codefendant for damages.

3. Damages ⇐185(1)

In personal injury suit, evidence *held* insufficient to support trial court's finding, on which award of damages was based, that plaintiff sustained compression fracture of bodies of two lumbar vertebrae.

4. Carriers ⇐409

A corporation operating sleeping cars in connection with railway trains is not regarded as "common carrier," unless statute so declares.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier".

5. Carriers ⇐411

A corporation operating sleeping cars in connection with railway trains is required to exercise high degree of care for its passengers' personal safety and comfort, even if it is not a common carrier.

6. Carriers ⇐411

A corporation operating railway sleeping cars must exercise same degree of care for its passengers' safety and comfort as is required of common carrier.

7. Carriers ⇐284(1)

A common carrier's liability to passenger for injury caused by strangers or fellow passenger's acts is relative, qualified, and contingent on whether carrier or its agents had, or from known conditions should have had, knowledge of conditions from which mischief was to be reasonably apprehended, and neglected to prevent injury.

8. Carriers ⇐284(1)

A carrier will not be held liable for assault committed on passenger by fellow passenger under such circumstances that it could not reasonably have been anticipated by carrier's employees in time to prevent it.

9. Appeal and error ⇐1056(1)
Carriers ⇐416

In action against railway sleeping car company for injuries to passenger assaulted by fellow passenger, where trial court found that passengers occupying same coach as plaintiff had been drinking intoxicating liquors and acting in generally noisy and boisterous manner, with knowledge of defendant's servants for some time immediately before assault, exclusion of evidence offered by defendant that all persons on train had been comporting themselves in peaceable and orderly manner was error requiring reversal of judgment for plaintiff.

10. Carriers ⇐411

A corporation operating railway sleeping car with sections separated from aisle only by curtains is bound to have employee charged with duty of carefully and continually watching interior of car while berths are occupied by sleepers.

11. Carriers ⇐411

A corporation operating railway sleeping cars is bound to use degree of care commensurate with danger to which passengers sleeping therein are exposed to protect their property and persons.

12. Carriers ⇐416

Under maxim that when reason of rule ceases, so should rule itself, rule that corporation operating railway sleeping cars is bound to have employee charged with duty of carefully and continually watching interior of cars while berths are occupied by sleepers is not applicable as matter of law to operator of sleeping cars in train chartered by fraternal organization, only members of which are passengers therein, but question whether circumstances known to such operator's agents required precautions against assaults or other unlawful acts by passengers toward each other in such case is one of fact. Civ.Code, § 3510.

Appeals from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Tracy C. Hicks against Hugh Scott and the Pullman Company for personal injuries sustained as the result of being pulled from an upper berth of a Pullman car by defendant Scott. Judgment for plaintiff, and defendants appeal.

Reversed.

Hearing denied; CURTIS, HOUSER, and CARTER, JJ., dissenting.

J. Marion Wright, of Los Angeles, for appellant Hugh Scott.

Robert Brennan, M. W. Reed, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant Pullman Co.

Joseph L. Fainer, of Los Angeles, Albert Anix, of Huntington Park, and Thomas Connell, of Los Angeles, for respondent.

SHAW, Justice pro tem.

The defendants, Hugh Scott and The Pullman Company, appeal from a judgment in favor of plaintiff Tracy C. Hicks, in a suit for personal injuries. In his complaint said plaintiff alleges that he was a passenger for hire on a car of defendant, The Pullman Company, and that after he had retired to his berth for the night the defendant Scott attacked him and with force and violence pulled him from his berth so as to cause him to strike his back on a portion of the car, thus inflicting on him the injuries complained of, and that prior to this assault the plaintiff summoned the Pullman porter for help but the porter did not come, and the defendant Pullman company gave him no aid during the assault. The defendants denied substantially all of the allegations of the complaint. After a trial by the court sitting without a jury, findings and judgment were made in favor of plaintiff.

Plaintiff was a member of a fraternal organization which had arranged a trip for its members from Los Angeles to Sacramento and San Francisco, and had chartered for that purpose a special train, including a number of Pullman sleeping cars. The plaintiff procured tickets entitling him to a berth on this train, and entered the train to make the trip. He went to bed about midnight and went to sleep. By reason of some error into which we do not deem it necessary to inquire, the plaintiff got into the wrong berth, retiring in upper berth 12 of car No. 208. The defendant Scott, who had lower berth 12 in the same car, came to the berth about three hours later, found the proper occupant of upper 12 ensconced in lower 12, because of the presence of plaintiff in upper 12, and the defendant then waked up the plaintiff. Thereupon an altercation ensued, in regard to which there is much conflict in the testimony. According to the testimony of the plaintiff, which was disputed by several witnesses and corroborated by none, Scott finally grabbed him by the left arm and around the shoulders, and forcibly pulled him from the berth down to the floor, in spite of plaintiff's effort to resist, saying at the same time, "God damn your soul, get out of there or I will jerk you out". As plaintiff fell, he struck his back on the arms of the berth opposite, thus receiving injuries for which he sues.

[1, 2] The defendant Scott contends that he cannot be held liable jointly with The Pullman Company for the reason, if we understand his argument, that the liability asserted against him is for a willful act of assault and battery, whereas the liability of The Pullman Company rests on negligence in not properly watching the car and going to plaintiff's rescue. But each liability is based upon an alleged breach of duty to plaintiff imposed by law, a tort, and the situation as alleged is such that without either breach of duty the injury to plaintiff would not have happened at all. The case is within the principle declared in Shea v. City of San Bernardino, 1936, 7 Cal.2d 688, 694, 62 P.2d 365. The case is not like those cited by defendant Scott wherein independent torts cause separate and independent injuries, in which cases of course there is no joint liability for the aggregate of all the injuries. Each of the causes of action above mentioned was alleged in the complaint and defendant Scott's objection here is really one of misjoinder, but no demurrer was filed by him and he is therefore not in a position to raise the point even if it were good.

[3] Defendants contend that the finding as to the extent of plaintiff's injuries lacks evidentiary support. The finding on this subject is that plaintiff "was caused to and did sustain and suffer a compression fracture of the bodies of the first and second lumbar vertebrae of the spine; fracture of transverse process of second vertebrae, causing permanent injury", with a further statement of pain, confinement and inconvenience caused thereby. It is conceded that there is evidence of a fracture of the transverse process, but defendants strongly insist that there is no evidence at all

of the compression fracture of the bodies of the first and second lumbar vertebrae, and we are unable to find any such evidence. The nearest approach to it is in the testimony of a physician who examined plaintiff and took X-rays of his back about twenty months after the injuries were received. He saw in those X-rays evidence of fractures of the two vertebrae last mentioned, and in a written report then made expressed the opinion that those fractures had been caused by plaintiff's fall, but when he came to testify as a witness in this action he stated that he had, since his examination of plaintiff, seen other X-rays of plaintiff's back taken within a few hours after the fall, in which the same fractures of the first and second lumbar vertebrae appeared as old fractures, and that, by reason of this appearance, "I will have to change my opinion on that". This testimony does not support the finding of which complaint is made. According to the testimony of the experts, a fracture of the body of a vertebra is much more serious than a fracture of the transverse process. The award of damages based upon an unsupported finding that there was a fracture of the bodies of two vertebrae cannot be allowed to stand.

The defendant, The Pullman Company, complains that it was not permitted to show that all persons on the train were comporting themselves in a peaceable and orderly manner, and that it therefore had no reason to expect or guard against such violence as that of which plaintiff complains. In behalf of that defendant, questions were propounded to several witnesses who were on the special train during the trip from Los Angeles to Sacramento and who had ample opportunity to observe what was going on, including a passenger agent of the railroad company, its head brakeman, its conductor, the Pullman conductor and the Pullman porter of the car in which the trouble between plaintiff and defendant Scott occurred. All of these witnesses, except the porter, made frequent trips through the train while it was en route and were asked questions relating to conditions on the train in general. The Pullman porter was asked particularly about conditions on the car above mentioned. Objections to these questions on the ground that they were incompetent, irrelevant and immaterial, were uniformly sustained.

[4-6] A sleeping-car company operating sleeping cars in connection with railway trains is not regarded as a common carrier, except where a statute so declares. 13 C.J.S., Carriers, § 904, pp. 1739, 1740. It is, however, required, even if not a common carrier, to exercise a high degree of care for the personal safety and comfort of its passengers. 13 C.J.S., Carriers, § 909, p. 1744. There is conflict among the authorities on the question whether such a company, though not technically a common carrier, should observe the same degree of care towards its passengers as a common carrier. We think the better reason is with the decisions which do require that degree of care. Caldwell v. Pullman Co., 1925, 132 S.C. 321, 128 S.E. 504; Mixon v. Southern R. Co., 1927, 139 S.C. 343, 138 S.E. 45, 49; Bonner v. Pullman Co., 1931, 160 S.C. 531, 159 S.E. 382, 76 A.L.R. 922, 925; Forbes v. Pullman Co., 1926, 137 S.C. 433, 135 S.E. 563, 566; Nevin v. Pullman Palace Car Co., 1883, 106 Ill. 222, 230, 46 Am.Rep. 688; Pullman Co. v. Hoyle, 1908, 52 Tex.Civ. App. 534, 115 S.W. 315, 319.

[7, 8] Applying the common carrier rules, one of them is that "the liability of a carrier to a passenger for the acts of strangers or fellow passengers is relative, qualified, and contingent upon whether the carrier, or its agents, has, or from known conditions should have, knowledge of conditions from which mischief is to be reasonably apprehended, and has neglected to prevent the injury". Schwerin v. H. C. Capwell Co., 1934, 140 Cal.App. 1, 3, 34 P.2d 1050, 1051; see, also, 13 C.J.S., Carriers, § 912, p. 1747; note in 15 A.L.R. 871, where many cases are cited to the proposition that "a carrier will not be held liable for an assault on a passenger by a fellow passenger, committed under such circumstances that it could not reasonably have been anticipated by the employees of the carrier in time to prevent it"; and supplemental notes citing further cases to the same rule, in 42 A.L.R. 169 and 43 A.L.R. 1035.

[9] The trial court, doubtless having this rule in mind, made a finding that, "for some time immediately prior to the time of the assault made upon said plaintiff by said defendant Hugh Scott, hereinbefore referred to, a number of other passengers occupying the same coach as that occupied by the plaintiff, had been indulging in intoxicating liquor and were acting in a generally noisy and boisterous manner, all of which was known to and observed by said defendant The Pullman Company, its

agents, servants and employees;". We find in the record no evidentiary support for this finding, except a general statement by the Pullman conductor that, "They were a pretty drunken bunch". This statement was not directed to any particular persons or car, but apparently referred to the passengers on the train in general, and we doubt its sufficiency to support the finding. But, in view of this finding, which is now relied on to support the judgment, the evidence which defendants attempted to produce regarding the conduct of the passengers at the time, should have been received.

[10, 11] A special rule has been declared applicable to sleeping-car companies at night. In Carpenter v. New York, etc., R. Co., 1891, 124 N.Y. 53, 26 N.E. 277, 11 L.R.A. 759, 762, 21 Am.St.Rep. 644, the court stated this rule as follows: "A corporation engaged in running sleeping-coaches, with sections separated from the aisle only by curtains, is bound to have an employe charged with the duty of carefully and continually watching the interior of the car while berths are occupied by sleepers." This rule has been approved in many other cases including Calder v. Southern Ry., 1911, 89 S.C. 287, 71 S.E. 841, 845, Ann.Cas.1913A, 894; Caldwell v. Pullman Co., 1925, 132 S.C. 321, 128 S.E. 504, 505; Pullman Co. v. Culbreth, 5 Cir., 1924, 2 F.2d 540, 42 A.L.R. 164, 167. In Carpenter v. New York, etc., R. Co., supra, the court stated the reasons for this rule as follows: "These cars are used by both sexes, of all ages, by the experienced and inexperienced, by the honest and dishonest, which is understood by the carriers * *. A traveler who pays for a berth is invited and has the right to sleep, and both parties to the contract know that he is to become powerless to defend his property from thieves, or his person from insult, and the company is bound to use a degree of care commensurate with the danger to which passengers are exposed." Similar reasons are mentioned in the other cases just cited.

[12] The rule just referred to is not one created by statute but one worked out by the courts from the necessities of the situation and it presents a proper case for the application of the maxim that "When the reason of a rule ceases, so should the rule itself". Civ.Code, sec. 3510. The reasons given for the rule, as stated in the cases, are in substance that while a passenger is asleep he cannot watch out for threatened danger, defend himself or call for help, and that the passengers in sleeping-cars may include both those especially vulnerable to attack or theft and also those disposed to commit such acts. The latter reason would ordinarily be absent in a case such as we have here, where a whole train has been chartered by a fraternal organization of men, and the passengers are all members of that organization. No reason would appear, in such a case, for expecting the passengers to assault each other or commit other unlawful acts toward each other; and without such reason the sleeping-car company should not be held to the anticipation of such acts. Hence we think that the rule above stated should not be held applicable as a matter of law to the operator of sleeping-cars engaged in such an expedition. In such case the question would be one of fact, whether the circumstances as they developed and were made known to the agents of the sleeping-car company required precautions against such acts. On this issue the evidence of good conduct that The Pullman Company attempted but was not permitted to produce here would be material and its exclusion was error.

The judgment is reversed.

YORK, P. J., and WHITE, J., concurred.



NOBLE et al. v. BEACH et al. *

Civ. 10995.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1941.

Hearing Granted Feb. 19, 1942.

1. Judgment ⇐780(7)

A judgment creditor may obtain, before distribution, a judgment lien on the interest of the debtor as heir or devisee of an estate.

2. Execution ⇐44

The interest of an heir in decedent's estate, prior to distribution, is subject to execution. Code Civ.Proc. § 688.

* Subsequent opinion 130 P.2d 426.

3. Wills ⇐721

A legatee's title vests upon the decedent's death subject to administration. Probate Code, § 28.

4. Estoppel ⇐37

A sheriff's deed following an execution sale conveys only the interest which judgment debtor had at the date of the execution and date of the sale, and does not convey any after-acquired interest. Code Civ.Proc. § 700.

5. Partition ⇐116(2)

On partition of property held in cotenancy, the lien existing on an undivided interest attaches to the land allotted to the cotenant against whose interest the lien was a charge, subject to its just proportion of the costs of the partition. Code Civ.Proc. § 769.

6. Partition ⇐116(1)

Where judgment creditors purchased at execution sales the undivided interests in two parcels of realty of judgment debtor as devisee under will devising such realty to debtor and his two sisters in equal shares, and thereafter in partition proceeding in probate the entire interest in one parcel was allotted to debtor and the other parcel was allotted to sisters, judgment creditors lost all rights in the land allotted to sisters. Code Civ.Proc. §§ 688, 700, 769; Probate Code, § 28.

7. Execution ⇐302
Partition ⇐116(2)

Where judgment creditors purchased at execution sales the undivided interests in two tracts of realty of judgment debtor as devisee under will devising such realty to debtor and his two sisters in equal shares, and thereafter in partition proceeding in probate the entire interest in one tract was allotted to debtor, the lien of judgment, which was of record, immediately attached to undivided two-thirds interest in tract allotted to debtor, which had not been sold under execution, so that debtor's subsequent transferee took the two-thirds interest subject to such lien and when transferee redeemed under the execution sale, he redeemed only the one-third interest sold under execution, the two-thirds interest remaining subject to judgment lien. Code Civ.Proc. §§ 688, 700, 769; Probate Code, § 28.

8. Partition ⇐116(1)

The rule that partition does not confer a new title on the cotenant cannot operate to confer on purchasers of judgment debtor's undivided interest in realty held in cotenancy sold under execution prior to partition a greater title than that held by debtor at the time of sale and purchased at the execution sale.

9. Executors and administrators ⇐314(11)

Probate court on distribution of decedent's estate is without power to pass on the claim of one who has, or claims to have, a judgment lien on the interest of a legatee, since such claim is not against the decedent's estate as such, but is against the interest of a legatee. Probate Code, § 28.

10. Executors and administrators ⇐315(6)

A decree of distribution of decedent's estate, which distributed to devisee's transferee land on which devisee's judgment creditors claimed a lien, was not "res judicata" of judgment creditors' rights under such lien, even though distribution decree did not expressly reserve the rights of the lien claimants, since, although distribution to a voluntary transferee of a legatee is proper, probate court has no power to pass on the rights of one claiming a judgment lien on the interest of a legatee.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

11. Executors and administrators ⇐315(6)
Judgment ⇐793(5)

The fact that judgment creditors, claiming a lien on the interest of debtor, as a devisee, in decedent's estate, failed to assert such claim in probate proceeding for distribution of the estate, did not "estop" creditors from asserting such lien against debtor's transferee to whom property on which lien was claimed was distributed, nor constitute "laches" precluding creditors from subsequently asserting lien, even though creditors had filed in probate court a request for notices under statute authorizing any person interested in estate to file such a request. Probate Code, § 1202.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Laches".

12. Executors and administrators ⇐315(6)

The delivery to sheriff under distribution decree of money due judgment debtor as legatee did not create an "estoppel" against judgment creditors subsequently asserting their lien against realty allotted to debtor in partition proceeding in probate and by distribution decree distributed to

debtor's transferee, on the theory that one who accepts the benefit of a judgment cannot avoid its burdens, since delivery to sheriff was merely for the purpose of protecting whatever interest creditors might have in the money, probate court having no power to determine validity of the lien either as to money or realty. Code Civ.Proc. § 561.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

13. Appeal and error ⇐907(3)

Trial court's finding that allegations of cross-complaints and affirmative defenses in the answers, which raised defenses of estoppel, laches and res judicata, were true and supported by the evidence did not raise a conclusive presumption on appeal on the judgment roll that evidence was introduced supporting the judgment on such grounds, where the only ground pleaded in support of such defenses was untenable.

14. Appeal and error ⇐907(3)

Where trial court found that allegations of cross-complaints and affirmative defenses in answers, which raised the defenses of estoppel, laches and res judicata, were true and supported by the evidence, upon appeal on the judgment roll, where it appeared that the only ground pleaded in support of such defenses was untenable, it could not be presumed in support of the judgment, that grounds of such defenses neither alleged nor disclosed by the findings were shown by the evidence.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Mary Noble and others against Frank Beach and others for declaratory relief for the purpose of securing an adjudication as to the rights of plaintiffs as judgment creditors, in certain realty. From a judgment that plaintiffs have no interest in such realty and that such realty is owned by certain of the defendants, plaintiffs appeal on the judgment roll

Judgment reversed.

Lionel B. Benas and Booth B. Goodman, both of Oakland, for appellants.

Frank J. Fontes, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought this action for declaratory relief for the purpose of securing an adjudication that as judgment creditors of Milton J. Wiren they have a lien on an undivided two-thirds interest in certain real property in Alameda county, or, in lieu thereof, that they have a lien on an undivided one-third interest in certain real property in San Francisco. From a judgment that they have no interest in either parcel, and that certain of the defendants own such property free of any claim of plaintiffs, this appeal is taken on the judgment roll.

The two parcels of real property involved constituted a part of the estate of Amanda W. Wiren, mother of Milton J. Wiren, and of defendants Mildred Tellier and Ruth A. Williams. By her will, Amanda W. Wiren devised these two parcels in equal undivided shares to her three children. Prior to the death of Amanda W. Wiren plaintiffs had acquired a judgment against Milton J. Wiren, and abstracts of the judgment were properly recorded in Alameda and San Francisco counties. After recording their lien the plaintiffs caused execution sales to be had in both Alameda and San Francisco counties of the interest of Milton J. Wiren. They purchased the debtor's interest in the Alameda county property for $700, and his interest in the San Francisco county property for $750. The trial court found that when this action was brought Milton J. Wiren still owed on the judgment on principal and interest the sum of $4,619.49.

Prior to the date of either of the execution sales, one of the daughters of Amanda W. Wiren filed a petition in the probate proceeding for the partition among the three legatees of the Alameda county and San Francisco county properties. The order for the partition was made and entered subsequent to the execution sales. By this order of partition the Alameda county property was allocated to Milton J. Wiren in sole ownership, and the San Francisco county property was divided between the two other legatees. Subsequently, Milton J. Wiren sold his interest in the Alameda county property to defendant Frank Beach, who purported to redeem that parcel from the execution sale by paying to plaintiffs the sum of $777—the amount bid by plaintiffs, plus penalties and interest, for the interest of Milton J. Wiren in the Alameda county property. Thereafter, a final decree of distribution was entered in the estate of Amanda W. Wiren. That decree was in accordance with the order of partition that

had been made in the probate proceeding and with the deed of Milton J. Wiren, that is, the interest of Milton J. Wiren in the Alameda county parcel was distributed to Beach as Wiren's assignee. This proceeding was instituted after the decree of distribution had become final. The trial court determined that plaintiffs had no interest in either parcel and quieted the title of defendants to those parcels.

The following table of events sets forth the various steps taken by the parties in the order that they occurred:

June 26, 1934—Plaintiffs obtained a judgment against Milton J. Wiren in Alameda county.

June 29, 1934—Abstract of that judgment duly and properly recorded in Alameda county.

April 18, 1935—Amanda W. Wiren died testate, and her will filed for probate in San Francisco. By that will she devised a parcel of real property in Alameda county and a parcel in San Francisco county to her son Milton J. Wiren, and to her two daughters in equal undivided shares.

October 20, 1935—Plaintiffs recorded abstract of their judgment against Milton J. Wiren in San Francisco county.

November 15, 1935—Execution filed in the records of the estate, and it was recorded in San Francisco county on January 14, 1936.

January 21, 1936—Execution levied by the sheriff on the interest of Milton J. Wiren in the San Francisco county property.

January 23, 1936—Ruth A. Williams, one of the legatees of Amanda W. Wiren, filed a petition in the estate proceedings to partition all of the real property in the estate.

January 26, 1936—Execution levied by the sheriff on the interest of Milton J. Wiren in the Alameda county property.

February 17, 1936—Sheriff's sale of the interest of Milton J. Wiren in the Alameda county property. Plaintiffs purchased the same for $700. Sheriff's certificate delivered to plaintiffs.

February 18, 1936—Sheriff's sale of the interest of Milton J. Wiren in the San Francisco county property. Plaintiffs purchased the same for $750. Sheriff's certificate delivered to plaintiffs.

February 19, 1936—Certificate of sale of the interest of Milton J. Wiren in Alameda county property recorded in Alameda county.

August 13, 1936—Partition ordered in the estate proceedings; all Alameda county property allocated to Milton J. Wiren, and San Francisco county property allocated to the other two legatees.

September 11, 1936—Deed from Milton J. Wiren to Frank Beach by which, for value received, Wiren transferred and conveyed all of his right, title and interest in and to the Alameda county property to Beach. This deed recorded January 8, 1937.

January 8, 1937—Beach redeemed the Alameda county property for the amount bid by plaintiffs, plus interest and penalties.

April 26, 1937—Decree of final distribution in the estate of Amanda W. Wiren made and entered by the probate court in San Francisco, by the terms of which the Alameda county property was distributed to Frank Beach as the grantee of the equity of redemption of Milton J. Wiren.

January 22, 1938—This action instituted by plaintiffs for declaratory relief, and to secure an adjudication as to plaintiffs' rights in the Alameda county and San Francisco county properties.

[1, 2] The procedure adopted by plaintiffs as judgment creditors to obtain a lien on the interest of their debtor in the estate of his mother was proper. A judgment creditor may obtain, before distribution, a judgment lien on the interest of the debtor as heir or devisee of an estate. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459. It is also clear that the interest of an heir, prior to distribution, is subject to execution. § 688, Code Civ.Proc.; Estate of Lind, 1 Cal.2d 291, 34 P.2d 486; 5 Cal.Jur.Supp., p. 751, § 1313. Plaintiffs followed the procedure prescribed by statute.

Plaintiffs contended before the trial court, and contend on this appeal, that an undivided two-thirds interest in the Alameda county property is subject to their judgment lien, or, in lieu thereof, that an undivided one-third interest in the San Francisco county property remains subject to their lien or execution sale. It is their view that the decree of distribution did not

conclude their rights because such rights, being dependent on judgment liens, were not cognizable in the estate proceedings.

The crucial question presented on this appeal is whether, when appellants purchased the interest of Milton J. Wiren in the Alameda county and San Francisco county properties, did they then purchase the undivided one-third interest in each parcel then owned by Wiren, or did they purchase the interest to which Wiren would be entitled on final distribution?

The respondents contend that the execution sales were of such interest as the judgment debtor should be entitled to receive on distribution, that is, of the entire interest in the Alameda county property, with the result that the redemption of the property by Beach, transferee of the judgment debtor, vested in Beach sole ownership of the Alameda county property free of any claim of plaintiffs. It is also urged by respondents that appellants have no interest in the San Francisco county property by virtue of their purchase of Wiren's interest at the execution sale prior to distribution, because on distribution the judgment debtor was entitled to no interest in the property. It is also claimed by respondents that appellants should have asserted their rights at the time of distribution.

[3-5] In this state the law is clear that a legatee's title vests upon the decedent's death, subject to administration. § 28, Prob.Code. Based on this major premise, appellants urge that under the will of Amanda W. Wiren her son, Milton J. Wiren, received an undivided one-third interest in the Alameda county property which, subject to administration, vested in Milton J. Wiren upon her death. The execution sale, in Alameda county, which was held prior to the partition, was of the interest that Milton J. Wiren then had in that property, that is, of the undivided one-third interest. It is settled law that a sheriff's deed following an execution sale conveys only the interest which the judgment debtor had at the date of the execution and date of the sale, and does not, and cannot, convey any after acquired interest. Emerson v. Sansome, 41 Cal. 552; Kenyon v. Quinn, 41 Cal. 325; Frink v. Roe, 70 Cal. 296, 11 P. 820; 11 Cal.Jur., p. 127, § 69; § 700, Code Civ.Proc. It is also a well-settled and general principle that on partition of property held in cotenancy the lien existing on an undivided interest attaches to the land allotted to the cotenant against whose interest the lien was a charge. This rule is codified in this state in section 769, Code of Civil Procedure, which provides:

"When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien."

[6, 7] Appellants recognize that a judgment lien, on the interest of a legatee, or even an execution sale of that interest, is subject to being defeated by the costs of administration, or, in certain circumstances, by a partition. But, in the instant case, they have a lien on any real property acquired by Milton J. Wiren in Alameda county by virtue of the recordation of their judgment. During administration, and prior to partition, they purchased at execution sale the then interest of Wiren in the Alameda county property—a one-third undivided interest. They also purchased, at a similar sale, the then one-third interest of Wiren in the San Francisco county property. Subsequently, by the probate partition, Wiren lost his interest in the San Francisco county property, but was allotted the entire Alameda county property—his former one-third plus the two-thirds formerly vested in the other two legatees. By the partition appellants lost all rights in the San Francisco county property. When they purchased at the San Francisco execution sale they did so subject to the right of the legatees to partition. But what happened as to the Alameda county property? Appellants were the owners, subject to administration, of an undivided one-third interest in this parcel by virtue of their purchase of the interest of Wiren. Certainly, by that purchase of an undivided one-third interest, they did not get title to the other two-thirds when it was allotted to Wiren. Such a rule would be highly unfair to a debtor. It would mean, for example, that if a legatee had a one-tenth interest worth, let us say, $1,000, in a piece of Alameda county property under a will, and a judgment creditor bought that interest at an execution sale for its value of $1,000, and then, by virtue of a partition in probate, the judgment debtor was awarded the entire parcel worth $10,000, if respondents are correct, the judgment creditor becomes the owner of the entire tract. That just cannot be, and it is not, the law. Appellants became the owners of an undivided one-

third interest in the Alameda county property by virtue of the purchase of that interest at the Alameda county execution sale. That interest was subject to the administration of the estate, which included the possibility that the interest might be defeated by a partition. When Wiren was subsequently allotted the entire interest in the Alameda county parcel in the probate partition, appellants remained the owners of the undivided one-third interest, subject to redemption, and Wiren became the owner of the undivided two-thirds interest. This two-thirds interest immediately became subject to appellants' judgment lien. When Wiren conveyed to Beach, and the latter redeemed, he redeemed only the interest purchased by appellants—the undivided one-third interest. As to the two-thirds, he took that subject to the judgment lien, and now holds it subject to that lien.

[8] The contention of respondents that a partition does not confer a new title on the cotenant is correct as a general proposition (Potrero Nuevo L. Co. v. All Persons, 29 Cal.App. 743, 156 P. 876), but that rule of law cannot operate to confer on an execution purchaser at the expense of his debtor a greater title than that purchased at the execution sale.

[9, 10] Respondents urge, however, that even if appellants had a lien on the undivided two-thirds interest they should have sought protection of that lien in the proceedings for the distribution of the estate, and, having failed to do so, they are barred by the decree of distribution, which is res judicata as to their rights. Under that decree the Alameda county property was awarded to Beach without mention of the judgment lien. It is also urged by respondents that because appellants failed to assert their claims in the distribution proceedings they are estopped to now claim a lien, and that such failure renders them guilty of laches. These contentions are unsound. In this state it is well-settled that the probate court on distribution is without power to pass on the claim of one who has, or claims to have, a judgment lien on the interest of a legatee. Such a claim is not against the decedent's estate as such, but is against the interest of a legatee. In Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459, one Martinovich devised his property to his wife and son. On distribution, one-half the property was distributed to the son as devisee and the other one-half to him as assignee of his mother. Pending administration, and prior to the widow's assignment to the son, a creditor of the widow had acquired a judgment lien on her interest in the estate. He did not assert that lien at the time of distribution. Thereafter, he brought this action to quiet title. The trial court held the judgment creditor should have asserted his lien at the time of distribution. This holding was reversed. The court held that the rights of the holder of a judgment or other lien against the share of a devisee or heir were not a proper subject for the consideration of the probate court; that there was no statutory provision requiring the holder of such a lien to present the same at the time of distribution at the peril of having the land distributed freed of his lien. The court properly recognized that distribution to a voluntary transferee of a legatee is proper, but held that the probate court had no power to pass on the rights of a judgment lien claimant at the time of distribution. The decree of distribution in that case, as in the instant case, was silent as to any lien against the interest of the legatee.

The position taken by the Supreme Court in the Martinovich case, supra, has frequently been approved and followed. One of the latest cases on the subject is McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026. In that case an attachment and judgment lien creditor purchased the interest of a legatee in certain real property at an execution sale, pending administration. The decree of distribution provided that the rights of judgment and attachment creditors should not be determined by the decree but were expressly reserved. In affirming a judgment protecting the execution sale purchaser in an action subsequently brought, the court stated, page 471 of 7 Cal.2d, page 1028 of 60 P.2d:

"This procedure was proper. There is no provision in the Probate Code for determining the rights of attachment and judgment lien creditors in the heir's or legatee's share of the decedent's estate, and such creditors are not entitled to distribution in the probate proceeding, but may urge their claims in a separate suit. Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Id., 150 Cal. 597, 89 P. 333, 119 Am.St.Rep. 254; Estate of Crooks, 125 Cal. 459, 58 P. 89; 11B Cal.Jur. 776. Distribution may be made to an assignee of a devisee or legatee where the assignment is admitted, but, where the assignment is challenged, distribution is properly made as in the will

provided, and the decree will not preclude the assignee from establishing his rights in an independent proceeding. Estate of Howe, 161 Cal. 152, 118 P. 515; Estate of Ryder, 141 Cal. 366, 74 P. 993." See, also, Estate of Feraut, 37 Cal.App.2d 12, 98 P.2d 795.

It is true that in the present case the probate court, in its decree of distribution, did not reserve the rights of the lien claimant as was done in the McGee case, supra. This omission is immaterial. If it is improper for the probate court to determine such lien claims, the silence of the decree adds nothing to the distributee's rights. That was exactly the holding in the Martinovich case, supra.

[11] This holding likewise disposes of respondents' contentions that appellants are estopped or guilty of laches in failing to assert their lien at the time of distribution. Obviously, if the probate court had no power to pass on such claims, such failure cannot constitute the basis of an estoppel or make appellants guilty of laches. It adds nothing to respondents' position that appellants filed in the probate court a request for notices as provided by section 1202 of the Probate Code, to the effect that "any person interested in the estate" may file such a request, or that in July of 1937, which was after the decree of distribution, they filed a waiver of all notices required to be given previous to March 1, 1937. If it was improper for the probate court to consider the rights of the appellants, the filing of the request for notices did not confer that power on the court.

[12] Respondents next urge that appellants are estopped because under the decree of distribution it was provided that the sum of $508.12, which represented Milton J. Wiren's share of cash in the estate, should be delivered to the sheriff pursuant to appellants' execution. Respondents invoke the principle that he who accepts the benefit of a judgment cannot avoid its burdens. It is urged that since appellants took advantage of this portion of the decree of distribution they are bound by the other portions of that decree. It seems quite clear that delivery of this sum to the sheriff by reason of the execution does not create an estoppel against appellants asserting their lien against the realty. The cash was distributed by the decree to the judgment debtor but "to be delivered to the sheriff". This procedure was in accord with the provisions of section 561, Code of Civil Procedure, which has been held to fix the procedure where the writ is one of execution, as well as where an attachment has been levied. Estate of Lind, 1 Cal.2d 291, 34 P. 2d 486. But, as that case implied, delivery to the sheriff does not determine any conflicting claims as between the legatee and judgment creditor. The distribution is to the legatee but delivery made to the sheriff to protect the creditor in whatever rights he may have. It necessarily follows that the decree of distribution gave appellants no rights, the acceptance of which precluded them from thereafter asserting their lien. The point is that neither as to the money nor as to the realty could the decree properly determine whether respondents had a lien.

[13, 14] The last point urged by respondents is that, since the appeal is on the judgment roll, and since the court concluded its findings with the provision that allegations of the cross-complaints and affirmative defenses in the answers were true and supported by the evidence, which allegations raised the defenses of estoppel, laches and res judicata, it must be conclusively presumed on this appeal that evidence was introduced which supports the judgment on these grounds. An examination of the answers and cross-complaints shows that the only grounds of estoppel, laches, and res judicata alleged are that appellants should have asserted their claim in the probate court. This theory, as already pointed out, is untenable. The trial court simply found that the allegations of the pleadings in question were true. Accepting the facts alleged as true, as we must, the legal conclusion that there was an estoppel is erroneous. It certainly cannot be presumed in support of the judgment, that grounds of estoppel neither alleged nor disclosed by the findings were shown by the evidence.

The judgment appealed from is reversed.

KNIGHT and WARD JJ., concurred.

48 Cal.App.2d 546

PEOPLE v. ONE 1940 CHRYSLER CONVERTIBLE COUPE.

Civ. 11752.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1941.

1. Forfeitures ⇐5

In proceeding to forfeit an automobile, trial court's finding that finance company's claim was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser, and without any knowledge that vehicle was being or was to be used for purpose charged, was presumed to be correct, and if supported by evidence, judgment based on the finding was required to be affirmed. St.1939, p. 768, § 11620.

2. Forfeitures ⇐3

The statute providing that claimant in a proceeding to forfeit a motor vehicle may prove conditional sales contract to be bona fide, and that interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser means the same as though it were written "after a reasonable investigation of the moral responsibility, moral character and moral reputation of the purchaser". St.1939, p. 768, § 11620.

"Moral responsibility" among other things is an attribute of one who keeps his word, while "moral character" is an attribute among others of one who does not commit wrongful or criminal acts, and "moral reputation" is among other things that which others say as to one's morals which means distinguishing between right and wrong.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Character", "Moral Reputation", and "Moral Responsibility".

3. Statutes ⇐189

In construing a statute, ordinary rules of grammar should be followed if by applying them such interpretation does not lead to an absurdity. Civ.Code, § 13; Code Civ. Proc. § 1858.

4. Forfeitures ⇐5

Evidence that when automobile buyer offered to buy automobile he was examined by an experienced credit man and investigator from finance company checked information contained in papers received from credit man and could find no derogatory information about buyer from creditor of the buyer, and from a bank with which buyer did business, sustained finding that finance company made reasonable investigation of the moral responsibility, character and reputation of the buyer so as to protect finance company against forfeiture of automobile by the state. St.1939, p. 768, § 11620.

5. Forfeitures ⇐5

Where trial court in forfeiture proceeding made finding that finance company's investigation of moral responsibility, character and reputation of automobile buyer was reasonable, finding could not be disturbed unless there was no substantial evidence to support it. St.1939, p. 768, § 11620.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Forfeiture proceeding by the People against one 1940 Chrysler Convertible Coupe, Engine No. C25-20972, wherein John Gamble, registered owner, and the Pacific Finance Corporation, legal owner, were served with notice and appeared and filed separate answers. From an adverse judgment, the People appeal.

Affirmed.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for appellant.

Treadwell & Laughlin and A. Thatcher Cook, all of San Francisco, for respondents.

STURTEVANT, Justice.

On May 22, 1940, under a conditional sales contract, James W. McAlister, Inc., sold John Gamble a Chrysler Windsor Convertible coupe, the car in suit. The vendor assigned its contract to Pacific Finance Corporation.

On August 17, 1940, the plaintiff commenced this action to forfeit said car. The plaintiff named the car as defendant. John Gamble was served with notice and appeared and answered. Pacific Finance Corporation was also served with notice and appeared and filed a separate answer. The trial court made findings in favor of the last-named defendant and against John Gamble. From the judgment entered on said findings the plaintiff appealed.

[1-3] To sustain the judgment the plaintiff asserts that the Pacific Finance Corporation was bound to prove the matters set forth in section 11620 of the Health and Safety Code, St.1939, p. 768. That section provides: "The claimant of any right, title, or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged." But the plaintiff contends that the record does not show that Pacific Finance Corporation did so. That is, the plaintiff claims Pacific Finance Corporation did not prove that it made "* * * a reasonable investigation of the moral responsibility, character, and reputation of the purchaser * * *". The plaintiff concedes the trial court made a finding (Finding No. IX) in which it found the facts on each of said elements in favor of Pacific Finance Corporation, and that that finding is presumed to be correct, but, the plaintiff contends, such finding was not supported by any evidence whatever. If that contention is sound the judgment must be reversed. But if there was evidence supporting each element of fact contained in said finding the judgment must be affirmed. We think the situation last stated is shown by the record. The provision of the statute specifically applicable is, "* * * after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser * * *". The matter before this court is first one of statutory construction and secondly the evidence applicable to the finding. Under ordinary rules of grammar the statute means the same as though it were written "* * * after a reasonable investigation of the moral responsibility, moral character, and moral reputation of the purchaser * * *". The ordinary rules of grammar should be followed if by applying them such interpretation does not lead to an absurdity. 23 Cal.Jur. 732, "Statutes," § 110. Words will be construed according to the context and the approved usage of the language. Civ.Code, § 13. And in construing a statute due force and effect should, if possible, be given to every word. Code Civ.Proc., § 1858. Applying these rules, "moral responsibility", among other things, is an attribute of one who keeps his word. By the same token "moral character" is an attribute, among others, of one who does not commit wrongful or criminal acts. And "moral reputation" is, among other things, that which others say as to one's morals. Finally, "morals" means, among other things, "distinguishing between right and wrong" (Webster). As so understood a bank or other creditor may not be said to be unconcerned in each of said factors.

When Gamble applied to James W. McAlister, Inc., offering to buy an automobile, he was examined by John H. Shepard, an experienced credit man. The latter prepared a questionnaire and took down in writing the answers. Gamble signed it. Later Shepard turned over the papers to James Hammill. He was an investigator for Pacific Finance Corporation. He received the papers from Shepard about the middle of May, that is about the date of the conditional sales contract. After Hammill received the papers from Shepard the former proceeded to check the information contained in said papers. Gamble had stated that he had had dealings with the Bank of America in Fresno. Hammill called on the credit manager of the bank at that place. Hammill testified the credit manager "told me the information they had as to their investigation was satisfactory. They had no derogatory information about him; he had been making payments satisfactorily; also about a furniture account, discounted by the Josephine Furniture Company; that too he had been paying. From their previous investigation there developed no derogatory information about the man's reputation in the community. I asked them if they had any derogatory information about him which I considered the same thing as asking about his general character and responsibility. After talking to the Bank of America in Fresno I decided that this man was of (sic) a good moral responsibility, character and reputation, and was a good credit risk for my company and decided to make the loan". On cross-examination the following occurred: "Mr. Hession: Q. They stated to you they had made an investigation previously about John Gamble? A. He said the information they developed. I assumed they had made investigation as the bank checks the same as we did." No objection was made to the assumption of the witness and no motion to strike out was made. In another part of the cross-exam-

ination the following occurred: "Mr. Hession: Q. The Bank of America at Fresno, the man you talked to there, stated they did not make any investigation of Gamble, but their records disclosed nothing derogatory? A. I didn't ask if they made an investigation, I assumed they did. They are stiffer than we are about the manner in which they conduct it." Again there was no objection to the assumption of the witness and no motion to strike. Neither assumption was broken down by any other evidence.

In one of the replies made to Shepard, Gamble had stated that he owned some race horses and exhibited a certificate issued by the horse racing board. "Mr. Cook: Q. Did that mean anything to you? A. I knew the racers always secured a permit, and check on the reputation and character of the individual before they give out the certificates."

[4] As to what examinations banks in general make when an application is made to them for a loan secured by personal property and what examinations are made by the horse racing board before it gives out certificates this court is not informed, nor is it informed of what the above mentioned institutions do in that behalf. However, it was part of Hammill's business to be informed on such matters. There are at least intimations in the evidence that he was informed as to the nature and extent of the examinations made by such institutions. It follows that we may not say as a matter of law that the finding that the Pacific Finance Corporation made an "investigation of the moral responsibility, character, and reputation of" Gamble was not sustained by the evidence. The facts in the case at bar are not similiar to the facts in People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013. In that case the bank's investigation consisted of a written report. It was solely a financial report.

[5] Finally the trial court made a finding that such investigation was "reasonable". That finding also may not be disturbed unless there was no substantial evidence to support it. As recited above Shepard presented to Gamble a questionnaire and took down in writing his answers. Those answers showed the latter's home address, his occupation (operating a service station), the names and addresses of the members of his family, and also facts regarding his assets. The questionnaire also showed local references. Moreover, Gamble orally stated to Shepard other facts and exhibited other documents including the certificate of the horse racing board. Many of those facts were checked by Hammill. Under such circumstances we may not say as a matter of law that the investigation was not reasonable.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 718

FORST v. CARR et al.

SAME v. CHURCH et al.

Civ. 13307, 13308.

District Court of Appeal, Second District, Division 2, California.

Dec. 26, 1941.

Hearing Denied Feb. 19, 1942.

1. Ejectment ⇐12

A real estate agent who took possession of a designated acre of land in 1918 with consent of owner who had agreed that agent should receive acre as compensation for arranging for subdivision of tract became the "equitable owner" of acre, and quitclaim deed executed in 1928 by owner's son and daughter-in-law, who were his immediate successors and never made any claim to that acre or to the lots thereof, passed only such title as they had at the time, and hence plaintiff who held under a quitclaim deed executed by purchaser at execution sale under judgment rendered against successors' grantee had no valid title to lots and could not maintain actions for ejectment.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Owner".

2. Ejectment ⇐16
Limitation of actions ⇐44(1)

Where neither plaintiff claiming under a quitclaim deed nor his grantor ever had possession of two lots of which defendant

became the equitable owner in 1918, not only was the defense of the statute of limitations effective as a bar to plaintiff's actions for ejectment, but actions were not maintainable. Code Civ.Proc. § 318.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Two consolidated actions in ejectment by A. Forst against Phil P. Carr and others and against C. A. Church, Phil P. Carr, and others. From judgments for defendant Carr, plaintiff appeals separately.

Judgments affirmed.

Jacob Forst, of Los Angeles, for appellant.

Fred Mansur, of Los Angeles, for respondent.

HANSON, Justice pro tem.

These are actions in ejectment which were consolidated below for the purpose of trial. As the cases are substantially identical on their facts and are submitted on a single set of briefs, we shall dispose of both cases in this opinion even though separate appeals were taken by the plaintiff.

The appellant, who was the plaintiff below in both cases, instituted each of the actions against respondent Carr and others. Only Carr joined issue. He did so by an answer in each case, which denied generally the material allegations of each complaint and additionally set up that the action was barred by section 318 of the Code of Civil Procedure and by his adverse possession of, and his equitable title to, the property involved. The trial court found for the respondent Carr and entered judgment on the findings in each case.

The facts so far as they are material to a decision are these: In 1917 James M. Graham was the owner of a certain six-acre tract of land near Compton which he desired to subdivide. To that end he entered into an oral contract with the defendant Carr, a real estate agent, by the terms of which Carr was to arrange for a subdivision of the tract. As compensation for his services Carr was to receive a designated acre of the tract. In 1918 Carr, with the consent of Graham, entered upon the acre, fenced it and built a home upon it. Ever since the date in question Carr has been in the actual possession of the two lots here involved, which were carved out of the one-acre tract. Carr, in accordance with his contract with Graham, made a subdivision map of the tract which was approved by Graham, but the city of Compton, to which it was tendered, refused to accept it. Thereafter Carr, in behalf of Graham while he held title and afterwards in behalf of Graham's immediate successors, sold several of the lots by their metes and bounds. In 1923 Graham conveyed the entire six-acre tract to his son and daughter-in-law by grant deed, without excepting Carr's acre therefrom. However, the grantees in the deed were informed by Graham that Carr was entitled to his acre in the tract and they at all times recognized his right thereto. Moreover, Carr paid them, as he had paid their grantor, his proportion of the annual taxes, as computed by them. In 1928 Graham's grantees quitclaimed the six acres to a corporation which had been created by them to dispose of their interest in the land. The corporation designated Carr as its exclusive agent to make sale of the remaining lots. In 1929, under a judgment rendered against the corporation, the corporation's interest in the six-acre tract was sold under execution. The purchaser at the execution sale was one Manierre, who in due course received a sheriff's deed to the property. After having held the deed to the property for a period of six years without exercising any possession of the lots here involved, he quitclaimed the lots to appellant herein, who, since he acquired title, has paid the taxes on the two lots in the one-acre tract which are here claimed by respondent Carr. Manierre testified that as long as he held the property he never made demand upon Carr for possession of the two lots here in question.

[1, 2] Upon the facts as recited it is evident that when Carr, in 1918, took possession of the acre designated, by and with the consent of Graham, he became the equitable owner thereof. As no claim to that acre, or to the two lots thereof which are here involved, was ever made by Graham or his immediate successors (his son and daughter-in-law), ejectment could not have been maintained by any of them in view of their concession of Carr's rights. As the quitclaim deed by Graham's son and daughter-in-law passed only such title as they had at the time, the plaintiff here has no valid title to the two lots located in the acre tract. Moreover, as neither he nor his grantor ever had possession of the two lots, not only was the defense of the statute of limitations effective as a bar to

plaintiff's actions, but the actions for ejectment were not maintainable.

For the reasons indicated, the judgment in each of the cases is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 506

PEOPLE v. HAUGHEY et al.

Cr. 2203.

District Court of Appeal, First District, Division 2, California.

Dec. 17, 1941.

Rehearing Denied Dec. 31, 1941.

Hearing Denied Jan. 15, 1942.

1. Gaming ⇐63(3)

The Horse Racing Act as amended, permitting pari-mutuel wagering on horse races conducted on licensed tracks, did not repeal the section of Penal Code, prohibiting general betting and registering of bets on horse races, but merely created an exception under certain limited circumstances. Pen.Code, § 337a; St.1933, p. 2046, and p. 2047, § 3, as amended by St.1935, p. 1943; St.1937, p. 1229, §§ 19400–19663, 19595, as amended by St.1941, pp. 659–669, 666; Const. art. 4, § 25a.

2. Gaming ⇐73

The 1935 amendment to the Horse Racing Act, which provides that a wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purposes of the act, does not extend the exception to the general prohibition against betting on horse races to a situation wherein wagers are solicited on a commercial basis outside the enclosure of a race track, so as to protect an agent who thus solicits bets from a charge of violating general prohibition against betting on horse races, even though agent personally places such bets in a pari-mutuel machine at the track. Pen.Code, § 337a; St.1933, p. 2046, and p. 2047, § 3, as amended by St.1935, p. 1943; St.1937, p. 1229, §§ 19400–19663, 19595, as amended by St.1941, pp. 659–669, 666; Const. art. 4, § 25a.

3. Gaming ⇐96

In prosecution for violating general prohibition against betting on horse races, burden of proving that actions of defendants came within an exception thereto specified in the Horse Racing Act, permitting pari-mutuel wagering on horse races conducted on licensed tracks, was upon defendants. Pen. Code, § 337a; St.1933, p. 2046, and p. 2047. § 3, as amended by St.1935, p. 1943; St. 1937, p. 1229, §§ 19400–19663, 19595, as amended by St.1941, pp. 659–669, 666.

4. Criminal law ⇐814(8)

In prosecution for violating general prohibition against betting on horse races, defendants' requested instruction that they must be found not guilty of the offense charged if they acted as agents and personally placed the bets for their principals through lawful pari-mutuel machines at the race track was properly refused, where defendants failed to establish that wagers solicited by them outside race track enclosure were personally placed by one defendant in a pari-mutuel machine at the track. Pen.Code, § 337a; St.1933, p. 2046, and p. 2047, § 3, as amended by St.1935, p. 1943; St.1937, p. 1229, §§ 19400–19663, 19595, as amended by St.1941, pp. 659–669, 666; Const. art. 4, § 25a.

5. Conspiracy ⇐47

A conspiracy need not be proved by direct evidence, but may be inferred from the circumstances.

6. Gaming ⇐98(5)

In prosecution for violating provisions of Penal Code prohibiting bookmaking, keeping a place for recording bets, etc., jury's inference that certain defendants conspired in the illegal acts charged with defendant who accepted bets was sustained by evidence. Pen.Code, § 337a.

7. Criminal law ⇐1159(2)

On appeal from conviction for violating provisions of Penal Code, prohibiting bookmaking, keeping a place for recording bets, etc., jury's finding that certain defendants conspired in the illegal acts charged with the defendant who accepted bets, was conclusive, where such finding was supported by substantial evidence in the record. Pen. Code, § 337a.

8. Criminal law ⇐699, 1171(3)

Where district attorney's remarks to the effect that prosecution was a test case and that there was no question of fact for the

jury to decide related to inferences which could fairly be drawn from the evidence, the propriety of such remarks was primarily for determination of the trial court and, in any event, such remarks were not prejudicial, since they had no bearing upon the guilt or innocence of defendants.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Pat Haughey and others were convicted of violating various subdivisions of section 337a of the Penal Code, which set forth the general prohibitions against pool-selling or bookmaking, keeping a place for recording bets, holding or forwarding stakes, registering bets, permitting a place to be used for such illegal purposes, and making or accepting bets, and from the judgments of conviction and the orders denying their motions for new trial, they appeal.

Judgments and orders affirmed.

Wilbur S. Pierce, of Oakland, and Frank J. Needles, of San Francisco, for appellants Haughey and Wittmayer.

James B. O'Connor, of San Francisco, for appellant Whelan.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., and Nathan Harry Miller, Asst. Dist. Atty., all of Oakland, for respondent.

NOURSE, Presiding Justice.

Defendants were jointly charged in an information containing five counts with violating subdivisions 2, 3, 4, 5, and 6 of section 337a of the Penal Code. Upon a trial by jury defendants Haughey and Whelan were found guilty of violating subdivisions 2, 3, 4, and 5 of the Code section and not guilty of a violation of subdivision 6; defendant Wittmayer was found guilty of violating subdivisions 2, 3 and 4 of the Code section and not guilty of a violation of subdivisions 5 and 6. The trial court denied defendants' motions for new trial as well as their applications for probation and entered judgments upon the verdicts against each of the defendants. The three defendants appeal from the judgments and from the orders denying their motions for new trial.

No evidence was introduced by defendants in the trial court and the case was sent to the jury on the evidence introduced by the prosecution based upon the theory of a conspiracy to violate section 337a of the Penal Code. The facts were undisputed.

On October 21, 1940, George Realty Company leased the premises at 422-13th street, Oakland, to defendant Whelan, doing business as "California Race Players Association", for a period of five months at a total rental price of $1,025. A clause in the lease limited the occupancy of the place to use as "a brokerage room for the placing of bets on horse races". Defendant Whelan secured a broker's license from the city of Oakland to conduct business on the premises and also contracted with the Oakland Towel Company for towel service. On October 25, 1940, an Oakland police officer warned the defendants that he would arrest them if they opened such an establishment.

On November 25, 1940, when the place was opened to the public, a sign on the door read "Member California Race Players Association" and a poster on the door stated "Will open Monday 7 P. M. for Tuesday's Races". There also appeared a newspaper clipping announcing the opening of the offices for betting and containing the statement that the method of wagering was strictly within the law. A police officer dressed in civilian clothes entered the establishment on the opening day and told the defendant Wittmayer that he desired to place a $2 bet on a certain horse which had been entered in a race for the following day at Bay Meadows Race Track. He was given a racing chart or "scratch sheet" and he signed a card as "principal" which authorized defendant Wittmayer to act as his "agent" in procuring for him a mutuel ticket within the enclosure of the race track. The card further provided that the agent was "to return the mutuel ticket(s) in the event the horse fails to win, place or show, as specified, or to collect and return to me the winnings (if any) from such race". The officer paid defendant Wittmayer the sum of $2 plus a commission of 20 cents and was given a receipt signed by Wittmayer as "agent" wherein the latter agreed "to perform the services as authorized". On subsequent days two other policemen placed bets with defendant Wittmayer in the same manner.

Appellants contend that the court committed prejudicial error in failing to give

their requested instructions to the effect that they must be found not guilty of violating section 337a of the Penal Code if they acted as agents and personally placed the bets for their principals through the lawful pari-mutuel machines at the race track. These instructions were based upon the 1935 amendment to section 3 of the "Horse Racing Act" of 1933, St.1935, p. 1943, and the cases construing the amendment. It is contended that under those authorities appellants' activities were legal and that the trial court could not construct a criminal act by inference.

Section 337a of the Penal Code sets forth the general prohibitions against pool-selling or bookmaking, keeping a place for recording bets, holding or forwarding stakes, registering bets, permitting a place to be used for such illegal purposes and making or accepting bets. In 1933 the legislature adopted a statute commonly referred to as the "Horse Racing Act" (Stats. 1933, Chap. 769, p. 2046) which took effect upon the adoption by the people of section 25a, article IV, of the Constitution on June 27, 1933. This act permitted pari-mutuel wagering on horse races conducted on duly licensed tracks where the wagers were made and placed within the enclosures containing such tracks. It may be noted in passing that in 1941 the act and all of its amendments were repealed, consolidated and revised, and now appear in chapter 4, sections 19400 to 19663, inclusive, of division 8 of the Business and Professions Code, St.1937, p. 1229, as amended by St.1941, p. 659. In 1935, section 3 of the "Horse Racing Act" was amended (Stats.1935, Chap. 719, page 1943) by the addition of the following provision: "A wager made inside an enclosure under the pari-mutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure." See section 19595 of the Business and Professions Code.

[1] The act of 1933 as amended in 1935 did not repeal section 337a of the Penal Code prohibiting general betting and registering of bets on horse races, but did no more than to create an exception under certain limited circumstances. In re McKelvey, 19 Cal.App.2d 94, 96, 64 P. 2d 1002; People v. Torrey, 16 Cal.App.2d 470, 472, 60 P.2d 900; In re Walker, 11 Cal.2d 464, 467, 80 P.2d 990, 117 A.L.R. 825. The courts of this state have had occasion to consider this exception to the general law and by interpretation of the statute have set forth the limited circumstances under which it would apply. Since the 1935 amendment did not effect a repeal of section 337a the prohibition against bookmaking is still in force. In People v. Coiner, 28 Cal.App.2d 21, 81 P.2d 1057, it was held that in spite of the "Horse Racing Act" one who is found guilty of conducting a pari-mutuel method of wagering outside the enclosure of a race track may be convicted of a violation of subdivision 2 of section 337a of the Penal Code. Finally, it has been decided that the actions of a commercial solicitor of bets, operating outside the track, receiving bets from others and never placing them himself in the manner authorized by the act, do not come within the protection of the 1935 amendment, and such actions are punishable under the provisions of the Penal Code. In re Walker, supra. However, the facts of the instant case are distinguishable from any of the cases heretofore adjudicated. The issue presented herein is whether an agent who solicits wagers on a commercial basis outside the enclosure of a race track and thereafter personally places the bets in a pari-mutuel machine at the track is protected by the exception set out in the 1935 amendment so that he is not guilty of a violation of section 337a of the Penal Code.

The meaning of the 1935 amendment has never been made altogether clear. However, "The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years. * * * There is nothing in the Horse Racing Act indicating the slightest intention to depart from the public policy of the state condemning commercial gambling. To the contrary, a determination to adhere to such policy is obvious." In re Goddard, 24 Cal.App.2d 132, 140, 141, 74 P.2d 818, 823. If the legislature had intended to reject this long established policy of the state prohibiting commercial gambling such an intention would have been indicated in the act and the subsequent amendment; the statute, however, when read in its

entirety, shows a specific intention to retain the general prohibitions.

[2] The wording of the 1935 amendment is not susceptible of the liberal construction contended for by appellants. The words, in themselves, go no further than to indicate that any activity of the principal or better in connection with such wager shall not be considered an illegal wager. Although the facts of the recent cases construing the amendment do not present the identical problem which confronts us here these decisions indicate that the construction placed upon the amendment by appellants is not tenable. "Under petitioner's view, commercialized gambling conducted away from the track would be permitted to flourish. Individuals could establish betting centers anywhere, solicit, and place bets in any amount, so long as they communicated the amounts to the track and had the bets placed there through the machine. If this was the purpose of the amendment, it radically changed the original statute and eliminated most of the protective regulations designed to prohibit wide-spread commercialized gambling on horse races. Before such an interpretation can be upheld, the statute must clearly compel it. The statute before us does not. The only thing clear about the amendment is that the principal or better does not commit any crime." In re Walker, supra, 11 Cal. 2d page 468, 80 P.2d page 992, 117 A.L.R. 825. In the light of such reasoning by the courts we must hold that it was not the intent of the legislature in passing the 1935 amendment to extend the exception to the general prohibition against betting on horse races to a situation wherein wagers are solicited or recorded on a commercial basis at established centers beyond the enclosure of a track even though the agent personally places the bets through the pari-mutuel machines at the track.

[3, 4] Furthermore, appellants introduced no evidence which would definitely establish that the wagers involved herein were personally placed by Wittmayer at the race track. The most that can be said is that the police officer saw Wittmayer in front of the "Daily Double" window on one occasion and saw him go into the clubhouse on another day. If the actions of appellants came within any possible exception specified in the "Horse Racing Act" it was a matter of defense to be proved by them. People v. Pierce, 14 Cal. 2d 639, 643, 96 P.2d 784. For the reasons above stated appellants' activities constituted a violation of section 337a of the Penal Code and the court did not err in failing to give the instructions requested.

[5-7] Appellants next argue that the evidence was insufficient to show a conspiracy on the part of Haughey and Whelan with Wittmayer. We cannot agree with this contention. A police officer testified that when he visited the premises on October 25, 1940, Haughey and Whelan were moving furniture onto the premises, that they told him they intended to start an establishment where bets could be placed on horse races and that they further stated that the method to be used by them was legal under a court decision. The evidence further showed that Whelan contracted for the advertisement in the newspaper, entered into the lease which limited the use of the premises as a "brokerage room for the placing of bets on horse races", entered into a contract for towel services upon the premises and secured from the city a brokerage license to operate. Upon their arrest Whelan and Haughey admitted in each other's presence that they owned the business. A conspiracy need not be proved by direct evidence but may be inferred from the circumstances. People v. King, 30 Cal. App.2d 185, 201, 85 P.2d 928; People v. McCarthy, 45 Cal.App.2d 278, 114 P.2d 24. From the testimony summarized above the jury could properly have inferred that appellants Haughey and Whelan were conspirators with appellant Wittmayer in the illegal acts charged, and as there is substantial evidence in the record to support the finding of the jury on this question its determination is conclusive. People v. King, supra, 30 Cal.App.2d page 202, 85 P.2d 928; People v. Kauffman, 152 Cal. 331, 335, 92 P. 861.

[8] Appellants claim that the district attorney was guilty of misconduct in making certain statements to the jury, including remarks to the effect that this was a test case and that there was no question of fact for the jury to decide. The record shows that appellants told a police officer that they intended to set up the establishment, that they had a court decision approving the legality of their method and that certain attorneys would represent them; they subsequently opened the place in spite of the policeman's warning

that he would arrest them. Upon the trial of the case appellants introduced no evidence to rebut the state's evidence. Further, upon motion for an advised verdict appellants' counsel stated: "Now, I am satisfied in this case it is purely one of law. The facts are substantially admitted. * * *" Hence the statements complained of related to inferences which could be fairly drawn from the evidence, and under those circumstances "much must be left to the discretion of the trial court to say whether an attorney is overstepping the boundary of legal propriety". People v. Burdg, 95 Cal.App. 259, 269, 272 P. 816, 820. In any event the remarks had no bearing upon the guilt or innocence of the appellants and therefore were not prejudicial. People v. Hanks, 35 Cal. App.2d 290, 302, 95 P.2d 478.

The judgments and the orders denying appellants' motions for new trial are affirmed.

STURTEVANT and SPENCE, JJ., concurred.



48 Cal.App.2d 475

CHARD v. O'CONNELL.

Civ. 11446.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1941.

Rehearing Denied Jan. 15, 1942.

Hearing Denied Feb. 11, 1942.

1. Appeal and error ⇐870(3)

On appeal from judgment for the plaintiff, defendant could not attack order denying motion for change of place of trial, since the order was itself appealable. Code Civ.Proc. § 956.

2. Descent and distribution ⇐90(1)
Executors and administrators ⇐129(3)

Plaintiff could not maintain action as her mother's heir to set aside for fraud or undue influence an assignment made by mother of her interest in the estate of her deceased brother, and such an action could only be brought by an executor or administrator of the mother's estate.

3. Descent and distribution ⇐90(1)
Executors and administrators ⇐129(3)

An action to set aside transfer of personalty by decedent on ground of fraud or undue influence must be brought by an executor or administrator, and cannot be maintained by an heir, in absence of allegations of circumstances taking the case out of the general rule.

4. Appeal and error ⇐1099(7)

Under the "law of the case" doctrine, in order to justify reviewing court in upholding findings of trial court at second trial of case, which were similar to findings made at first trial which were held on appeal to be unsupported by the evidence, the evidence at the second trial must have been substantially different than that offered on the first trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

5. Trusts ⇐44(2)

Evidence sustained finding that at time of mother's assignment of proceeds of settlement under a will contest to her son, the son represented that he would hold proceeds in trust and divide them equally among his brothers and sisters, and that therefore a "trust" in favor of the brothers and sisters was created.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

6. Appeal and error ⇐931(1)

Where there was nothing inherently improbable in certain testimony, the reviewing court was required to assume in support of trial court's judgment that the trial court believed the testimony.

7. Appeal and error ⇐1012(1)

The District Court of Appeal could not interfere with the trial court's determination of the weight and sufficiency of evidence.

8. Appeal and error ⇐1099(7)

A finding of the District Court of Appeal that evidence did not sustain trial court's finding of an express trust did not under the "law of the case" doctrine preclude finding of existence of an express trust in second trial wherein there was additional testimony, which was not inherently improbable, offered in support of such a finding.

9. Trial ⇐404(1)

Trial court's finding was required to be read in view of evidence and was required to

be given a liberal construction to uphold rather than defeat the judgment.

10. Trusts ⇐373

In action to enforce trust in proceeds of settlement of will contest based on son's representation to his mother on her assignment of proceeds to the son that he would hold proceeds in trust and divide them equally among his brothers and sisters, finding that at time of executing assignment the mother was incapable of transacting business did not preclude finding that express trust was created, on ground that an element of any contract is parties capable of contracting, in view of codal provision that a trust may be created as to the trustee by words or acts of his indicating acceptance of trust, and the subject, purpose and beneficiary thereof. Civ. Code, §§ 1550, 2222.

11. Limitation of actions ⇐103(2)

The statute of limitations begins to run in the case of an express voluntary trust, from the date when the trustee repudiates the trust.

12. Limitation of actions ⇐103(3)

The only way in which a trustee of an express trust can set statute of limitations in operation in his favor with respect to it or its properties in his hands is by distinct act of repudiation amounting to a denial of its existence, and no mere tacit failure of trustee to perform his duty in respect to the trust can be held to amount to a "repudiation" of it, so as to set the statute in motion.

See Words and Phrases, Permanent Edition, for all other definitions of "Repudiation".

13. Limitation of actions ⇐103(1)

Where evidence sustained finding that on or about the month of March, 1929, a trust beneficiary first made demand on trustee for any money and at that time the trustee refused to give her any money, action to recover beneficiary's share in the trust fund, filed November 24, 1931, was not barred by limitations.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Grace H. Chard, administratrix, etc., against Daniel F. O'Connell for a share in money alleged to have been received by defendant in trust. From an adverse judgment, the defendant appeals.

Affirmed.

Raymond Salisbury, J. A. Kennedy, and John S. DeLancey, all of Oakland, for appellant.

W. A. Lahanier and Abraham Glicksberg, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff. A previous judgment for plaintiff was reversed for lack of evidence to support it in Chard v. O'Connell, 7 Cal.2d 663, 62 P.2d 369. The basic facts are fully stated in the opinion of the Supreme Court on the former appeal and we deem it unnecessary to extend this opinion by again reciting them.

[1] Two matters presented on this appeal may be somewhat summarily disposed of. After an amended complaint had been filed defendant and appellant O'Connell made a motion for change of place of trial which was ordered denied. No appeal was taken from that order but appellant seeks to attack it on this appeal from the judgment. The applicable Code sections make it clear that this may not be done. Section 963, Code of Civil Procedure, authorizes the taking of an appeal from an order changing or refusing to change the place of trial. Section 956 of the same Code after providing for the review of certain orders on appeal from a judgment concludes: "The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

[2, 3] In the amended complaint plaintiff included a count based on fraud or undue influence. Since plaintiff in that count attempts to sue as an heir and expressly alleges that no administrator of her mother's estate had ever been appointed, that count fails to state a cause of action. It was expressly held in Holland v. McCarthy, 177 Cal. 507, 171 P. 421, that an action to set aside a transfer of personal property by a decedent on the ground of fraud or undue influence must be brought by an executor or administrator and cannot be maintained by an heir in the absence of allegations of circumstances taking the case out of the general rule. See, also, the later cases of Hall v. Alexander, 18 Cal.App.2d 660, 64 P.2d 767 and Samter v. Klopstock Realty Co., 31 Cal.App.2d 532, 88 P.2d 250. No circumstances sufficient to take this case out of the general rule were alleged or proved.

It follows that the judgment must stand or fall under the first count alleging an express oral trust in favor of plaintiff and her brothers and sister.

The trial court found in that regard: "That it is true that prior to and at the time of executing said assignment dated March 25, 1926, the defendant, Daniel F. O'Connell represented and stated to his mother, Mary J. O'Connell, that he could complete the settlement of the will contest with less difficulty if she would assign to him the money coming to her by reason of the settlement executed on or about December 22, 1925, and that he would receive said money for the benefit of her, Mary J. O'Connell, and her children; that it is true that at the time of the execution of said assignment, on or about the 25th day of March, 1926, defendant Daniel F. O'Connell obtained said assignment from his mother, Mary J. O'Connell, upon the understanding and subject to the agreement that he would hold the proceeds of such settlement for the benefit of all her children and that he would divide the same equally between the children of Mary J. O'Connell to-wit, Anna Wulff and the defendants above named."

[4] A similar finding was held not to find support in the evidence in Chard v. O'Connell, supra. Under the doctrine of the law of the case the evidence must be substantially different on the second trial to justify us in upholding this finding.

On the second trial the witness E. O'Connell testified to three conversations concerning the subject matter of this suit at all of which defendant Daniel F. O'Connell and the decedent Mary J. O'Connell were present. These in chronological order were:

Shortly after the institution of the will contest in the estate of Daniel Moriarty, at which time "my grandmother * * * mentioned that her children had never had anything, and she hoped that they would get enough out of it to take care of them, she hoped that they would get the money before—or while she was still living to enjoy it."

Second, on Christmas day, 1925 (this would be three days after the compromise was arrived at in Estate of Moriarty). The testimony as to this conversation was the most detailed, the witness testifying that Daniel F. O'Connell stated that they were to receive a compromise for $35,000 and now all of the children were to receive their money and Mary J. O'Connell said that all the children who have had a hard time will now receive their share and that Dan was handling the entire affair for her. Further that Dan said that the money would be divided among all the children, $4,000 to each child, and the balance would be set aside for the maintenance of Mary J. O'Connell during her life, and after she passed away if anything was left over it was to be divided share and share alike.

In the third conversation, which the witness fixed at about March 12 to 14, 1926, he testified that Daniel F. O'Connell and Mary J. O'Connell discussed that the children were each to get $4,000.

It will be seen that in the second conversation will be found all of the elements necessary to constitute an express trust. The subject matter, the beneficiaries, the nature and quantity of their interests and the manner in which the trust was to be performed were all clearly stated. Each child was to get $4,000 immediately, the balance was to be administered for the benefit of the mother during her lifetime, and at her death the residue was to be divided equally among the children.

[5] The other two conversations while more fragmentary and less complete were consistent with and tended to confirm the understanding expressed in the second conversation. The second conversation followed the agreement of compromise by only a few days; the third conversation preceded the execution of the assignment from Mary J. to Daniel F. O'Connell on March 25, 1926, by less than two weeks. The evidence in our opinion was ample, if believed, to support the finding of the creation of an express trust.

[6-8] It is true that Ed. O'Connell was a witness at the first trial and did not testify to these conversations. Whatever suspicion this fact might arouse as to the credibility of his testimony was for the trial court to resolve. There being nothing inherently improbable in the testimony we must assume in support of the judgment that the trial court believed it, and with the trial court's determination of the weight and sufficiency of the evidence under settled principles we cannot interfere. We conclude that in view of this new testimony, the doctrine of the law of the case is not applicable and that the judgment finds support in the evidence.

[9] Appellant attacks the quoted finding as too indefinite and self-contradictory in that it purportedly finds two different trusts, one for the benefit of Mary J. O'Connell and her children and the second for the benefit of the children alone. The finding is not a model of certainty but it is to be read in view of the evidence and is to be given a liberal construction to uphold rather than defeat the judgment. Hotaling v. Hotaling, 193 Cal. 368, 385, 224 P. 455, 56 A.L.R. 734; Menghetti v. Dillon, 10 Cal.2d 470, 75 P.2d 596; 2 Cal. Jur., p. 871. Reading it as a whole it is consistent with the quoted evidence, the money was to be received for the benefit of Mary J. O'Connell and her children and ultimately divided equally between the children. The finding reasonably bears such a construction.

[10] Appellant also cites a finding that prior to and at the time of executing the assignment "Mary J. O'Connell was weak in mind and body, incapable of transacting any business" and argues that this finding is destructive of the finding that an express trust was created since one of the elements of any contract is "parties capable of contracting". Civ.Code, sec. 1550. A sufficient answer to this argument is found in the language of section 2222 of the Civil Code:

"Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

"1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

"2. The subject, purpose, and beneficiary of the trust."

Finally appellant urges that the action is barred by the statute of limitations. It would perhaps be a sufficient answer to this argument that the original complaint with its filing date was not included in the record on appeal. The only place in which a reference to the filing date is found is in an affidavit on motion for change of venue wherein it is alleged that the original complaint was filed on November 24, 1931.

But assuming that this sufficiently establishes the filing date to permit the point to be made on appeal there is an express finding supported by the evidence "that on or about the month of March, 1929, Anna Wulff first made demand upon defendant Daniel F. O'Connell for any money; and at said time said defendant Daniel F. O'Connell refused to give her any money".

[11-13] In the case of an express voluntary trust it is settled that the statute of limitations only commences to run from the date when the trustee repudiates the trust.

"The only way in which the trustee of an express or voluntary trust can set the statute of limitations in operation in his favor with respect to it or its properties in his hands is by a distinct act of repudiation amounting to a denial of its existence, and no mere tacit failure of the trustee to perform his duty in respect to such trust could or should be held to amount to a repudiation of it so as to set the statute of limitations in motion in his favor and as a result of his own neglect of duty." England v. Winslow, 196 Cal. 260, 272, 237 P. 542, 547.

Such cases as Rafferty v. Mitchell, 4 Cal. App.2d 491, 41 P.2d 563, relied upon by appellant, are distinguishable on the ground that they do not deal with express voluntary trusts, but with trust relations imposed by law because of the situation of the parties.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



FUENTES v. LING.*

Civ. 11721.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1941.

Hearing Granted Feb. 16, 1942.

1. Automobiles ⇐217(3)

A pedestrian's act in crossing a street in the middle of a block in a business district contrary to a traffic ordinance was "negligence per se", as regards pedestrian's right to recover for injuries sustained when struck by defendant's automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

* Subsequent opinion 130 P.2d 121.

2. Automobiles ⇐226(2)

Where a pedestrian's act in crossing street in middle of block in a business district in violation of a traffic ordinance was contemporaneous and contributory with acts of defendant motorist, pedestrian's violation of ordinance was a "proximate cause" of pedestrian's injuries as a matter of law, unless there were facts which brought case within last clear chance doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Appeal and error ⇐846(5)

Where trial court made no finding on a particular issue, that issue was not before the appellate court.

4. Negligence ⇐83

The doctrine of "last clear chance" excludes from the operation of its underlying principle every case wherein negligence of injured party was contemporaneous, concurrent, continuing and contributory with negligence of party inflicting injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

5. Automobiles ⇐227(3, 5)

Where pedestrian, who was crossing street in middle of block in a business district in violation of traffic ordinance, was in possession of all of his faculties, and street was fully lighted and was not occupied so as to obstruct pedestrian's view of acts of defendant motorist, nor motorist's view of pedestrian's acts, neither had the "last clear chance" to avoid accident in which pedestrian was struck by defendant's automobile.

6. Automobiles ⇐227(3)

Where pedestrian's act in crossing street in middle of block in violation of traffic ordinance was contemporaneous, concurrent, continuing and contributory with acts of defendant motorist, and defendant testified, without contradiction, that he did not see pedestrian, that auomobile hit something and that defendant then saw pedestrian lying on ground, and evidence showed that defendant stopped his automobile instantly, the doctrine of "last clear chance" was not applicable in pedestrian's action for injuries.

7. Negligence ⇐83

The doctrine of "last clear chance" is not applicable to one who should have known but who did not know of danger of other party.

Appeal from Superior Court, City and County of San Francisco, John J. Van Nostrand, Judge.

Action by Robert Fuentes against Lee Ling for injuries allegedly sustained when plaintiff was struck by defendant's automobile. From a judgment for plaintiff, defendant appeals.

Reversed.

Snook, Snook & Chase, of Oakland, for appellant.

Leon A. Blum, of San Francisco, for respondent.

STURTEVANT, Justice.

In this action the plaintiff sued to recover damages for injuries suffered when he was hit and knocked down by an automobile driven by the defendant on Third street in San Francisco. The trial court made findings in favor of the plaintiff. From the judgment the defendant appealed.

Third street between Kirkwood and LaSalle avenue, where the accident occurred, extends northerly and southerly. It is about eighty feet wide. Double street car rails occupy the center of the street. The entire street is divided by white lines making six lanes. Kirkwood and LaSalle avenue which bound the block in which the accident occurred are parallel cross-streets and extend beyond Third street both easterly and westerly for some distance and Third street and its intersections are marked by white lines, traffic buttons, safety zones for street car passengers, and other signs and guides usual and customary on heavily traveled arterial boulevards of San Francisco. Third street is a main highway between San Francisco and all points south. With the exception of a vacant lot at the southwest corner of Kirkwood and Third street the frontage of the block on the west side of Third street is completely filled and occupied by stores, and on the east side are stores, apartments, a public garage, flats, and a vacant lot. All of the above buildings were occupied and made it a business district under the traffic ordinance. The block between Kirkwood and LaSalle is about 200 feet long.

On the evening of December 30, 1938, the sun set before 5 p. m. At about 7 o'clock on that evening the plaintiff Robert Fuentes, dressed in a dark suit, was in the act of crossing Third street from east to west at a point in about the middle of the block bounded by Kirkwood and LaSalle

avenues. At the same time the defendant Lee Ling was in the act of driving south, on the westerly side of Third street, going to San Mateo. He was driving in the lane second from the west curb. The weather was clear. The block was well lighted, and Christmas electric light streamers were strung throughout the entire block. In the middle of the block his front right bumper, fender, and light contacted Robert Fuentes, knocking him down and injuring him. Neither Lee Ling nor his son Henry, who was riding with him in the front seat, saw Fuentes before the impact although each was looking at the road in front. Fuentes was knocked over toward the west sidewalk. In the place where he fell his head was near the curb and his feet were beside the right front wheel of the automobile. He lay squarely across the street, at right angles to the former course of Lee Ling's automobile which traveled only a few feet after Fuentes was struck. The front bumper of Ling's machine was five feet, or thereabout, south of where Fuentes lay. The plaintiff testified he saw defendant 200 feet distant when he, the plaintiff, was crossing the street car tracks. No obstructions obscured the view of either party.

The answer denied negligence on Ling's part, alleged contributory negligence on Fuentes' part, and set up the defense of unavoidable accident.

The findings were drawn following the language of the pleadings. There was no finding of facts applying the doctrine of last clear chance.

After a trial without a jury, the judgment was in favor of plaintiff for $4,373, and costs. Defendant made a motion for a new trial. The motion was denied and he appealed from the judgment.

[1-5] The first point made by the defendant is that plaintiff was guilty of contributory negligence. He calls to our attention that the zone where the accident occurred is "within the central traffic district or a business district. * * *" He also calls to our attention that section 10 of Article 3 of Ordinance 7691, New Series, of San Francisco provides: "When within the central traffic district or a business district no pedestrian shall cross a roadway other than by a cross-walk." An examination of the record discloses that the plaintiff, beyond the peradventure of a doubt, was at the time of the accident directly violating the provisions of said section. Such act on his part was negligence per se. It further appears that the acts of the plaintiff were contemporaneous, concurrent, continuing and contributory with the acts of the defendant. Under such circumstances there is no room for reasonable minds to differ and plaintiff's violation of the ordinance becomes a proximate cause of his injury as a matter of law, unless there are facts which bring the case within the last clear chance doctrine. Meincke v. Oakland Garage, Inc., 11 Cal.2d 255, 256, 79 P. 2d 91. But, as hereinabove recited, there was no finding on the doctrine of the last clear chance and that subject is not before us. New York L. Oil Co. v. United Railroads, 191 Cal. 96, 101, 215 P. 72. However, in Young v. Southern Pacific Co., 189 Cal. 746, at page 755, 210 P. 259, 262, the court said: "In other words, the doctrine of last clear chance excludes from the operation of its underlying principle every case wherein it may be said that the negligence of the injured party was contemporaneous, concurrent, continuing, and contributory with the negligence of the party inflicting the injury. [Citing cases.]" Bearing in mind the plaintiff's contention that he was not intoxicated, that he was in possession of all of his faculties, that the street was fully lighted, that the street was not occupied so as to obstruct the view of the plaintiff of the acts of the defendant, nor the view of the latter with the acts of the plaintiff, neither can be said to have had the last clear chance. Young v. Southern Pacific Co., supra.

[6, 7] Down to this point we have assumed that the evidence showed the defendant Ling was negligent. As to that fact the evidence was conflicting. However, as to one material fact there was no conflict in the evidence. The defendant testified that he did not see the plaintiff, that his machine hit something and then he saw the plaintiff lying on the ground, and the evidence showed that the defendant stopped his machine almost instantly. It is the settled law of this state that the doctrine of the last clear chance is not applicable to one who should have known but who did not know of the danger of the other party. Starck v. Pacific Electric R. Co., 172 Cal. 277, 283, 156 P. 51, L.R.A. 1916E, 58.

The plaintiff cites and relies on Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P. 2d 317. It is not in point. In that case the court took much pains to show that at the time of the accident involved the plaintiff Quinn was

not violating the provisions of any statute or ordinance. On the other hand the case at bar is controlled by the case entitled Meincke v. Oakland Garage, Inc., supra.

The judgment is reversed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 568

MITCHELL et al. v. CITY OF SANTA BARBARA et al.

Civ. 13147.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1941.

1. Municipal corporations ⇐835

Where surface waters customarily flow in definite channel, municipal corporation is liable for damages caused by its obstruction of such natural water course.

2. Municipal corporations ⇐835

Generally, municipal corporations, in grading and improving streets, are not bound to provide for escape of mere surface water, except where such water, owing to conformation of adjoining country, has formed definite channel, in which it customarily flows, though such channel does not come within common law definition of water course.

3. Municipal corporations ⇐835

As respects liability of municipal corporations for escape of surface water as a consequence of the grading and improvement of streets, the term "natural channel" may be construed as including all channels through which, in existing condition of country, water naturally flows.

See Words and Phrases, Permanent Edition, for all other definitions of "Natural Channel".

4. Municipal corporations ⇐835

A city obstructing natural water course through creation of dams by raising of street grades and filling of land previously constituting water basin, into which such stream flowed, with rubbish and other debris, thereby diverting storm waters onto contiguous land, is liable to owners thereof for resulting damages.

5. Negligence ⇐63

A rainstorm which is merely of unusual intensity is not an "act of God".

See Words and Phrases, Permanent Edition, for all other definitions of "Act of God".

6. Municipal corporations ⇐840

A rainstorm, as result of which large quantities of water, which could not escape through natural water course because of its obstruction by city, inundated contiguous land, was not "act of God" relieving city from liability for resulting damage to such land, especially where there was substantial evidence that rainstorm was not of unusual intensity.

7. Municipal corporations ⇐835

A city obstructing natural water course, thereby diverting storm waters onto contiguous land, was not relieved from liability for resulting damage thereto under "common enemy doctrine", which applies only where water has escaped from well-defined channel and threatens damage to property owner, who may take reasonable means to protect his property without incurring liability for resulting diversion of water on another's lands.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Enemy Doctrine".

8. Municipal corporations ⇐834

A city obstructing natural water course owes duty to provide adequate drainage for waters thereby diverted, so as to prevent damage to adjacent property.

9. Municipal corporations ⇐845(4)

In action against city for damages to realty from diversion of water from natural stream obstructed by defendant, testimony that city engineer told plaintiff that water had been taken care of and that buildings across street from location of plaintiffs' proposed buildings were on setback line flush with sidewalks was substantial evidence sustaining trial court's finding that plaintiffs were not contributorily negligent in erecting their buildings at such location on street curb level with knowledge that storm waters overflowed premises.

10. Damages ⇐142

Damages which are necessary consequences of wrongful act can be recovered

under general allegation of amount of damage inflicted.

11. Trial ⇐375

In action for damages to realty, evidence received by trier of facts in viewing premises constitutes substantial evidence sufficient to support fact finding as to amount of damages sustained.

12. Appeal and error ⇐1013

In action against city for damages to realty from diversion of waters from natural stream obstructed by defendant, trial judge's finding as to extent of damage after viewing premises is controlling on District Court of Appeal on appeal from judgment for plaintiffs, in absence of showing that damages allowed were excessive.

13. Appeal and error ⇐195, 236(2)

In action against city for damages to realty from diversion of waters from natural stream obstructed by defendant, where plaintiffs asked and received leave to amend complaint to conform to proof of damage to plaintiffs' furniture in store building on such premises and defendant did not object to such amendment or request continuance when it was made, no prejudice to defendant, warranting reversal of judgment for plaintiffs, was shown.

Appeal from Superior Court, Santa Barbara County; C. Douglas Smith, Judge pro tem.

Action by Franklin H. Mitchell and others against the City of Santa Barbara and others for damages to realty from diversion of water from a natural stream. Judgment for plaintiffs, and defendant city appeals.

Affirmed.

Norris Montgomery, of Santa Barbara, for appellants.

W. P. Butcher and A. D. Haines, both of Santa Barbara, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to recover damages for injury to real property from the diversion of waters from a natural stream, defendant city of Santa Barbara appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

Plaintiffs are the owners of a store building and furniture business located on the corner of Milpas and East Ortega Streets in the city of Santa Barbara. Since man's memory runneth not to the contrary there has existed within the corporate city a series of foothills and mountains rising from the level land immediately north of Milpas Street and running in an easterly and westerly direction. These foothills and mountains are broken by a series of natural canyons and streams descending down the slopes of the foothills and from a watershed adjacent to and east of Milpas Street in defendant city and to some extent adjacent to and immediately north of what is known as Canon Perdido Street. These natural creeks, canyons and ravines, after leaving the watershed and foothills become tributary to a major natural water course or channel extending in a general north and south direction from a point on the north at approximately the intersection of Canon Perdido and Milpas Streets and to the south to a major basin extending over an area of about a quarter of a mile in diameter along the shores of the Pacific Ocean.

In the period of seasonal storms the waters from the watershed flow down from the creeks, canyons, and ravines into the natural water course and then into the basin, thereafter escaping into the Pacific Ocean. Prior to the alteration of this natural water course the seasonal waters had been carried into the basin and thence to the Pacific Ocean at a point which is now the southerly termination of Santa Barbara Street.

Defendant city, prior to the spring of 1938, raised the grade of certain streets that traversed the natural water course above described, thereby creating a series of dams, and also caused to be filled with rubbish and other debris a large portion of the land that formerly constituted the water basin above described.

Plaintiffs' premises are located to the northeast and contiguous to the natural water course heretofore mentioned. Due to the artificial changes in the natural water courses which defendant city had effected, storm waters in the early morning of March 2, 1938, accumulated upon the upper levels of the above described drainage area and large quantities of rain water, not being able to escape through the obstructed natural water course, inundated plaintiffs' property.

Defendant city relies for reversal of the judgment on these propositions:

First: The waters which damaged plaintiffs' property were flood waters and defendant city was, therefore, not liable for the resulting damage to plaintiffs.

Second: The rain storm which caused the injury to plaintiffs' property was an act of God and, therefore, defendant city was not liable for the injury to plaintiffs.

Third: The "common enemy doctrine" was applicable to the facts of the instant case and relieved defendant city from any liability for injuries resulting to plaintiffs.

Fourth: Plaintiffs, having built their store at the level of the street curb with knowledge that storm waters had overflowed their premises were contributorily negligent and, therefore, not entitled to a judgment against defendant city.

Fifth: The court's finding that plaintiffs had been damaged in the sum of $6,384 finds no substantial support in the evidence.

Sixth: Plaintiffs were not entitled to recover for damage to furniture contained in their building, for the reason that such alleged damage was not specially pleaded.

[1] Defendant's first proposition is untenable. The law is established in California that, where surface waters have found for themselves a definite channel in which they are accustomed to flow, a municipal corporation is liable for damages which result because said corporation has obstructed the natural water course (Conniff v. San Francisco, 67 Cal. 45, 49, 7 P. 41; White v. City of Santa Monica, 114 Cal.App. 330, 332, 299 P. 819; Jefferis v. City of Monterey Park, 14 Cal.App.2d 113, 116, 57 P.2d 1374; Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1).

[2, 3] The rule is aptly stated in 18 Cal. Jur.(1924), 1102, sec. 352, note 4, thus: "The general rule that municipal corporations, in the grading and improvement of streets, are not bound to provide for the escape of mere surface water, has an exception where the surface water, owing to the conformation of the adjoining country, has formed for itself a definite channel in which it is accustomed to flow, though such channel does not come within the common-law definition of a watercourse. The term 'natural channel' may be construed as including all channels through which, in the existing condition of the country, water naturally flows."

[4] In the present case the trial court found that defendant city had obstructed a natural water course which diverted storm waters onto plaintiffs' land, thereby causing the injury of which plaintiffs complain. Under the foregoing findings of fact and rule of law above stated, the city was clearly liable for the damage suffered by plaintiffs.

[5, 6] Defendant's second proposition is also untenable. A rainstorm which is merely of unusual intensity is not an "act of God." (Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847.) In the instant case substantial evidence was received to the effect that the rainstorm which was the cause of plaintiffs' damage was not of unusual intensity, there having been several rainstorms of the same or greater intensity during the years preceding the spring of 1938.

[7, 8] Defendant's third proposition is without merit. The "common enemy doctrine" applies only in cases where after water has escaped from a well defined channel and threatens damage to a property owner, the property owner without liability to himself may take reasonable means to protect his property, even though in doing so he may divert the water upon the lands of another. The water in such case being a common enemy to all property owners along the water course, each property owner has a right to protect himself against damage. In the instant case, however, the damage was caused by defendant city's obstructing a natural water course, thereby causing the water to flow upon plaintiffs' land. In such case it is the duty of the city to provide adequate drainage for the diverted waters, so as to prevent damage to adjacent property. (Spangler v. San Francisco, 84 Cal. 12, 17, 23 P. 1091, 18 Am.St. Rep. 158.)

[9] Defendant's fourth proposition is likewise without merit. The trial court found, supported by substantial evidence, that plaintiffs were not contributorily negligent in erecting their buildings at the location and level they did. For example, there was testimony that plaintiff Franklin H. Mitchell had been told by the city engineer of defendant city that the water had been taken care of and that buildings across Milpas Street from the location of plaintiffs' proposed buildings were on a set-back line flush with the sidewalks. This testimony of itself was substantial evidence to

sustain the trial court's finding that plaintiffs were not contributorily negligent.

[10] Defendant's fifth proposition is untenable and is controlled by the following rules of law:

(1) Damages which are the necessary consequence of the wrongful act can be recovered under the general allegation of the amount of damage inflicted. (Gomez v. Reed, 178 Cal. 759, 763, 174 P. 658.)

[11, 12] (2) Evidence received by the trier of fact in a "view" of the premises constitutes substantial evidence sufficient to support a finding of fact. In the present case the trial judge (the trier of fact) viewed the premises and thus was in a position to form his own opinion as to the extent of the damage suffered by plaintiffs, and, in the absence of a showing that the damages were excessive, which we do not believe to be the case, such finding is controlling on this court.

[13] Defendant's final proposition is without merit. During the course of the trial plaintiffs asked and received leave to amend their complaint to conform to the proof relative to the damage to plaintiffs' furniture. No objection was made by defendant to such amendment nor did defendant request a continuance at the time said amendment was made. Therefore, it has utterly failed to show any prejudice resulting to it.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 580

EDGER v. FOSTER.

Civ. 13313.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1941.

1. Pleading ⇐123

Answer, stating that defendant denies certain paragraphs of complaint, is sufficient to constitute a "general denial" of the allegations of the paragraphs mentioned. Code Civ.Proc. § 437, subd. 2, and § 452.

See Words and Phrases, Permanent Edition, for all other definitions of "General Denial".

2. Pleading ⇐34(1)

The tendency of the court is to liberalize pleadings with an end to having cases tried upon their merits.

3. Pleading ⇐93(1)

A defendant may plead inconsistent defenses.

4. Pleading ⇐93(3)

The fact that defendant denied certain material allegations of complaint in his answer and subsequently in an affirmative defense alleged the same material allegations of the complaint as true did not constitute an "admission" of the truth of the allegations in the complaint, since defendant was merely pleading inconsistent defenses.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Dema Pearl Edger against C. C. Foster for specific performance of a contract. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

Charles H. Johnson, Holcomb, Holcomb & Kempley, and Chester C. Kempley, all of Los Angeles, for appellant.

David C. Levenson and Kenneth E. Matot, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after the sustaining by the trial court of a demurrer to defendant C. C. Foster's amended answer without leave to amend in an action for specific performance of a contract to sell real property or damages in lieu thereof, defendant C. C. Foster appeals.

The essential facts are as follows:

Among other paragraphs of plaintiff's complaint, it alleged the following:

"V.

"That thereafter, the plaintiff herein and her said husband, John Albert Edger, made

each and every payment of Fifteen Dollars ($15.00) or more, per month, commencing on the 6th day of July, 1932, and ending on the 6th day of December, 1939, each of which payments were credited upon the back of said contract by the defendant, C. C. Foster.

"VI.

"That prior to the commencement of this action, the plaintiff herein demanded of the defendants, and each of them, delivery to the plaintiff of the property covered by said Agreement for the sale of real estate, and did tender an offer to pay to said defendants any balance due under and by virtue of the terms and conditions of said agreement for the sale of real estate.

"VII.

"That the said defendants, and each of them, have failed, neglected and refused, and still fail, neglect and refuse to deliver the said property to the plaintiff herein, and that the said defendants, and each of them, are unable to deliver the said property to the plaintiff herein, for the reason that the said defendants, and each of them, did prior hereto, and on the 8th day of August, 1933, deed the said property to one Horace C. Heaton, and that said Horace C. Heaton is now the holder and owner of said property.

"VIII.

"That the said property so agreed to be conveyed is worth a sum in excess of Two Thousand Dollars ($2,000.00), and that plaintiff has paid to the defendants, and each of them, under and by virtue of said agreement for the sale of real estate the total sum of Sixteen Hundred Eighty-four Dollars ($1684.00)."

Defendant C. C. Foster's amended answer contained, among other allegations, the following:

"III.

"Denies paragraph five of said complaint.

"IV.

"Denies paragraph six of said complaint.

"V.

"Denies paragraph seven of said complaint.

"VI.

"Denies paragraph eight of said complaint."

Plaintiff demurred to the amended answer upon the ground, among others, "that said answer does not, nor does any paragraph, word, or sentence thereof state facts sufficient to constitute a defense to this action. * * *" The trial court sustained a demurrer to the answer without leave to amend and thereupon entered judgment in favor of plaintiff.

These are the questions necessary for us to determine:

First: Do the words, "Denies paragraph (insert appropriate paragraph No. of the complaint) of said complaint," constitute a general denial of the allegations of the paragraph of the complaint mentioned?

Second: Does the fact that defendant C. C. Foster, in an alleged affirmative defense, makes admissions which are consistent with the material allegations of the complaint which have been previously denied in the answer, constitute an admission of the material allegations of the complaint admitted in the affirmative defense?

[1] The first question must be answered in the affirmative. Section 437 of the Code of Civil Procedure, subsection 2, as amended in 1927, reads in part as follows:

"* * * The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint * * *."

Section 452 of the Code of Civil Procedure reads thus:

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."

[2] Applying the rule set forth in section 452 of the Code of Civil Procedure to the quoted portions of section 437 of the same code, we are of the opinion that the form of denial here in question constitutes a denial of all of the allegations of the paragraph so denied and, therefore, raised material issues which, if found in favor of defendant C. C. Foster would have constituted a valid defense to the action. It is true that the form of denial here used is neither logical nor grammatical, as it is not correct to deny a paragraph. The better form would have been to have used the phrase, "Defendant denies each and every allegation of paragraph (insert appropriate paragraph No. of the complaint) of plaintiff's complaint herein." However, in view of the tendency of the courts to liberalize pleadings with an end to having cases tried

upon their merits, and, since neither plaintiff nor the trial court could have possibly misunderstood the intent of defendant to deny each and every allegation of the various paragraphs mentioned, we hold that such a form of denial is sufficient to raise an issue.

[3, 4] The second question must be answered in the negative. The rule is established in California that a defendant may plead inconsistent defenses. (People v. Tulare Packing Co., 25 Cal.App.2d 717, 729, 78 P.2d 763.) Therefore, the fact that defendant in the instant case denied certain material allegations of the complaint in his answer and subsequently in an affirmative defense alleged the same material allegations of the complaint as true, did not constitute an admission of the truth of the allegations in the complaint. He was merely pleading inconsistent defenses.

For the foregoing reasons the judgment appealed from is reversed with directions to the trial court to overrule the demurrer to the answer.

W. J. WOOD, Acting P. J., and SCOTT, J., pro tem., concurred.



REXSTREW et al. v. CITY OF HUNTINGTON PARK et al. *

Civ. 12522.

District Court of Appeal, Second District, Division 1, California.

Dec. 16, 1941.

Hearing Granted Feb. 11, 1942.

1. Officers ⇐4

Abolition of an office or position is not synonymous with "discharge" from employment, as affecting rights of employee prejudiced thereby, although effect upon such employee is precisely the same.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharge".

2. Municipal corporations ⇐126

Generally, an office or position created by municipal ordinance may be abolished by ordinance, in which case the incumbent ceases to be an "officer".

See Words and Phrases, Permanent Edition, for all other definitions of "Officer".

3. Officers ⇐7

There is a fundamental distinction between the "abolition" of an unnecessary position and the "discharge" of a faithful employee in violation of his statutory rights, and discharge cannot be concealed nor protected by pretense that it was in exercise of right to abolish position.

See Words and Phrases, Permanent Edition, for all other definitions of "Abolition".

4. Mandamus ⇐168(4)

Evidence indicating that council of city of Huntington Park abolished positions of policeman and fireman in good faith, for reasons of economy, *held* not to warrant granting mandamus to compel reinstatement of such policeman and fireman. St.1883, p. 267, § 852; St.1935, pp. 380, 381, §§ 1, 2; St.1937, p. 1812, § 852.

5. Municipal corporations ⇐180(3), 194

Under statute governing City of Huntington Park, and providing that officers and employees should hold office during pleasure of city council, dismissals of policemen and firemen by resolution reciting that reduction in personnel was being effected for purposes of economy were regular in form. St.1937, p. 1812, § 852.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Mandamus proceeding by Stanley E. Rexstrew and another against the City of Huntington Park and others, to compel reinstatement of employees of fire department and police department. From a judgment ordering the reinstatement, defendants appeal.

Reversed and peremptory writ discharged.

Christopher J. Griffin, city attorney, of Huntington Park, for appellants.

John J. Hamilton, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

The City of Huntington Park and the members of the city council of that municipality appeal from a judgment entered

* Subsequent opinion 128 P.2d 23.

in a mandamus proceeding by which the two respondents, Rexstrew, formerly a member of the fire department, and Cantonwine, formerly a member of the police department, were ordered reinstated, restored and returned to their respective positions. The order also provided that payment be made to each of the respondents of his monthly salary reckoned at the amount formerly received, for the period elapsing from the date of separation from his department until he should be reemployed.

Huntington Park has never adopted a city charter. It operates as a city of the sixth class under the charter established for its government by the General Municipal Corporations Act (Stats. 1883, p. 93), as amended. Section 852 of the act as originally passed provided that "The Board of Trustees may, in their discretion, appoint an Attorney, a Poundmaster, a Superintendent of Streets, a Civil Engineer, and such police and other subordinate officers as in their judgment may be deemed necessary, and fix their compensation, which said officers shall hold office during the pleasure of said Board". Stats. 1883, at page 267.

This act has been amended on several occasions, and in 1937 the legislature cast the above passage in slightly altered form as follows: "The city council shall appoint the chief of police and the city judge; it may also, in its discretion, appoint a city attorney, a superintendent of streets, a civil engineer, a court clerk, and such other subordinate officers or employees as in its judgment may be deemed necessary. The compensation of all appointive officers and employees may be fixed from time to time by the city council by resolution or ordinance, and said officers and employees shall hold office during the pleasure of said city council." Stats. 1937, p. 1812.

On August 22, 1938, the city council of Huntington Park passed the following resolution:

"Resolution No. 1758.

"A resolution of the City Council of the City of Huntington Park effecting a reduction of Personnel in the Police and Fire Departments.

"The City Council of the City of Huntington Park does resolve as follows:

"Whereas, the City Council finds it necessary for purposes of economy to effect a reduction of expenses in the Police and Fire Departments, and

"Whereas, the City Council after a careful study of all factors involved have decided that the needed economies can best be made without a disruption or serious curtailment of City services by a reduction of the Personnel of the Police and Fire Departments, and

"Whereas, there are now fifteen patrolmen, members of the Police Department, and it is hereby determined that ten patrolmen is a number sufficient to adequately police the City of Huntington Park, and

"Whereas, there are now fifteen firemen, members of the Fire Department, and it is hereby determined that twelve is a number sufficient to adequately protect the City from fire, and

"Whereas, there are now nine Motorcycle patrolmen, members of the Police Department, and it is hereby determined that eight motorcycle patrolmen is a sufficient number, and

"Whereas, it is hereby determined by the City Council that the hereinafter named men can best be spared from their respective ranks and departments in order to accomplish the reduction in personnel hereby made for the following reasons:

"1. For the best interests of the service.

"2. The special qualifications and fitness of the persons retained in the respective ranks and departments, for the work remaining,

"Now, therefore, be it resolved that the number of Patrolmen in the Police Department be reduced to ten, that the number of Firemen in the Fire Department be reduced to twelve, and that the number of Motorcycle Patrolmen in the Police Department be reduced to eight, and

"That, in order to accomplish said reduction in Personnel the following named men be, and they are, hereby dismissed from duty and their services dispensed with, effective as of September 1st, 1938.

"Police Department

"Motorcycle Patrolman	Hollis G. Miller
"Police Patrolman	H. F. Benecke
" "	B. F. Cantonwine
" "	Henry Williams
" "	O. S. Welch
" "	J. B. Martin

"Fire Department

"Fireman	S. E. Rexstrew
"	George Hays
"	Dudley Peterson."

Appellants contend that they were performing their duty, as the legislative body of Huntington Park, in adopting this resolution, and that they were fully authorized to do so, since Section 852 at the time provided that, "said officers and employees shall hold office during the pleasure of said city council". Stats. 1937, supra.

As we understand their position, respondents urge that the judgment should be affirmed because it rests largely upon the finding of the trial court that each respondent "was entitled and is entitled to continue his employment as Civil Service Employee until and unless for some just cause said petitioner is accused, notified and tried by said Civil Service Commission, upon showing that he has violated some or any of the rules and regulations of said Civil Service employment", and upon the further findings that "the asserted claim of the respondents, and each of them, that it was necessary for the purposes of economy to effect a reduction in the expenses of the Police and Fire Departments, was false and untrue", and that "said termination of this petitioner's employment by the respondents, and each of them, was done not for the purpose of economy, but for the purpose of enabling the respondents, and each of them, to replace this petitioner in his employment by another person more friendly to the respondents, and each of them, than was this petitioner". As to respondent Rexstrew, there was a finding that "the retention of Glenn Snoeberger accomplished the removal of this petitioner without any reason or justification therefor, and deprived this petitioner of his right to employment, and replaced his position by a probationary fireman with less seniority than this petitioner, to-wit: said Glenn Snoeberger". As to respondent Cantonwine, the court found that "one Will Bailie, a school traffic officer and not classified as a duly or regularly appointed patrolman, but under a different classification, to-wit: that of school traffic officer, * * * has been walking said beat formerly patrolled by said petitioner Cantonwine, and has been performing the duties of patrolman fully and completely as though he were the duly and regularly appointed patrolman, and that said Will Bailie has been performing the same identical patrolman's duties since September 1, 1938, as those formerly performed by petitioner Cantonwine".

Respondents also argue that the judgment in their favor should be affirmed because of the adoption by the electors of Huntington Park of three initiative ordinances, the first of which, applying to the fire department and numbered 767, became effective in April, 1932; the second, numbered 821-A, relating to the police department, becoming effective in April, 1934. Ordinance No. 767 is denominated, "An ordinance of the people of the City of Huntington Park creating a Civil Service Board, providing for the manner and method of their Appointment; providing for the placing of the members of the Fire Department under Civil Service." This ordinance, certain pertinent portions of which we have italicized below, provides among other things that "All officers or members shall be chosen or promoted by the chief of the Fire Department" (§ 3); that an appointee in the lowest grade of the classified service *may be discharged by the chief* (§ 7); that "If discharged * * * the employee * * * may demand a trial, whereupon he shall be tried as provided in the section referring to suspensions and removals" (§ 8); that "The Chief of the Fire Department or Civil Service Board *in whom shall be vested removal or disciplinary power* shall be allowed full freedom "in his or its action, * * *" (§ 9); that the chief *"shall recommend to the City Council members* of the Fire Department *for demotion or dismissal* * * *". § 13. The section referring to suspensions and removals is numbered 15 and provides for a hearing by a trial board of any charges filed by the chief against any member of the department. Section 16 names as the trial board the members of the civil service board and the chief of the fire department, and provides that a majority verdict of the trial board shall be final and that *said board may dismiss* the accused from the service of the city. Membership upon the civil service board is provided by section 1—three citizens of the municipality having no other connection with the city government and chosen by the city council.

As will be noted, this ordinance provides for dismissal by the fire chief of an appointee, in the lowest grade only, of the classified service; for dismissal by a trial board, of which the chief is a member, and before which he is officially an accuser, of any member of the department who has been ordered discharged and who seeks and

obtains a hearing. But section 13 enjoins upon the chief as one of his duties recommendation to the city council for demotion or dismissal of members of the fire department.

Under this ordinance, or the sections to which we have referred, it is difficult to determine where the power to effect removal resides, unless we say that any one of three authorities: the chief, the trial board, or the city council, may accomplish it—a most unsatisfactory situation so far as members of the department are concerned. How the matter of removal of a chief of the department might be handled is even more difficult to determine, in view of section 12 of the ordinance providing that he "shall be removed or reduced in rank only as provided for other members of the classified service".

Initiative ordinance No. 821-A, in its opening section, reads as follows: "The Civil Service Board of the City of Huntington Park, heretofore created by an Initiative Ordinance adopted * * * on the 11th day of April 1932, shall formulate rules and regulations governing the selection and promotion of members of the Police Department. * * * All officers or members shall be chosen or promoted by the Chief of the Police Department * * * from three (3) highest standing candidates on the list." The balance of the ordinance is practically identical in its provisions with the fire department ordinance, the only substantial difference being the elimination of the chief of the department from membership upon the trial board.

In 1935 the legislature adopted an act set out in full as chapter 48, page 380, Stats. 1935, by the terms of which "The legislative body of any city within this State is hereby authorized to adopt by ordinance a personnel system, merit system, or civil service system, for the selection, employment, classification, advancement, suspension, discharge and retirement of appointive officers and employees". Section 1. Section 2 of the act provides that, "In said ordinance creating such system said legislative body shall designate the departments, appointive officers or employees of the city which shall be placed under such merit system or civil service system; such legislative body may from time to time, by ordinance, add additional departments, appointive officers or employees of the city to the list originally designated in the ordinance creating such system".

Pursuant to the authority of the abovementioned act of the legislature, the voters of Huntington Park adopted an initiative ordinance No. 893-a, in April, 1938, establishing a civil service system for that city. Section II reads as follows: "Classified Service. The provisions of this ordinance shall apply only to the following departments, appointive officers and employees of the City, other than those paid by the day. * * *" Then follows a list including practically all the departments, officers or employees of the city with the exception of the legal, the police, and the fire departments, their officers and employees. Section XIX provides that, "Any provisions or clause of the several ordinances of the City of Huntington Park in conflict herewith are hereby expressly repealed". And the closing words in this ordinance, section XXI, are as follows: "Nothing in this Ordinance shall be construed as repealing the Civil Service ordinance governing the Fire Department as adopted by the people at a General Election in the City of Huntington Park held April 11th, 1932, and/or the Civil Service ordinance governing the Police Department as adopted by the people at a General Election in the City of Huntington Park April 9th, 1934."

It may be noted here that whereas the fire department ordinance No. 767 had established, as a trial board, the civil service board and the chief of the fire department, and whereas the police department ordinance No. 821-A had named, as a trial board, the civil service board, the new ordinance No. 893a, by section XII, provided for a trial board of five members appointed by the city council, making no mention in this section of the civil service board. Section III of the new ordinance provided that "The Civil Service Board of the City of Huntington Park, heretofore created by an Initiative Ordinance adopted by the People of the City of Huntington Park on the 11th day of April, 1932, shall formulate rules and regulations governing the selection and promotion of all employees and appointive officers designated in Section II of this ordinance".

Whatever this ordinance may have accomplished for employees of the city, generally, it did nothing for the members of the fire and police departments except to mention, as unrepealed, the two initiative ordinances passed in prior years. It is interesting, however, to note that as to the departments and employees subject to the

terms of the new ordinance, the following provision is made in section X: "Whenever in the judgment of the City Council it becomes necessary in the interest of economy or because the necessity for the position involved no longer exists, the City Council may abolish any position or employment in the Civil Service list and discharge the employee holding such position or employment. * * *"

As we have previously stated, on August 22, 1938, four months after the civil service ordinance became effective, the city council of Huntington Park adopted the resolution under which the positions held by the respondents were abolished. Shortly thereafter each employee addressed letters of protest to the chief of his department and to the city council, and each made a request in writing of the civil service commission for reinstatement, for back pay and for a hearing, "as is required by said Ordinance", referring to the initiative ordinances governing the fire and police departments, respectively.

The civil service board on November 15, 1938, considered the matter of respondents' discharge and under date of November 21, 1938, through its secretary, sent to the city council the following communication:

"The Civil Service Board at a meeting November 15, 1938, adopted a resolution to the effect that it was not within the jurisdiction of the Board to take any action in the matter of the removal from service of several members of the Police and Fire Departments, on the ground that these dismissals were made for reasons of economy; that there is nothing in the Police and Fire Departments' ordinances covering the subject of removal of employees from the service on 'grounds of economy'; and that there is no clause in these Ordinances covering the subject of 'seniority'.

"Furthermore, it was pointed out that pursuant to the provisions of these Ordinances governing the Police and Fire Departments, the Board can act only when charges are preferred against employees of these two departments."

No exception appears to have been taken by either respondent to this decision of the civil service board not to arrange for a hearing, and we note that the members of that board were not joined as defendants with the other city officials named in the petition for a writ of mandate which respondents filed in January, 1939.

The record before us indicates that in the early part of June, 1938, and about two months before the adoption by the city council of resolution No. 1758 which we have quoted herein, that body increased the number of fire department employees by engaging two men, Snoeberger and Peterson, but this was shortly before an audit of the city's finances was ordered toward the close of the fiscal year, July 1, 1938. The report of the auditor was returned in the early part of August. It showed that a deficit of more than $42,000 arose during the preceding fiscal year and that an excess of expenditures over income, estimated at $20,000, would result for the fiscal year just beginning. A recommendation was made by the auditor to the effect that expenditures be reduced or the tax rate raised. Councilman Schulz testified that all members of the city council were in favor of maintaining the old rate of 70 cents on $100 valuation. He stated, "* * * it was my recommendation that the personnel in the police department as well as in the fire department be reduced together with a ten percent reduction in salaries for the ensuing year; and also to impose a two-weeks' compulsory vacation on the membership of the street department without pay. So that we could live within our means and maintain that 70 cents tax rate. We had several meetings together with the auditor; we tried to devise the necessary amount of reduction in personnel. And we finally decided to have our chief of police, Mr. William L. Hulquist, bring in a list of the men that he felt that he could spare the easiest. And also the same kind of a recommendation to the chief of the fire department, Chief Slocum.

"Q. And did these men—I mean the two chiefs—did they bring in a list? A. Yes, sir; they did. They came into the committee room where the Council was in session, together with the auditors and yourself discussing this budget. They were called up on the 'phone to come upstairs. And they had made out this list of the men that they recommended to be dismissed.

"Q. Did they receive any instructions from the City Council on who to put on that list? A. They did not.

"Q. Did the City Council follow the advice of the chiefs of the two departments in forming their resolution which was subsequently passed? A. They did."

It further appears from Mr. Schulz's testimony that inquiries were made concerning the size of personnel employed in the police and fire departments of municipalities in the immediate neighborhood of Huntington Park, some of them of larger size than that city and approximately the same population. The result of those inquiries indicated, according to Mr. Schulz, that "We were over-manned according to the amount of men that they had, in accordance with their population and area to cover. And the salaries, I might say too, our salaries were greater than theirs."

Indicating that the purpose of reducing the personnel was to effect economy, Mayor Cox of the city of Huntington Park testified, "* * * we decided that we would meet our budget with the same tax rate and in so doing we decided there would be a certain number out of the police department that would be laid off, a certain number out of the fire department. If all of the men in the street department would take a two weeks' vacation without pay, if all of the employees in the fire department and police department would take a ten percent cut in wages that made up our deficiency so that we would not be going in the red and we set our tax rate accordingly the same as it was. * * *

"Q. The salary in both departments is still ten percent less? A. Yes. All the street men took their two weeks last year without pay throughout the entire department.

"Q. Did you have any discussion or did the City Council ever take any action in regard to reducing personnel prior to your report? A. No, sir.

"Q. On June 1, 1938, had you any discussion or had you formed any plans to reduce the size of either department? A. No.

"Q. About what time did you first receive your knowledge on this matter? A. I would say it was around posssibly early in August sometime that we got our first inkling of the real condition from the auditor."

Testimony of the two witnesses above quoted, and other evidence received by the court, in our opinion establishes the fact, contrary to the findings and conclusions of the trial court, that the positions which respondents had held were abolished legally and in good faith, not from any ulterior motive but upon the grounds of economy, as stated in the resolution of August 22, 1938.

It was established at the trial that, at a considerable saving, the duties which had attached to the positions held by respondents were taken over and performed by members of their departments without the hiring of additional men to succeed them.

[1] On June 1, 1938, there were twenty-six men in the fire department; on June 11th, before the report of the auditor was received, the number was increased to twenty-eight, and at the date of trial the personnel numbered not more than twenty-five. On August 22, 1938, when the resolution of the city council was adopted, there were thirty-six or thirty-seven men in the police department, while at the time of trial the number did not exceed thirty. A quotation from the opinion in Livingstone v. MacGillivray, 1 Cal.2d 546, at page 553, 36 P.2d 622, 625, is apropos at this point: "It must, we think, be conceded that abolition of an office or position is not synonymous with discharge from employment although the effect upon the individual who loses employment is precisely the same. In the former instance the duties of the position are either absorbed by other persons or they are entirely discontinued while in the latter case the duties remain unchanged but some individual other than the discharged employee is selected to perform them. It must also be conceded that the power to abolish a position may not be tortured into a mere instrumentality to effect the discharge of an employee protected by the salutary provisions of civil service regulations."

[2] Also, as bearing on the matters we are here considering, we note the case of O'Neill v. Williams, 53 Cal.App. 1, 199 P. 870, 871. In that case the city council of Oakland reduced the number of corporals in the police department from fourteen to seven while the plaintiff, a corporal, was absent under suspension. On his return to duty he was assigned to the position of sergeant at a lower salary. He sought a writ of mandate to compel the payment to him of a corporal's salary. The District Court of Appeal, in affirming the trial court's refusal to grant the writ, said, "It cannot be supposed that the framers of the charter intended that after the police department was once organized, and its members finally appointed, the number so appointed must continue in office, whether the public needs require their re-

tention or not. It is a general rule, now well settled, that an office or position created by municipal ordinance may be abolished by ordinance, in which case the incumbent ceases to be an officer. * * *

[3] "In answer to appellant's contention that to uphold the judgment of the lower court is to leave every officer and member of the police department at the mercy of a designing and evil-intentioned city council, we need only point out that the element of good faith must ever govern such matters. Fraud, deceit and intrigue, if shown, would defeat the object of any pretended praiseworthy action. An apt quotation from the highest court of a sister state appeals to us in this connection: 'There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute, and the latter action can neither be concealed nor protected by a pretense that it was an exercise of the former right.' Garvey v. Lowell, 199 Mass. 47, 50, 85 N.E. 182, 127 Am.St.Rep. 468. If fraud was present in the instant case, it has not been shown." O'Neill v. Williams, supra.

[4] We have found nothing in the record before us to indicate that the power of the city council to abolish positions was tortured into an instrumentality to effect the discharge of either of the respondents; neither does fraud or subterfuge appear.

[5] It may well be, as appellants argue, that the initiative ordinances passed in 1932 and 1934, which the trial court determined were valid and subsisting laws, are in fact void and ineffective for the reason that no power to enact such ordinances was granted, expressly or impliedly, by any legislative act to the electors of Huntington Park, a city of the sixth class. See Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316, and Richards v. Wheeler, 10 Cal.App.2d 108, 51 P.2d 436, but a determination of that question seems unnecessary here since each respondent was dismissed from the service in exact conformity with the terms of the respective ordinance relating to his department, namely, by the city council acting upon the recommendation of his chief. Since the General Municipal Corporations Act (Stats. 1937, § 852, pp. 1811, 1812) also provided that "said officers and employees shall hold office during the pleasure of said city council", we are satisfied that the dismissals were, from every viewpoint, regular in form. That they were also regular in substance appears from the evidence, showing conclusively as it does that the positions formerly held by the respondents were legally abolished for reasons of economy, and in good faith. Since the findings and conclusions in this case are not, in our opinion, supported by the evidence, it follows that the judgment based thereon must be reversed, and that the peremptory writ heretofore issued in this cause must be discharged. It is so ordered.

YORK, P. J., and DORAN, J., concurred.



SHEWARD et al. v. BULLOCK'S, Inc., et al.*

Civ. 13170.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1941.

Rehearing Denied Jan. 8, 1942.

Hearing Granted Feb. 11, 1942.

1. Master and servant ⇨53

Where beauty parlor operator, on receipt of chair from manufacturer, carefully inspected chair, and during all of the time chair was in beauty parlor had employee weighing 250 pounds sit in chair twice weekly while riding it across floor, and employee also oiled, washed and inspected it at the same times, such care exemplified duty imposed upon vendee of manufacturer, as respects liability of operator for injuries to customer when leg on chair broke.

2. Negligence ⇨27

Under ordinary circumstances, neither manufacturer nor vendor is liable to third parties having no contractual relations with him for negligence in construction, manufacture and sale of an article such as a chair used in beauty parlor.

3. Negligence ⇨27

A manufacturer who fails to exercise reasonable care in manufacturing an article, which, unless carefully made, is reasonably certain to involve risk of causing bodily

* Subsequent opinion 126 P.2d 345.

harm to those using it for its intended purpose, is liable for bodily injuries caused to those engaged in its lawful use.

4. Negligence ⇐27

Manufacturer is obliged to exercise reasonable care in manufacture of a chattel, and amount of his care is to be governed by degree of peril to attend if article be negligently made.

5. Negligence ⇐27

If manufacturer employs a formula calculated to result in a finished product safe for its proposed uses, intelligently selects his materials with sufficient technical knowledge, inspects them during course of their fabrication and assembly, and on completion, with care in proportion to extent of risk to be involved in using the chattel if made without such precautions, he has by such care, method and process fulfilled his obligations to vendee and to all users of such chattel.

6. Negligence ⇐27

If the thing manufactured is such that, if fatally defective, it is reasonably certain to imperil safety of its lawful users, it is a "dangerous instrumentality" and should not be sold for use by public without first being subjected to tests in keeping with its nature.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Instrumentality".

7. Negligence ⇐136(18)

Where bodily injuries are suffered by persons lawfully using a chattel, because of defects alleged to have been caused by negligence of manufacturer, it is "question of fact" for jury as to whether article of recent make, when used as person injured was using it, became, because of defect of construction or assembling, an instrument imminently dangerous to human life or limb.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

8. Negligence ⇐136(18)

Whether cast-iron chair, used in beauty parlor, the leg of which broke while customer was sitting in it, and the seat of which was not more than 20 inches from floor, would, if defective, be imminently dangerous to one sitting therein, was a question for triers of fact in light of all evidence properly admissible, including customs and practice of other manufacturers of similar articles.

9. Negligence ⇐121(1)

In action against manufacturer for injuries to customer in beauty parlor sustained when leg of chair broke, burden was upon plaintiff to establish customary standard of care exercised by manufacturers of such chairs.

10. Negligence ⇐27

It was incumbent upon manufacturer of beauty parlor chair, a leg of which broke while customer was sitting therein, to make such tests and inspection as one in his business should recognize as reasonably necessary to put out a safe article.

11. Negligence ⇐134(4)

Where leg of cast-iron chair in beauty parlor broke while customer was sitting in it, causing injuries to customer, manufacturer of chair who obtained the rough castings used in the chair from another manufacturer, and whose method of manufacturing the chair required an inspection of the castings during each of several operations by skilled workmen, each casting being handled by between five or ten persons before process was complete, and the same types and style of castings being used by other manufacturers, was not liable for injuries, in absence of any proof as to customary standard of care exercised by manufacturers of like cast-iron chairs.

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Robert L. Sheward and wife against Bullock's, Inc., Phillip M. Virtue, and others, to recover damages for injuries sustained when a chair in which plaintiff, Mrs. Sheward, was sitting in a beauty parlor, broke. From a judgment for plaintiffs, from the verdict, from the order denying a motion for new trial, and from the order granting Bullock's, Inc., a new trial, defendant Phillip Virtue and another appeal. Plaintiffs appeal from the order granting Bullock's, Inc., a new trial.

Purported appeals by defendants from verdict and from the order denying their motion for a new trial dismissed. Order granting defendant Bullock's, Inc., a new trial affirmed, and judgment against defendants reversed.

Murchison & Clopton, of Los Angeles, for appellants.

Betts & Garrison, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The plaintiff Mrs. Robert Sheward, while sitting in a metal chair in the beauty parlor of defendant Bullock's for the purpose of receiving a treatment, was precipitated to the floor when the front right leg of the chair was broken. She sustained serious personal injuries. In order to recover damages suffered on account of such injuries and for the medical and surgical expenses incurred by her husband, they instituted this action against Bullock's, Inc., and against Virtue Brothers Manufacturing Co., who manufactured and assembled the chair in which she sat, and against Myerson and Benjamin, who operated the Paris Beauty Parlor Supply Co., and who had sold the chair to Bullock's, Inc., with the knowledge that it was to be used by the general public in Bullock's beauty parlor and against Showalter, operator, who directed Mrs. Sheward to be seated in the chair. Virtue Brothers Manufacturing Company will be referred to as appellants.

Judgment having been rendered upon the jury's verdict against Bullock's, Inc., and against appellants in the sum of $4,750, the latter appeal from the judgment, from the verdict, from the order denying their motion for a new trial and from the order granting Bullock's, Inc., a new trial. At the same time plaintiffs appeal from the order granting Bullock's a new trial. It appearing from the verdict and the judgment that the only defendants mentioned therein are Bullock's, Inc., and appellants, we must assume that all other defendants were disposed of by proper orders prior to the submission. Seventeen days after the filing of the notice of appeal by appellants and nine days after the filing of the notice of appeal of the plaintiffs, the trial court ordered that the clerk's transcript on appeal be considered on the appeals for all parties.

[1] Plaintiffs base their cause of action upon the alleged negligence of appellants in the manufacturing and assembling of the cast-iron chair which the latter had sold to Bullock's, Inc., some nine months before plaintiff wife received her injuries. On receipt of it, Bullock's carefully inspected the chair and during all of the time the chair was in the beauty parlor, it underwent tests for its strength and soundness. Bullock's had an employee weighing 250 pounds to test the chair twice weekly by riding it back and forth across the floor. He also washed, oiled and inspected it at the same times. Such care exemplified the duty imposed upon the vendee of a manufacturer. Restatement of the Law of Torts, sec. 396. Reasonable care could not have required more of Bullock's.

Whether appellants were negligent in the manufacture of the chair can be determined only (1) by a consideration of the care exercised in the selection of materials and in the choice of methods and processes used by them in the construction of the chair, (2) by the care exercised in inspecting the article during the course of its manufacture and at the conclusion thereof, and (3) by a consideration of the care they exercised in the light of knowledge of the care taken by other manufacturers of the same commodity. An intimate knowledge of the degree and amount of care practiced by appellants in their operations has enabled us more satisfactorily to appraise the nature and extent of their care in manufacturing such chairs.

Appellants purchase certain materials and parts from other manufacturers. The casting used in manufacturing the cast-iron chair is delivered to appellants by the Independent Iron Works as rough castings. The iron works have manufactured and furnished such castings to appellants and other manufacturers and assemblers for many years. The patterns for the molds used by the iron works for molding casting are furnished by appellants. After receipt of the castings by appellants, they are handled by about 75 employees in the manufacturing and assembling of the chairs. The method employed is the "batch system" that is, by running through one batch of parts before beginning with another. Each casting, though heavy, is handled, treated, polished and assembled separately. Each piece is scrubbed, rinsed and carefully inspected. When a casting is first received, it is in very rough form. It is polished with a coarse emery paper to a fine, smooth finish when a different employee takes it to a finer wheel. During the process of smoothing the surface of the casting, it is cautiously observed by the polisher to see that the casting is properly smoothed and polished. It is placed in an alkaline solution for the purpose of cleaning it.

It is then dipped and rinsed in water until it is clean; then it is nickel-plated. This requires a half hour and the casting is then rinsed, dried and polished again on soft cloth wheels. Thereafter it is chromium plated, dipped in cold water, dried and polished again with rouge. After each step in the process an employee inspects each casting to see that it is free from grease and is fit for plating. At each step in the process the employee must hold the casting in such position that it is not less than 16 inches from his eyes. When it is ready for the plating, the plating foreman inspects it to see that all of the wheel marks are buffed, that there is no shading of the chromium; to see that it is covered and that there are no white spots left from chromium burns. The foreman then inspects the polishing operation and he inspects the casting again after the chromium plating has been applied. Each step in the process is handled by a skilled workman. Whenever a crack or hole is noticed in the course of the process, the casting is discarded. The finished castings are then sent to the assembly department where they are constructed into a complete chair. The assemblers are also skilled workmen. After the chairs are finally completed, the packers inspect them before they are shipped. Between five and ten persons handle each casting before the process is complete. The same type and style of casting are used by other manufacturers. Appellants have sold over 1,000 of such cast-iron chairs in Southern California; another company situated there also makes and sells substantially the same type of chair. They are designed for beauty shops.

[2-8] It is conceded that appellants were not insurers of the soundness and safety of the cast-iron chair. Under ordinary circumstances neither the manufacturer nor the vendor is liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such an article. Sherman & Redfield on Negligence, volume 4, page 1571. But a manufacturer who fails to exercise reasonable care in the manufacture of an article, which, unless carefully made, is reasonably certain to involve risk of causing death or bodily harm to those using it for its intended purpose, is liable for bodily injuries caused to those engaged in its lawful use. The manufacturer is obliged to exercise reasonable care in the manufacture of a chattel and the amount of his care is to be governed by the degree of peril to attend if the article be negligently made. The manufacturer of devices that are operated by the explosion of gasoline or dynamite, or of those instrumentalities used for the distribution and transmission of high voltage currents, is required to exercise "almost meticulous precautions" to see that the instrument approaches substantial perfection. But where one creates an article which, howsoever imperfect, can be calculated to do only some trivial harm, such amount or degree of care is not exacted. If the manufacturer employs a formula calculated to result in a finished product safe for its proposed uses, intelligently selects his material with sufficient technical knowledge, inspects them during the course of their fabrication and assembly and on completion, with a care in proportion to the extent of the risk to be involved in using the chattel, if made without such precautions, he has by such care, method and process fulfilled his obligation to the vendee and to all users of such chattel. Restatement of the Law of Torts, sec. 395. If the thing so created is such that, if fatally defective, it is reasonably certain to imperil the safety of its lawful users, it is a dangerous instrumentality, and should not be sold for use by the public without first being subjected to tests in keeping with its nature. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann. Cas.1916C, 440. In the event of bodily injuries declared to have been suffered by a person while lawfully using the chattel, because of defects alleged to have been caused by the negligence of the manufacturer, it is a proper question of fact for the jury as to whether the article of recent make, "when used as plaintiff was using it, became, because of defective construction or assembling, an instrument imminently dangerous to human life or limb". Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, 482. But whether a cast-iron chair, whose seat is not more than 20 inches from the floor, would, if defective, be imminently dangerous to one sitting therein is not, in the abstract, to be determined on appeal. To do so would be to adjudicate by formula. That is a question for the triers of fact in the light of all the evidence properly admissible upon the subject including the customs and practice of other manufacturers of similar articles.

While the expert witness introduced by plaintiff testified that by the use of certain acids and heat he could distinguish a fracture in the broken casting which inferentially was present at the time of its delivery to appellants, in the absence of evidence as to the standard of care used by manufacturers of such commodities, we are unable to determine that appellants were obliged to make use of a powerful magnifying glass, heat, and sulphuric acid in order to test the casting for the presence of defects.

[9-11] Whether the standard of care that was actually exercised by appellants in the manufacture of the casting in question is higher or lower than that which generally obtains among manufacturers of such merchandise is a question that can be fairly determined only by the introduction of competent proof as to the customary methods used by such manufacturers to detect defects from which something more than a trivial danger could be foreseen. The burden was upon plaintiffs to establish the customary standard of care exercised by such manufacturers. Kalash v. Los Angeles Ladder Co., supra. It was incumbent upon appellants to make "such tests and inspections as one in its business should recognize as reasonably necessary to put out a safe article". Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576, 578. In the absence of any proof as to the customary standard of care exercised by manufacturers of like cast-iron chairs, we are unable to say that appellants should have exercised any higher degree of caution or any more ordinary care than was exercised in the manufacture of the chair whose collapse caused the misfortune to Mrs. Sheward.

The purported appeals by appellants from the verdicts and from the order denying their motion for a new trial are dismissed. The order granting Bullock's, Inc., a new trial is affirmed. The judgment against appellants is reversed.

McCOMB, J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion the burden was not upon plaintiffs to establish the customary standard of care exercised by manufacturers. In malpractice cases, the rule, stated briefly, requires that the plaintiff present expert testimony that the defendant failed to exercise that degree of care and skill which was ordinarily exercised by practitioners in the same community. Taylor v. Fishbaugh, 26 Cal.App.2d 300, 79 P.2d 174. This rule, however, should not be applied to manufacturers of articles which are reasonably certain to cause bodily injury if negligently made. The cases of Kalash v. Los Angeles Ladder Co., 1 Cal.2d 229, 34 P.2d 481, and Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576, relied upon by defendants, do not go so far as to hold that proof by the plaintiff of the custom among manufacturers is necessary.

In the case under review none of the parties offered evidence to prove custom among manufacturers. Unquestionably the burden of proof to establish negligence was upon the plaintiffs, and in my opinion the proof presented by them is sufficient to support the jury's implied finding of negligence on the part of the manufacturer. The judgment against Virtue Brothers Manufacturing Company should be affirmed.



48 Cal.App.2d 540

In re LINDBLOM'S ESTATE.

Civ. 11953.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1941.

Taxation ⇐904

Where legatees filed election not to pay balance of inheritance taxes until contingencies on which highest tax was based actually occurred, and thereafter executor and state controller entered into stipulation to compromise balance of contingent inheritance taxes remaining unpaid, such compromise which was approved by order of court precluded legatees from obtaining refund of taxes paid under compromise, it not appearing that compromise was erroneous or that any payment of taxes had been erroneously made.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

In the matter of the estate of Erik Olof Lindblom, deceased, wherein Brita Lindblom and others petitioned for a refund of inheritance tax. From an order directing the refund, Harry B. Riley, State Controller, appeals.

Reversed.

James W. Hickey, of Sacramento, and A. W. Brouillet and Hugo P. Correll, both of San Francisco, for appellant.

Worthington, Park & Worthington and Leonard A. Worthington, all of San Francisco, for respondent Hartford, etc., Co.

STURTEVANT, Justice.

This is an appeal from an order made by the trial court on the 30th day of July, 1940, directing the refund to Hartford Accident & Indemnity Company of the sum of $1,000.85 and to Brita Lindblom and Olof Henry Lindblom of the sum of $125, alleged to be inheritance taxes erroneously collected. The controversy arose out of the following facts.

Erik Olof Lindblom died testate on September 23, 1928, being at the time of his death a resident of the county of Alameda, state of California. Probate proceedings were instituted in his estate, and on October 10, 1928, letters testamentary were granted to Central National Bank of Oakland.

The bank or its successor continued to act as executor of the decedent's will until September 4, 1936.

An inheritance tax appraiser was appointed by an order of the probate court, filed on April 15, 1929, to appraise the assets of the estate of the decedent, and to report to the court the amount of inheritance tax due upon any property passing in the probate proceedings. Thereafter, on October 2, 1929, the appraiser filed his inheritance tax report with the court.

The report found that the clear market value of the property in the decedent's estate amounted to $235,617.83. The report also found that the inheritance tax, based on the highest rate which would be possible on the occurrence of any of the contingencies provided for in the decedent's will, amounted to $2,582.35 on the interest of Olof Henry Lindblom, an adult son of the decedent, and a like amount on the interest of respondent Brita Lindblom, and a total tax on all interests of $5,194.70. On October 16, 1929, the court made its order fixing the inheritance tax. This order confirmed the appraiser's report and fixed the inheritance tax in exact conformity with the computations made in the report. The order has never been modified and is in full force and effect.

On March 21, 1930, a payment in the sum of $3,914.41 was made by the estate to the Alameda county treasurer on account of the inheritance tax due.

On the same day the respondent Brita Lindblom, and her brother Olof Henry Lindblom, filed their written election not to pay the balance of the inheritance tax until the contingencies on which the highest tax was based actually occurred. Also on March 21, 1930, said respondent and her brother, as principals, and Hartford Accident & Indemnity Company, as surety, filed a bond securing the payment of the balance of the tax.

On September 7, 1935, the executor of the decedent's will and the state controller entered into a written stipulation to compromise the balance of the contingent inheritance taxes remaining unpaid, which was approved by order of the court on December 13, 1935. On the latter date respondent, Hartford Accident & Indemnity Company, paid $1,120.85, the amount of the compromise balance of the tax specified in the compromise stipulation.

No further questions arose with respect to the inheritance taxes in said estate until June 27, 1940, when the respondents filed their petition for refund of $1,120.85, the portion of the inheritance taxes which had been paid pursuant to said compromise.

The appellant has brought up a bill of exceptions which purports to be a full, true, and correct statement of the evidence introduced and the proceedings had in the trial court. The bill contains copies of certain of the papers filed in the probate proceedings and a copy of the petition filed by these respondents. It does not contain any other evidence.

The appellant contends that the petition of the respondents did not state facts sufficient to support the order appealed from and that the evidence was insufficient to support said order. The respondents attempt to controvert the first contention but do not reply to the second. Among other things they state: "The contingency upon which the high tax was based has never occurred, the heirs have never come into enjoyment of the estate nor any portion thereof, *and there are insufficient assets*

even to pay the costs of administration. According to the high contingency tax each heir was to receive $98,308.91, and according to the low contingency tax $75,367.95. Neither of them has received anything from said estate *and according to the final accounting the costs of administration undoubtedly never will be paid.*" (Italics ours.) An examination of the record discloses no evidence to support the statements which we have italicized. The entire record shows that the respondents seek to attack the compromise made on September 7, 1935. There is not a word in the record showing that said compromise was not in accordance with the facts as they appeared on said date. That the estate of the decedent is embarrassed financially from some cause is apparent. Whether that condition arose prior to September 7, 1935, whether it existed at that time, or whether it has occurred since, the record is silent. Whether in the future the holdings by the estate of numerous corporate securities may be sufficient to pay off all claims and pay off the bequests, the record is entirely silent. In short the record does not disclose that the compromise was erroneous or that any payment of taxes has been erroneously made. It merely shows that the legatees have changed their minds about the advisability of paying the tax based on the highest contingency until a decree of distribution has been made.

The order appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 535

ANTONSEN v. PACIFIC CONTAINER CO. et al.

Civ. 11862.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1941.

1. Judgment ⇐407(1)

The denial of motion in prior action to set aside judgments entered in prior action did not preclude granting of relief in independent action in equity to set aside judgments, where issues presented in independent action were different from issues presented on motion in prior action.

2. Judgment ⇐435, 443(1)

Equity will grant relief from judgment obtained in prior action upon appropriate circumstances on ground of mistake or constructive or actual fraud, provided that such fraud or mistake is extrinsic rather than intrinsic.

3. Pleading ⇐336

The service of cross-complaints on plaintiff's attorney five days after attorney was suspended from practice of law was invalid, since attorney's authority to act as an attorney had ceased. Code Civ.Proc. § 286.

4. Attorney and client ⇐76

The authority of attorney to represent plaintiff in litigation ceases when attorney is suspended from practice of law. Code Civ. Proc. § 286.

5. Judgment ⇐425

Where cross-complaints were served on plaintiff's attorney five days after attorney was suspended from practice of law, and neither plaintiff nor person commencing action for plaintiff had actual knowledge of service or filing of cross-complaints, plaintiff could not be charged with knowledge thereof as matter of law, and was not negligent in failing to answer cross-complaints.

6. Judgment ⇐435, 443(1)

Where default judgment was entered against plaintiff in prior action on assumption that there had been valid service of cross-complaints, whereas in fact there had been no valid service, such judgment was properly set aside in independent action in equity either on ground of extrinsic fraud or extrinsic mistake.

7. Judgment ⇐456(1)
Limitation of actions ⇐100(4)

An independent action in equity, instituted on November 19, 1936, to set aside judgment entered in prior action on September 30, 1931, on ground of extrinsic constructive fraud or extrinsic mistake, was not barred by statute of limitations or by "laches", where facts constituting fraud or mistake were not discovered until August 11, 1936. Code Civ.Proc. § 338, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Louis J. Antonsen against the Pacific Container Company and others, to set aside two judgments entered in a prior action. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Rudolph J. Scholz, of San Francisco (Fredrik S. Waiss, of San Francisco, of counsel), for appellants.

Herman Weinberger, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in an action brought to set aside two judgments entered in a prior action.

[1] Plaintiff had previously made a motion in the prior action to set aside said judgments which motion was denied. The order denying said motion was affirmed on appeal. Antonsen v. San Francisco Container Co. et al., 20 Cal.App.2d 214, 66 P.2d 716. The present action was commenced upon the theory that plaintiff was entitled under the facts pleaded to have said judgments set aside in an independent action in equity. The issues presented in this action were different from those presented on the motion in said prior action and the decision on the motion in said prior action did not preclude the granting of equitable relief in the present case. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Estudillo v. Security Loan & Trust Co., 149 Cal. 556, 87 P. 19; Herd v. Tuohy, 133 Cal. 55, 65 P. 139; 15 Cal. Juris. 27.

On this appeal, defendants contend that the complaint did not state a cause of action; that the evidence was insufficient to warrant the granting of any relief to plaintiff; and that plaintiff's alleged cause of action was barred. The consideration of these contentions requires a statement of facts in addition to the statement contained in the opinion on the appeal in the prior action. Antonsen v. San Francisco Container Co. et al., supra.

In 1931, plaintiff, a resident of the state of Washington, gave to one Seely, a resident of the state of California, a power of attorney which followed generally the wording of the ordinary general power of attorney but was qualified by the words "* * * for the purpose of realizing on the undersigned's interests, without subjecting him to liability". The parties discuss the question of whether the power thus granted was sufficient to authorize the bringing of the action hereinafter referred to but, under the views hereinafter expressed, this question becomes immaterial.

Without the knowledge of plaintiff and without any direction or authorization from plaintiff, except as might be found in said power of attorney, Seely employed William F. Herron, an attorney, and commenced the above-mentioned action entitled "Antonsen v. San Francisco Container Co. et al." in March, 1931, in the superior court in San Francisco. Plaintiff did not learn that any action had been filed until 1936, being approximately five years after the filing of said action.

On April 1, 1931, said William F. Herron was suspended for one year from the practice of the law in California. Five days thereafter defendants served their answers and cross-complaints upon said William F. Herron. It does not appear that Herron notified anyone at any time of the purported service of said pleadings. On August 24, 1931, other counsel were substituted by Seely in the place of Herron. On September 30, 1931, defendants, without notice, entered plaintiff's default and obtained two judgments against plaintiff on their cross-complaints, one in favor of defendant Pacific Container Co. in the sum of $3,500 and the other in favor of defendant Sommer in the sum of $1,897.

Plaintiff first learned of said action and of said judgments on or about August 11, 1936, when an action was commenced against him in the state of Washington based upon said judgments. He immediately employed counsel in San Francisco and said counsel promptly filed the motion to set aside said judgments. The motion was denied on September 24, 1936, and plaintiff took the appeal to which reference has been heretofore made. The present action was commenced on November 19, 1936, during the pendency of said appeal.

All of the material facts above set forth were alleged and proved. Plaintiff also alleged and proved facts showing that he had a meritorious defense to the causes of action set forth in the cross-complaints in the prior action. Findings were made in favor of plaintiff on all of said issues. Defendants do not question the sufficiency of the allegations, evidence or findings on

the "meritorious defense" issue. Defendants do question, however, the sufficiency of the allegations, evidence and findings on the other issues to support the judgment setting aside the judgments in the prior action. It is apparently the contention of defendants that there was no allegation, evidence or findings to the effect that defendants had knowledge that Herron had been suspended from the practice of the law at the time that they served their answers and cross-complaints upon Herron and that there was therefore no actual fraud on their part in proceeding to act upon such service and to have the defaults and judgments entered against plaintiff on said cross-complaints.

[2] The weakness in this contention rests in the assumption that plaintiff was required to plead and prove actual fraud on the part of defendants in order to be entitled to the relief granted. It seems clear that equity will grant relief upon appropriate circumstances upon the ground of constructive as well as actual fraud (Herd v. Tuohy, 133 Cal. 55, 62, 65 P. 139; 15 Cal.Juris. 11, sec. 121), and also upon the ground of mistake (Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sullivan v. Lumsden, 118 Cal. 664, 50 P. 777; 15 Cal.Juris. 23, sec. 126), provided always that such fraud or mistake constitutes what has been termed extrinsic rather than intrinsic fraud or mistake. It appears unnecessary to discuss the distinction between extrinsic fraud or mistake and intrinsic fraud or mistake (see Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sullivan v. Lumsden, 118 Cal. 664, 50 P. 777; 15 Cal.Juris. 14, sec. 123; 15 Cal.Juris. 24, sec. 126; 23 Cal.LawRev. 79; 9 Cal.LawRev. 156, and cases cited), for it appears to be conceded that if the facts alleged and proved were sufficient to constitute fraud or mistake such fraud or mistake was extrinsic rather than intrinsic.

[3-6] While it seems entirely clear that there was no actual fraud on the part of defendants' counsel, we are of the opinion that plaintiff was entitled to the relief granted. In the prior action counsel for defendants and the trial court proceeded upon the assumption that there had been a valid service of the cross-complaints whereas in truth and in fact there had been no valid service thereof. When Herron was suspended from the practice of the law, his authority to act as an attorney ceased and he was no longer authorized to represent plaintiff in the prior action. See Code Civ. Proc., sec 286. Neither plaintiff nor Seely had any actual knowledge of the service or filing of the cross-complaints and plaintiff may not be charged with knowledge thereof as a matter of law. There was therefore no negligence on the part of plaintiff in failing to answer said cross-complaints. By the acts of defendants in causing said defaults to be entered and in seeking default judgments based upon the invalid service of the cross-complaints and by the act of the court in causing said default judgments to be entered, plaintiff was deprived, through no fault of his own, from appearing and presenting his defense to the alleged causes of action set forth in said cross-complaints. Under these circumstances, it would be a travesty on justice to permit said judgments to stand and the action of the trial court in setting aside said judgments may be justified either upon the ground of constructive fraud or upon the ground of mistake under the authorities above cited.

[7] Under the views which we have expressed, it becomes clear that there is no merit in the claim that plaintiffs' cause of action was barred by the statute of limitations or by laches. When a cause of action is based upon fraud or mistake, the cause of action is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake". Code Civ.Proc., sec. 338, sub. 4. The evidence showed and the trial court found that plaintiff did not discover the facts until on or about August 11, 1936.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

48 Cal.App.2d 584

SBARBARO v. ROSA et al.

Civ. 6440.

District Court of Appeal, Third District, California.

Dec. 19, 1941.

1. Set-off and counterclaim ⇐31

In action for partnership dissolution and accounting, a cross-complaint, filed by a defendant who was not member of partnership, to recover on plaintiff's note for half of amount due cross-complainant for services to partnership, was not properly before trial court.

2. Appeal and error ⇐931(1)

On appeal, the record must be considered in light most favorable to trial court's findings and any conflicts in testimony must be ignored.

3. Partnership ⇐83

A partner is entitled to compensation for services rendered to partnership by him pursuant to express or implied agreement between partners for payment of such compensation.

4. Partnership ⇐140

Equal partners may contract to pay wife of either partner for services rendered to partnership by her, so as to entitle her to recover on other partner's note for half of amount due for such services.

5. Husband and wife ⇐270(1)

The husband must bring all actions concerning community property of spouses.

6. Husband and wife ⇐259

A wife's earnings while living with husband constitute community property.

7. Husband and wife ⇐266

A husband and wife may contract between themselves that wife's earnings while living with husband may be retained by her as her separate property.

8. Husband and wife ⇐264

A husband's relinquishment of his interest in wife's earnings constituting community property and consent to wife's retention thereof as her separate property may be shown by evidence of husband's acts or conduct indicating that he did not regard such earnings as community property.

9. Husband and wife ⇐270(8)

One resisting liability on obligation, given by him for property or advantage received from married woman, on ground of her marriage, has burden of showing that she entered into transaction as agent of community, not for herself.

10. Husband and wife ⇐264

In action for partnership dissolution and accounting, evidence *held* sufficient to support trial court's finding that plaintiff's note, on which plaintiff's former partner's wife sought to recover by cross-complaint, was her sole and separate property.

Appeal from Superior Court, Siskiyou County; A. F. Ross, Judge.

Action by Antonio Sbarbaro against Alfiso Rosa, Rosa Rosa, and others, for dissolution of a partnership between plaintiff and first-named defendant and an accounting, in which defendant Rosa Rosa filed a cross-complaint against plaintiff on a note. From a judgment for cross-complainant, plaintiff appeals.

Affirmed.

J. Everett Barr, of Yreka, and Huston, Huston & Huston, of Woodland, for appellant.

Mark Brawman, of Yreka, for respondent E. Rosa.

Chas. E. Johnson, of Yreka, for respondents Rosa Rosa, Anita Calhoun, and Philip Gibson.

Tebbe & Correia, of Yreka, for respondents Bondi and Dora Bondi.

PARKER, Justice pro tem.

This case began as a proceeding to dissolve a partnership alleged to have existed between plaintiff Sbarbaro and the defendant Alfiso Rosa. The other parties defendant were included by reason of their alleged claims in or to certain partnership assets. An accounting was asked.

Issues were joined by the various parties and the case came on regularly for trial. The court below determined first the issue of partnership and therein an accounting was had. The partnership by decree was dissolved and the partnership accounts settled. The foregoing will suffice as a general statement of the main proceeding, inasmuch as there is no appeal from the action of the trial court in that regard.

[1] The defendant Rosa Rosa filed an answer and also a cross-complaint. It is with the cross-complaint and the judgment rendered thereon that we are here concerned. The trial of the issues raised by the said cross-complaint was had some months after the determination of the partnership and accounting issues and for all purposes was treated as an entirely separate action. In view of that situation we will refer to the parties as plaintiff and defendant, rather than as defendant and cross-complainant and plaintiff and cross-defendant. Rosa Rosa will be hereinafter referred to as plaintiff and Antonio Sbarbaro as defendant. At the outset we desire it to be understood that we are not holding that a cross-complaint such as the one before us was properly before the trial court. Indeed, the trial judge appreciated the point, as did counsel appearing. It was agreed, however, by all concerned that any irregularities of pleading should be ignored and the cross-complaint and answer thereto should be treated as a distinct and separate action without reference to the partnership action—the general idea being that as long as the plaintiff claimed the defendant owed her money there was no need of her filing a separate action. We might suggest that such irregularities would better be avoided.

Coming to the appeal before us: The plaintiff by appropriate pleading alleged the making and delivery of a promissory note in the sum and amount of $5,760. The maker of the note was alleged to be A. Sbarbaro, defendant, and the payee was the plaintiff. It was further alleged that plaintiff was the then legal owner and holder of the note and that no part of the sum promised had been paid. The prayer of the complaint was for the face of the note, plus interest, attorneys' fees and costs. The answer denied any indebtedness, denied the execution and/or delivery of the said or any note. The answer further alleged a lack of consideration and a lack of capacity in plaintiff to maintain the suit. As a further defense, fraud in the procurement of the note was alleged. We may at once eliminate the question of fraud from further discussion. The trial court found no fraud and no point is here urged on the sufficiency of the evidence to uphold the finding.

Thus prefaced, we may detail the facts of the case, or at least sufficient of them to illustrate the points of law raised. Defendant Sbarbaro and E. Rosa, the latter being the husband of the plaintiff Rosa Rosa, were partners in the conduct of a restaurant, bar and hotel. This partnership was commenced prior to the marriage of the Rosas. Likewise, prior to the marriage the plaintiff, Rosa, had worked for the partnership at a salary of one hundred dollars per month. After the marriage the services of the wife stopped for a time. At a subsequent period the plaintiff, then the wife of E. Rosa, resumed her employment and continued therein up to the date of the promissory note sued upon, covering a period of some twelve years.

At the end of the said period the partners, upon agreement, determined that the amount of wages earned by said wife totaled eleven thousand five hundred and twenty dollars and that no part thereof had been paid over the entire period of labor. Thereupon each partner agreed that he was liable for half of that amount and each partner assumed and agreed to pay his half. The defendant Sbarbaro, without ready funds, executed the note in question, payable to the plaintiff wife and concededly has paid no part thereof.

[2-4] The foregoing, of course, reflects the record most favorable to the findings and ignores any conflicts in the testimony. Judgment having been entered against the defendant, he prosecutes this appeal and relies for reversal upon the following points, to-wit: First. Appellant contends that the wife has no right or cause of action to recover for services rendered to a copartnership where the husband is an equal partner. This contention necessarily embraces and includes the claim of lack of consideration. We deem the point not well taken. The law is well settled that a partner is entitled to compensation for services rendered the partnership when and where there is shown to have been an express or even implied agreement between the partners to that effect. Dugan v. Forster, 104 Cal.App. 117, 285 P. 384; Parigian v. Phillips, 138 Cal.App. 702, 33 P.2d 426. Mrs. Rosa was not a partner; but if her husband, who was a partner, would be entitled to receive payment for services rendered, by the same token the partners could contract and agree to pay the wife of either partner for service. The findings of the court support such an employment and agreement and the evidence supports the finding.

[5-8] The next contention is that the earnings of the wife, being community property, it would follow that the cause of action was in the husband and that therefore in this action the plaintiff, Rosa Rosa, has no capacity to sue and no interest in the subject-matter of the action. In support of this contention, appellant cites the case of Johnson v. National Surety Company, 118 Cal.App. 227, 5 P.2d 39. The cited case is authority for the proposition that the husband must bring all actions that concern property of the community. This is conceded to be the law. It is likewise settled law that the earnings of the wife, while living with the husband, constitute community property. But it is likewise settled that husband and wife, between themselves, may contract that such earnings may be retained by the wife as her separate property. See Pacific Mutual Life Insurance Co. v. Cleverdon, 16 Cal.2d 788, 791, 108 P.2d 405, 406. This case, supporting the rule as stated, goes a little further into the question and we find the following language: "Such relinquishment and mutual consent may be shown by evidence of the acts or conduct of the husband, indicating that he did not regard the earnings as community property."

[9] In the case of Schwarze v. Mahoney, 97 Cal. 131, 31 P. 908, 909, we find this language: "Whenever, in a transaction with a married woman, another person has received from her any property or advantage for which he has given his obligation, the burden is upon him to show that the transaction was entered into by her as the agent of the community, and not for herself, if he would resist his obligation upon the ground of her marriage."

[10] The trial court found that the note in suit was the sole and separate property of Rosa Rosa and it has not been pointed out wherein the evidence is lacking to support the finding. We have carefully gone over the entire transcript and we find an abundance of evidence supporting the finding.

Other contentions are urged by appellant but upon analysis each respective claim reflects the two main points considered and a determination of the two points discussed does cover the arguments presented in support of the other claims of appellant, which in fact are mere repetition of the principles set out in the first arguments.

From the record before us we are mindful of the difficulties surrounding the trial of the cause, inasmuch as none of the parties involved seem to have been familiar with business practices or procedure. As in similar cases where a disrupted partnership presents itself there were many allegations and many denials and it is barely possible that the true facts might have been covered up a bit in certain instances.

In that light, we can appreciate the feeling of appellant, but his task was to convince the trial judge and having failed in that, we have no alternative but to accept the record before us.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.



48 Cal.App.2d 417

WATSON v. HEGER et al.

Civ. 13386.

District Court of Appeal, Second District, Division 2, California.

Dec. 11, 1941.

As Amended on Denial of Rehearing Jan. 9, 1942.

1. Easements ⇐30(2)

An easement created by grant is not lost by mere nonuser.

2. Easements ⇐30(1)

For an easement to be lost by mere nonuser, it must be accompanied by an implied intention of abandonment.

3. Easements ⇐30(1)

"Abandonment" of easement is a question of intention to be shown by the facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

4. Appeal and error ⇐907(3)

On appeal from judgment denying permanent injunction restraining trespass on property beyond strict limits of easement, District Court of Appeal would assume that evidence completely sustained findings, where appeal was upon judgment roll alone and trial court found that there was no abandonment.

5. Easements ⇐44(2)

The owner of servient tenement was entitled to injunction restraining owner of dominant tenement from trespassing in the future upon servient tenement beyond strict limits of easement, where owner of dominant tenement had made entrance through wall of building on dominant tenement connecting directly with easement, and easement was for ingress and egress only, and there was need to protect owner of servient tenement against encroachment because of narrowness of easement, and owner of dominant tenement had continually trespassed on servient tenement under claim of right up to time of trial.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Inez Watson, etc., against Anita L. Heger and others, for an adjudication that an easement created by reservation in a grant deed had been abandoned and to enjoin trespass upon plaintiff's property beyond the strict limits of the easement. From a judgment in favor of the defendants, the plaintiff appeals on the judgment roll.

Reversed with instructions, and attempted appeal from order denying new trial dismissed.

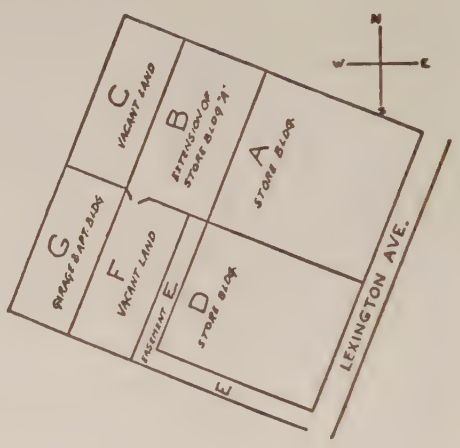
Arthur E. Briggs, of Los Angeles (Charles E. McGinnis, of Los Angeles, of counsel), for appellant.

Felix H. McGinnis, of Los Angeles, for respondents.

HANSON, Justice pro tem.

The main question presented by this appeal of plaintiff is whether an easement of ingress and egress, created by reservation in a grant deed, has been abandoned by acts of the present owner of the dominant tenement; and if not, whether the present owner of the servient tenement is entitled (1) to a permanent injunction restraining any trespass upon her property beyond the strict limits of the easement, and (2) to the costs of the suit below against the owner of the dominant tenement. In the court below judgment on all these questions went against the plaintiff, the owner of the servient tenement. The appeal is on the judgment roll alone.

As the two tenements and the easement are described in the various deeds involved by metes and bounds, we think it will simplify the discussion to set forth a diagram of the properties, with such labels thereon as are requisite to an understanding of it.



The diagram above set forth represents what is known as lot 4. In 1924 the then owner of lot 4 conveyed to the husband of plaintiff (to which interest she has succeeded) approximately the southerly half of lot 4, i.e., parcels D, E, F and G, reserving, however, an easement or right of way over parcel E for ingress and egress from the northerly half of the lot, i.e., parcels A, B and C, to Lexington avenue, with joint user of such parcel by the owners of the dominant and the servient tenement, without let or hindrance on the part of either. As the property surrounding lot 4 on three sides was privately owned, such easement was necessary as a means of vehicular ingress and egress to parcels B and C, as a brick building had been erected covering all of parcel A, which fronted its full width on Lexington avenue. Plaintiff's husband in the year 1931 built a store building covering parcel D, and also a garage, with an upstairs apartment, covering parcel G. The defend-

ant Anita Heger and her husband, as joint tenants, acquired the dominant tenement, parcels A, B and C, along with the right to the use of the easement, parcel E, for purposes of ingress and egress. In 1931 the joint tenants mentioned concluded to extend the store building located on parcel A—flush with its sides—so as to cover all of parcel B. As they planned there should be no break in the store wall immediately at the northerly end of the easement, parcel E, they sought and obtained from the husband of plaintiff a parol license to pass over parcel F before they built the extension. To that end a door was made in the wall when it was extended, at the point indicated on the diagram. After the extension was built and by June, 1938, such discord had arisen between the owners of the dominant and servient tenements with respect to the use of parcels E and F that a written notice of revocation of the license, and a cancellation of the easement over parcel E as well, was served by the owner of the servient tenement upon the owner of the dominant tenement. As the owner of the dominant tenement, in disregard of the notice, continued to use both parcels E and F for ingress and egress and storage, the instant suit was instituted on May 10, 1940.

Inasmuch as the trial court found that the parol license terminated upon the day notice was served, and as it assessed damages for the trespasses on parcel F, we are here initially concerned in deciding whether the trial court's finding that there had been no abandonment of parcel E by the owner of the dominant tenement is sustained. On the facts which we have recited—all of which are deduced from the pleadings and the findings—appellant here contends that as a matter of law there was an abandonment.

[1-4] It is well settled in this state that an easement created by grant is not lost by mere non-user. City of Vallejo v. Scally, 192 Cal. 175, 219 P. 63. For an easement to be thus lost it must be accomplished with an express or implied intention of abandonment; and abandonment, as has been said, is a question of intention, to be shown by the facts. People v. Southern Pacific Co., 172 Cal. 692, 158 P. 177. As the trial court found that there was no abandonment, and as the appeal is upon the judgment roll alone, we are required to assume that the evidence completely sustains the findings. The case of Fletcher v. Stapleton, 123 Cal.App. 133, 10 P.2d 1019, relied upon by appellant, is not in point.

[5] Appellant's next contention is that she was entitled to injunctive relief from future trespasses on parcel F by the owner of the dominant tenement. We think there is merit in this contention. As respondent in her brief admits an entrance was made through respondents' brick wall prior to the trial so as to connect directly with the easement, we think that plaintiff was entitled to a decree enjoining the owner of the dominant tenement from committing any trespasses on parcel F while making use of the easement in the future. The only right which the owner of the dominant tenement has is to use the easement for ingress and egress, and strictly within the limits of the easement. As it is evident from the width of the easement that only a very short vehicle could make a turn in the corner of the easement, there is need that the plaintiff should be protected against any encroachment on her parcel F. The contention of respondents that such an injunction should not be decreed because there was only a naked trespass is not sustained by the record. The trial court specifically found that right up to the time of trial the defendants had continually trespassed on parcel F under a claim of right, but that the number of trespasses was unascertainable. Under such circumstances there should have been a decree enjoining future trespasses. Mendelson v. McCabe, 144 Cal. 230, 77 P. 915, 103 Am.St.Rep. 78; Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A., N.S., 1024; Lintner v. Augustine Furniture Co., 199 Wis. 71, 225 N.W. 193.

Reversed with instructions to the trial court to amend its judgment so as to grant injunctive relief as herein indicated; to award to appellant her costs here and in the court below against the defendant Anita L. Heger personally and as executrix, and that it award in favor of each of the disclaiming defendants such costs only as each is entitled to against the plaintiff below. The attempted appeal from the order denying motion for new trial is dismissed.

The petition for rehearing is denied.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

PEOPLE v. KEARNEY. *

Cr. 3493.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1941.

Hearing Granted Jan. 15, 1942.

1. Infants ⇐13

An essential element of the crimes defined by section of the Penal Code, punishing lewd conduct with a child with intent to arouse or gratify lust or passion, is the intent with which the prohibited acts are done or committed. Pen.Code, § 288.

2. Infants ⇐13

The specific intent required to constitute a violation of section of Penal Code, punishing lewd conduct with a child with intent to arouse or gratify lust or passion, is that the prohibited acts be accompanied by the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the defendant or of the child involved in the alleged offense. Pen.Code, § 288.

3. Criminal law ⇐1172(4)

Where instructions are inconsistent or conflicting, such inconsistencies or conflicts constitute reversible error, if the substantial rights of the defendant have been affected.

4. Criminal law ⇐1172(4)

In prosecution for violating section of Penal Code punishing lewd conduct, inconsistencies between instruction which correctly stated the nature of the offense charged and following instruction, which in defining the word wilfully as used in prior instruction in effect told jury that no specific intent was essential to commission of the offense, constituted prejudicial error, in that jury was thereby given diametrically conflicting instructions. Pen.Code, § 288.

MOORE, P. J., dissenting.

Appeal for Superior Court, Los Angeles County; Arthur Crum, Judge.

Perry Kearney was convicted of violating section 288 of the Penal Code, and from the judgment of conviction and an order denying his motion for a new trial, he appeals.

Judgment and order reversed, and new trial ordered.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 288 of the Penal Code after trial before a jury, defendant appeals. There is also an appeal from the order denying his motion for a new trial.

Defendant relies for reversal of the judgment on the following propositions:

First: There is a prejudicial inconsistency in the following instructions of the trial court:

A.

*"Section 288 of the Penal Code provides that any person who shall wilfully and lewdly commit any lewd or lascivious acts * * * upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or such child, shall be guilty of a felony."*

B.

"The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law or to injure another, or to acquire any advantage."

C.

"The Court instructs the jury that it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case.

"Second: The testimony of the prosecuting witness relative to the manner in which defendant is alleged to have committed the acts constituting a violation of section 288 of the Penal Code is inherently improbable, and therefore there is no substantial evidence to sustain the implied finding of fact of the jury that defendant committed the acts charged against him."

[1-3] Defendant's first proposition is tenable and is governed by the following pertinent rules of law:

(1) An essential element of the crimes defined by section 288 of the Penal Code is the intent with which the prohibited acts

* Subsequent opinion 126 P.2d 612.

are done or committed. (People v. McCurdy, 60 Cal.App. 499, 502, 213 P. 59.)

(2) The specific intent required to constitute a violation of section 288 of the Penal Code is that the prohibited acts be accompanied by the intent "of arousing, appealing to, or gratifying the lust or passions or sexual desires" of the defendant or of the child involved in the alleged offense. (People v. McCurdy, supra; sec. 288, Pen. Code.)

(3) When instructions are inconsistent or conflicting, such inconsistencies or conflicts constitute reversible error, if the substantial rights of the defendant have been affected. (People v. Harris, 169 Cal. 53, 69, 145 P. 520; People v. Westlake, 124 Cal. 452, 457, 57 P. 465; see also, 8 Cal. Jur. [1922] 633, sec. 608.)

[4] Applying the foregoing rules to the instructions given by the court in the instant case, it appears that instruction A, supra, correctly instructed the jury. However instruction B, supra, in effect told the jury that, in order to constitute a violation of section 288, it was not required to find that defendant had any specific intent. Thus the two charges gave the jury diametrically conflicting instructions upon one of the essential elements of the crime with which defendant stood charged; and, since we cannot determine which instruction the jury followed, this error was prejudicial to the substantial rights of the defendant. (People v. Snyder, 15 Cal.2d 706, 710, 104 P. 2d 639.)

The foregoing error was accentuated by the giving of instruction C, supra, since this instruction, when read in the light of the other two instructions which were given, in effect, instructed the jurors that, if they believed that defendant committed the acts charged against him, they should find him guilty, irrespective of the intent with which the acts were committed.

In view of the conclusion which we have reached, it is unnecessary for us to pass upon defendant's second proposition. It is to be noted, however, that there was a direct conflict in the testimony, and that defendant urges his second proposition with earnestness, calling attention, not only to discrepancies in the testimony of the prosecutrix, but to her extraordinary statement that, although she was only 10 years old, the defendant had intercourse with her while both of them were standing on their feet. This contention of defendant finds substantial support in the decisions of our Supreme Court in People v. Adams, 14 Cal.2d 154, 93 P.2d 146, and People v. Headlee, 18 Cal.2d 266, 115 P.2d 427. In People v. Adams the testimony on behalf of the prosecution was stronger than the testimony introduced by the People in the instant case.

For the foregoing reasons the judgment and order are and each is reversed and a new trial is ordered.

W. J. WOOD, J., concurred in the judgment.

MOORE, Presiding Justice (dissenting).

I dissent. To reverse the judgment in this case upon the technical point ascribed in the majority opinion is hypertechnical. In order to demonstrate the injustice of reversing the judgment upon the ground stated it will be necessary to state the accusations and the evidence which governed the deliberations and the verdict of the jury.

The information against defendant contained three counts: (1) violation of section 288 of the Penal Code on March 22, 1941; (2) violation of section 288 on the 13th of March, 1941, and (3) commission of rape on March 13, 1941. Mary Louise Lence, 10 years of age, was the victim named in each count. Prior to the submission of the case, upon motion of the district attorney the third count was dismissed. Verdicts of guilty were returned on counts 1 and 2. Thereafter a new trial was granted as to count 1 on the ground that the court had misdirected the jury. I shall discuss all four assignments.

Mary lived with her parents on property belonging to appellant. On the afternoon of the 13th day of March, Mrs. Kearney telephoned Mrs. Lence and requested Mary to come over for a visit. Mary arrived at the Kearney home about 1 o'clock in the afternoon and shortly after her arrival, she testified, a large dark-haired woman called on Mrs. Kearney who accompanied the lady to the front room. Mary testified that while Mrs. Kearney and the stranger were in the living room, she stayed in the kitchen with Mr. Kearney; that he was frying fish; that he turned the flame low, opened the door leading to the bath room; that he put her against the door and removed her panties and performed the act described in count three of the information; that his efforts to penetrate were unsuccessful; that while she was thus standing against the

door which stood open into the kitchen, she could see the bath tub containing clothes and could see the bath room wall.

The trial consumed the greater portion of two days commencing June 11, 1941. Mary's testimony required practically one whole day. We shall return to a consideration of the facts after disposing of the alleged errors in the instructions.

There is no inconsistency in instructions A and B. As stated in the second instruction the word "wilfully" when applied to intent implies simply a purpose to do the act with which defendant is charged. When a man is engaged in the commission of a crime his mind is not occupied with the consideration of whether the act in which he is engaged is a violation of law. His primary thought is to do the thing at hand. Therefore in determining whether a person did an act wilfully, the jury's function is to determine whether defendant purposed to do the act of which he is accused. Appellant relies upon the case of People v. Snyder, 15 Cal. 2d 706, 104 P.2d 639. This was a prosecution for attempted murder. There the court instructed the jury "that a person is presumed to intend to do that which he voluntarily and wilfully does in fact do and is presumed to intend all the natural, probable and usual consequences of his acts". That was, of course, prejudicial for the reasons (1) that the crime of attempted murder requires proof of a specific intent to kill the victim, and (2) that such intent must be proved. In that case, the trial judge even refused an instruction to the effect that the firing of a gun at the victim in itself creates no presumption of law that defendant intended to murder the person fired at. However, it was held by the Supreme Court impliedly that the instruction, while prejudicial, as applied to the charge of attempted murder, would not have been prejudicial had it been limited solely to those offenses charged in the indictment that did not require proof of a specific intent.

In making proof of a lewd and lascivious act by an adult male upon the body of a child 10 years of age in the manner described by the prosecutrix, it is not necessary to make proof of the intention of the miscreant. His very act is in itself sufficient proof of intent. The fact that the act is done "wilfully" establishes his intent and, as instruction B says, "implies simply a purpose or willingness to commit the act referred to". The language of instruction B "that in order to constitute a violation of section 288, it was not required to find that defendant had any specific intent" is the expression of a fundamental principle of criminal law when referring to malum prohibitum.

There is no error in instruction C. It renders unnecessary proof of the exact hour of the commission of the crime. The purpose of that instruction was to relieve the jury of the necessity of determining whether the criminal act was committed at 1 o'clock or at a later hour on March 13. The instruction could have been erroneous only if appellant had pleaded an alibi and had undertaken to establish his presence at another place at the time designated by the prosecutrix but there was no suggestion in any testimony that appellant was not present on the occasion of the visit of Mary and her mother to appellant's home on March 13. His own testimony established the fact of his presence at his home at the time in question. His sole contention at the trial and in his voluminous briefs before this court has been and is that the story of the prosecutrix is "incredible" and "physically impossible". For the foregoing reasons, the cases cited by appellant (People v. Morris, 3 Cal.App. 1, 10, 84 P. 463, and People v. Waits, 18 Cal.App.2d 20, 62 P.2d 1054) are not in point.

In his effort to defeat the judgment appellant contends that there is no substantial evidence to support the verdict and that the story of Mary is inherently improbable. He points out: (1) that he and his wife contradicted Mary's testimony that Mrs. Kearney telephoned Mrs. Lence; they testified that Mrs. Lence telephoned to Mrs. Kearney; (2) that they contradicted Mary as to the presence of the large dark-haired woman during the time appellant was frying fish; (3) that Mary's testimony was that she saw the bath tub and the things in it while she stood with her back against the door was impossible because the door opened into the kitchen and stood substantially at right angles to the door if closed; (4) that while he and Mrs. Kearney testified that Mrs. Kearney was absent from the kitchen during the fish fry not more than two minutes, and that such absence was during the visit of Mrs. Lence, with Mrs. Kearney in the front room, Mary's testimony was that when the offense occurred Mrs. Kearney was in the front room with a strange lady for five minutes.

The fact that Mary was contradicted by appellant and his wife is not proof of the

falsity of her testimony or of the inadmissibility of the occurrences and facts related by her. Whether the act occurred during the presence of a large dark-haired woman, as testified by Mary, or whether it occurred later during the call of Mrs. Lence, is not such a discrepancy as should vitiate the verdict. The testimony that Mary could see the bath tub during the moments of the act while her back was against the door is not incredible. Exhibits filed show both the kitchen and the bath to be small rooms. To stand by the door in the position described by Mary might easily leave the impression upon the child's mind under such circumstances that she had been in either room. The position in which she stood was not twenty-four inches from the bath room, a large portion of which was clearly visible including the tub and its contents. She never said that appellant closed the bath room door. Her testimony was "then he opened that door that leads to the bath room and there was some cupboards there and then when he put the door against hem you could not see anything," etc.

Whether the criminal act occurred during the presence of the large dark-haired woman or during a call later by Mrs. Lence is not important. Whether Mrs. Kearney was absent from the kitchen two minutes or twenty minutes, it is not unreasonable to believe the testimony of the child who describes the act done with every evidence of sincerity and truthfulness. Opinions as to the passing of time are often shown to have been ill-founded. If appellant intends to argue that the alleged discrepancies proved the inherent improbability of her story, he is not supported by the authorities. Appellant urges that the case of People v. McCullough, 38 Cal.App.2d 387, 101 P.2d 531, should govern. The McCullough case is not at all parallel. The prosecutrix was a child seven years of age. She was not definite as to the time of the alleged crime. The child was uncertain as to the manner of the commission of the crime and "in no essential particulars was her testimony directly corroborated". Also his alibi was established by competent proof.

In addition to the "discrepancies" suggested, appellant directs our attention to the fact that the physician who examined Mary on March 24th, eleven days following the events narrated by her, testified that there was no irritation and that her findings were negative as to any proof of penetration. The period elapsing between the date of the occurrence and the day of the examination was sufficient to allow for the healing of any irritation caused by the act. Such finding does not render the child's testimony a nullity. She did not testify that a penetration was accomplished but only an act that was sufficient to constitute a violation of 288 of the Penal Code.

The contention of appellant that the parents of Mary cunningly planned a situation whereby a charge could be brought against appellant is not sustained. The parties were neighbors; the Lence family were tenants of appellant; there had been no misunderstandings; Mrs. Kearney was fond of Mary and thought "she was a lovely girl". She had asked Mary to visit her on that very day. The two were occupied in reading a newspaper together before their interruption. Facts admitted by the Kearneys lend support to Mary's testimony: appellant was frying fish; Mary was left with him while Mrs. Kearney visited with the large lady in the living room between which and the kitchen was another room. Moreover, Mary's testimony that in removing her panties appellant broke the elastic; her mother, upon their return home, discovered the impaired waist band and she removed the garment. It was filed as an exhibit in the case.

Any doubt as to whether the act described was physically impossible was resolved by the jury against appellant and by the judge on the motion for a new trial. People v. Stangler, 18 Cal.2d 688, 117 P.2d 321, 323. "An appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court." Ibid. It is not suggested nor does the record indicate that the jury was moved by passion, prejudice or sympathy to convict appellant. It was their exclusive province to determine the credibility of the witnesses. People v. Becker, 140 Cal.App. 162, 35 P.2d 196; People v. Parker, 74 Cal.App. 540, 550, 241 P. 401. The trial proceeded with due regularity and decorum. The fact that the trial judge found no reason to disturb the verdict shows his impression of the prosecutrix's testimony. People v. Jefferson, 31 Cal.App.2d 562, 88 P.2d 238. Before this court may assume the functions of the trial jury, the evidence in support of the verdict must be so

obviously and inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment. People v. Antunez, 28 Cal.App. 740, 742, 153 P. 963. For the appellate court to declare the testimony unworthy of belief would be to assume what could not legally be supported. People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186.

If all discrepancies in Mary's testimony existed as claimed by appellant, they would not warrant our disturbing the findings of the jury. People v. Christensen, 32 Cal. App.2d 380, 89 P.2d 1095. Contradictions and inconsistencies in the testimony of a witness alone will not constitute inherent improbability. People v. Amadio, 25 Cal. App. 729, 145 P. 151. Neither is it sufficient in order to black out the testimony of the prosecutrix that it discloses unusual circumstances. People v. Collier, 111 Cal. App. 215, 226, 295 P. 898. Neither does the failure of memory or inaccuracy of observation of a ten-year-old child with reference to contemporaneous collateral events, occurring with cinematic speed at the time she was subjected to an unusual fright or excitement, warrant the conclusion that her testimony as to the fact in issue is inherently incredible. Whether Mary was confused with reference to the time of her arrival at the Kearney home; whether a large dark-haired strange woman came or whether Mrs. Lence only called, or whether the occurrences in the kitchen were exactly as Mary detailed; or whether she stood against the door in the bath room, whether she was confused with respect to such matters and whether her memory and her credibility were thereby affected were questions solely for the jury to determine. The child was on the witness stand during the greater part of a day. Her cross-examination was as severe as though she had been the prisoner and it covered every phase of the case. Nothing in her testimony discloses a desire to fabricate a vicious story against a man who had theretofore been a friend of her family. There was good reason why she should have held appellant in high esteem.

Appellant suggests that the case should be governed by People v. Benson, 6 Cal. 221, 65 Am.Dec. 506, and People v. Adams, 14 Cal.2d 154, 93 P.2d 146. The only point made in those cases is that the court should caution the jury against the danger of conviction on the uncorroborated testimony of a prosecutrix when requested to do so by defendant.

If conviction was based upon the testimony of appellant and his wife that Mrs. Lence was the only lady who visited their home while Mary was there, then the testimony of Mrs. Lence that she and Mrs. Kearney left Mary in the kitchen with appellant; that on returning home she found the elastic band in Mary's garment broken, —these facts, taken with the uncontradicted proof that Kearney was there, frying fish, are concurrent circumstances which tend to corroborate Mary's narrative. They justify the finding that the testimony of the child was the "result of actual experience, rather than a fancy or figment of her imagination". People v. Stangler, supra. This court will not attempt to determine the weight of the evidence "but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt". People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

Appellant's contention that he was acquitted of violating section 288 by reason of the dismissal of the count charging rape because both charges depended upon proof of the same act cannot be sustained. Although the two counts were predicated upon events of the 13th day of March, they constituted separate offenses. Pen.Code, sec. 261; Pen.Code, sec. 288. Merely because section 288 includes the act described in section 261 does not prevent the prosecution of the defendant under either charge if the other is dismissed. People v. Stangler, supra. Moreover, a "verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count". Pen.Code, sec. 954.

Finally appellant's contention that the court erred in its exclusion of certain testimony sought to be elicited upon the cross-examination of the prosecutrix cannot be sustained. The girl in describing the posture of appellant at the time of the criminal act testified that "he stooped down real low and his shoulders were back, the abdomen forward". Defense counsel then read her testimony at the preliminary hearing, in which she described the posture of appellant as follows: "His knees were forward practically touching mine and his hips were to the reverse." Her testimony at the preliminary trial was stricken by the

court with the comment that he had not seen any impeachment in it. We see no error in the court's ruling. It would have been the height of absurdity to hold that such testimony was an impeachment of her testimony given on the stand. It is not to be expected that a child of ten years subjected to such oppression as that described could have given a photographic impression of the exact curves of the lines of the body of her assailant during the moment of the assault. The child having testified, it was a proper exercise by the trial judge of his right to comment upon evidence to aid the court. Const., art. VI, sec. 19. The same may be said of the court's exclusion of the testimony sought from the prosecutrix when her testimony at the preliminary trial was read, in which she said that appellant "did not take hold of her with his hands any place during the act", although she testified before the jury that "he pulled my knees apart with his hands after my panties had come down". Mary's testimony that she had not talked about her testimony to her mother or to anyone else is of no material value. Since the beginning of the trials of criminal cases timid witnesses have denied having talked about their testimony when asked with reference thereto by the cross-examiner. Such inquiries are oftentimes made of inexperienced witnesses for the sole purpose of committing them to a statement whose falsity is easily demonstrable.

In view of the proof and of the freedom of the record from prejudicial error, the judgment should be affirmed.



48 Cal.App.2d 518

FOWLER v. HANSEN et al.

Civ. 13309.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1941.

Hearing Denied Feb. 13, 1942.

1. Pleading ⇐350(3)

A motion for judgment on the pleadings, like a general demurrer, admits for purpose of argument every well pleaded allegation of complaint.

2. Specific performance ⇐86
Wills ⇐58(1)

One may make a valid agreement binding himself to dispose of his property in a particular way by will and a court of equity will enforce such an agreement specifically by treating heirs as trustees and compelling them to convey the property in accordance with contract.

3. Specific performance ⇐86
Wills ⇐58(1), 59

A contract to make a will, to be binding, must show adequate consideration, must be definite and certain, and the remedy asked for by one seeking specific performance thereof must not be harsh or oppressive or unjust to innocent third parties or against public policy.

4. Specific performance ⇐86

Where services are to be rendered as consideration for agreement to make will, they must be of such peculiar, extraordinary or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compensate for them in money, in order that specific performance may be had.

5. Wills ⇐58(1)

Prior to statutory amendments in 1905 and 1907 it was not required that an agreement to make a will should be in writing. Civ.Code, § 1624; Code Civ.Proc. § 1973.

6. Specific performance ⇐114(4)

In suit for specific performance of contract by decedent to make will leaving one-half her property to plaintiff and wife, decedent's sister, if they would take decedent's mother into their home and care for her, allegations of years of care of decedent's mother by plaintiff and his deceased wife from 1896 to 1922 and further allegation that in 1908 decedent wrote asking them to move to Los Angeles and bring the mother with them and establish home there and that plaintiff and wife did so, sufficiently met requirements of equity that such services must be peculiar to warrant enforcement of agreement.

7. Pleading ⇐8(3)

In suit for specific performance of agreement by decedent to make will leaving her property to plaintiff and wife if they would

take decedent's mother into their home and care for her, allegation that decedent's letter in 1908 "reaffirmed the aforesaid oral contract", must be viewed as no more than the statement of a "conclusion" which, for purpose of determining whether complaint stated a cause of action, should be disregarded.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

8. Specific performance ⇐121(3)

In suit for specific performance of contract by decedent to make will leaving one-half her property to plaintiff and wife if they would take decedent's mother into their home and care for her until she died, evidence showed that relief sought would not work injustice or be unduly harsh toward respondents, a granddaughter to whom decedent left one dollar under her will and an old ladies' home to which decedent left the balance of her estate, and would not preclude enforcement of contract.

9. Specific performance ⇐114(2)

In suit for specific performance of contract by decedent to make will leaving one-half her property to plaintiff and wife, decedent's sister, if plaintiff and wife, deceased at time of suit, would take the mother into their home and care for her until she died and also remove to Los Angeles and establish a home there, a sufficient "consideration" was alleged, since in such a case either a benefit to the promisor or a detriment to the promisee is sufficient consideration. Civ.Code, § 1605.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

10. Specific performance ⇐17

In suit for specific performance of contract by decedent to leave one-half her property to plaintiff and his wife if they would take decedent's mother into their home and care for her until she died, if the benefits under the will as contemplated by the contract alleged were to be several in that both plaintiff and his wife were to be beneficiaries, and not joint, that fact would not of itself bar plaintiff from his right to equitable relief, where plaintiff's wife had died.

11. Specific performance ⇐114(4)

Allegations of complaint to effect that about July 20, 1908, plaintiff and his wife, decedent's sister, received a letter from decedent, requesting plaintiff and wife to move to Los Angeles and bring decedent's mother with them and establish home there and care and provide for mother until time of her death and that decedent promised to leave will giving plaintiff and wife one-half of all decedent's property and that plaintiff and wife fully performed the services called for by contract, were sufficient to state cause of action for specific performance of decedent's contract to make such will. Civ.Code, § 1624; Code Civ.Proc. § 1973.

12. Specific performance ⇐114(1)

Where complaint stated cause of action in alleging that in 1908 decedent made contract obligating decedent to make a will leaving to plaintiff and his wife one-half of decedent's estate in consideration of services to decedent's mother, further allegations that in 1931 decedent obligated herself to leave plaintiff, then a widower, one-half of her estate in consideration of his services to her personally, did not affect cause of action previously stated.

13. Pleading ⇐35

Where complaint in suit to enforce contract by decedent made in 1908 to make a will giving plaintiff and wife one-half of all decedent's property in consideration for services to decedent's mother stated good cause of action on such contract, allegation that in 1931 decedent reaffirmed the terms of the aforesaid contract was "surplusage" and must be disregarded where services to the mother had been completed and there was nothing more to be done by plaintiff and wife to entitle them to benefits promised by decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

14. Wills ⇐64

Where decedent made contract in 1908 to make will leaving one-half her estate to plaintiff and wife in consideration for their services to decedent's mother who died in 1922, fact that decedent may have said in 1931 that she would do that which she was already bound to do as prelude to entering upon a new and different contract to leave plaintiff, then a widower, one-half of decedent's estate in consideration of his services to her personally did not relieve decedent of obligation to perform her part of the previous contract.

15. Specific performance ⇐116½

In suit for specific performance of contract by decedent to leave one-half of her

estate to plaintiff for care of decedent's mother, amendment alleging that plaintiff received letter about January, 1897, containing request that plaintiff and wife keep and care for mother and agreeing to leave them one-half of decedent's property and that they accepted offer and performed the services was improperly refused in view of allegations of original complaint. Civ.Code, § 1624; Code Civ.Proc. § 1973.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by William A. Fowler against Ethelbell M. Hansen and others, to compel specific performance of a contract to make a will and to impress a trust upon the estate of decedent, Mrs. Alice Bauer. From a judgment for defendants, plaintiff appeals.

Reversed.

Hearing denied; EDMONDS, HOUSER, and TRAYNOR, JJ., dissenting.

James V. McCandless, Wendell W. McCanles, and W. I. Gilbert, all of Los Angeles, for appellant.

Meserve, Mumper & Hughes, Edwin A. Meserve, and Roy L. Herndon, all of Los Angeles, for respondent Ethelbell M. Hansen.

William Ellis Lady, of Los Angeles, for respondent Sarah Daft Home.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment in a suit to compel specific performance of a contract to make a will and to impress a trust upon the estate of decedent, Mrs. Alice Bauer. Judgment was entered following order granting motion for judgment on the pleadings and on a portion of the opening statement. Plaintiff was denied leave to file an amended complaint.

The record discloses that plaintiff William A. Fowler married Ella Vermillion, sister of decedent Mrs. Bauer, in 1896. Their mother, Mrs. Malinda Vermillion, went to live with the Fowlers in their home and was cared for by them until her death in May, 1922. Ella Fowler passed away in 1930, and a few months later Mrs. Bauer came to live with plaintiff and was cared for in his home until her death in March, 1939. Her sole heir was defendant Ethelbell M. Hansen, granddaughter and adopted child. Decedent left a will dated November 15, 1937, leaving her granddaughter "one dollar and no more because of her unkindness to me", five hundred dollars each to a sister and a brother and "the balance of my estate to the old ladies Home located in Salt Lake Utah to be used for the comfort of the old ladies". This old ladies' home was identified as being defendant the Sarah Daft Home.

Plaintiff bases his suit on a claim that decedent, Mrs. Bauer, agreed to execute and leave a will under which he and his wife, who has since died, would receive one-half of her estate. It is alleged that she executed such a will but that it was not in effect at the time of her death. The complaint contained allegations as follows: that on or about October 1, 1896, decedent wrote a letter to the Fowlers asking them to take the mother, Mrs. Vermillion, into their home and care for her during her lifetime, stating that decedent "would see that they were fully and generously paid for such service and care"; that about December 1, 1896, decedent came from her home in Salt Lake City, Utah, to the home of the Fowlers in Texas and entered into an oral agreement with them for the care of Mrs. Vermillion, promising that decedent "would pay and fully remunerate plaintiff and his wife for such care, and if she was unable to do so during her lifetime she would leave a will giving them one-half of her estate". In his opening statement counsel for plaintiff indicated that he was not relying upon these agreements in 1896.

The complaint contained further allegations upon which plaintiff chiefly relied, to the effect that about July 20, 1908, the Fowlers received a letter from Mrs. Bauer which "reaffirmed the aforesaid oral contract" and requested them to move to Los Angeles, bringing Mrs. Vermillion with them, to establish a home there, care and provide for the mother and "administer unto her welfare and wishes and render unto her love and affection until the time of her death", and that decedent promised that in return therefor she, Mrs. Bauer, would make and leave a will giving plaintiff and his wife one-half of all her property. It is alleged that plaintiff and his wife fully performed the services called for by the contract.

The complaint continues by alleging an oral agreement by Mrs. Bauer when she came to live with plaintiff in 1931, to the effect that if he would similarly care for her she would make provision in her will leaving him one-half of her estate, and that he carried out the terms of this agreement

and cared for Mrs. Bauer until her death in 1939. Allegations were included to the effect that the services thus rendered to the mother and to Mrs. Bauer were so peculiar, extraordinary, unusual and exceptional in nature that they were not intended to be and could not be compensated for in money.

[1] The only other portion of the opening statement to which respondents direct our attention as having been in any way determinative of the trial court's ruling is the declaration that decedent left an estate valued at about $240,000. Our primary concern, therefore, has been the question of the sufficiency of the complaint. Respondents concede that their motion for judgment on the pleadings, like a general demurrer, admits for purposes of argument every well-pleaded allegation of the complaint. 21 Cal.Jur. 234, § 163. We have considered, therefore, the question whether such an agreement as the one here involved is valid and enforceable, and if so, what elements must be pleaded so as to state facts sufficient to constitute a cause of action.

[2-5] A person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement specifically by treating the heirs as trustees and compelling them to convey the property in accordance with the terms of the contract. Such a contract must show adequate consideration, must be definite and certain, and the remedy asked for must not be harsh or oppressive or unjust to innocent third parties or against public policy. Where services are to be rendered as consideration for the agreement they must be of such a peculiar, extraordinary or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compensate for them in money. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Monsen v. Monsen, 174 Cal. 97, 162 P. 90; Steinberger v. Young, 175 Cal. 81, 165 P. 432; Pugh v. Bell, 21 Cal. App. 530, 132 P. 286; Flood v. Templeton, 148 Cal. 374, 83 P. 148. Prior to the amendments in 1905 and 1907 of our codes, Civ.Code, § 1624; Code Civ.Proc., § 1973, it was not required that such an agreement should be in writing. Staples v. Hawthorne, 208 Cal. 578, 283 P. 67.

[6] In considering the nature of such cases in which relief was afforded, the court in Jaffee v. Jacobson, 8 Cir., 48 F. 21, 25, 14 L.R.A. 352, observed that "in most, if not all, instances they [the promisees] had lived in the promisor's household as members of his family, and had rendered faithful and affectionate services for a long period of years. It was not possible, therefore, to administer adequate relief, otherwise than by decreeing specific performance." In Flood v. Templeton, supra, the consideration for the contract by decedent to devise certain property on his death was not any service but a fixed monetary demand. On appeal judgment for plaintiff was reversed because in such a case the action should be one in law, not in equity. In that case, however, the court quoted with approval from the case of Stellmacher v. Bruder, 89 Minn. 507, 95 N.W. 324, 99 Am.St.Rep. 609, as follows: "If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promisee whole, specific performance will not be decreed. But where the consideration of the contract is that the promisee shall assume peculiar and domestic relations to the promisor, and render to him services of such a peculiar character that it is practically impossible to estimate their value by any pecuniary standard, specific performance will be decreed." [148 Cal. 374, 83 P. 151.] It is apparent that in the instant case the allegations of years of care by plaintiff and his deceased wife sufficiently meet the requirements of equity that such services must be peculiar, for in the very nature of things twenty-six years, from 1896 to 1922, or even fourteen years, from 1908 to 1922, so changed conditions in the lives of the Fowlers that "it is out of the power of an earthly tribunal to restore the parties to their original situation and environment". Healey v. Simpson, 113 Mo. 340, 20 S.W. 881, 883.

From the foregoing it will appear that this case is readily distinguishable from the cases of De Mattos v. McGovern, 25 Cal. App.2d 429, 77 P.2d 522, in which plaintiff was employed by decedent in the conduct of his business; Zaring v. Brown, 41 Cal.App. 2d 227, 106 P.2d 224, in which an ordinary lodging-house proprietor rendered personal services in giving unprofessional care and attention to a sick man; Morrison v. Land, 169 Cal. 580, 147 P. 259, in which plaintiff rendered services as assistant manager of a hotel; and Zellner v. Wassman, 184 Cal.

80, 193 P. 84, in which the promise to make provision for plaintiff in his will was made by decedent solely by way of security to plaintiff for the payment of a specific sum of $5,000. In Baumann v. Kusian, 164 Cal. 582, 129 P. 986, 44 L.R.A.,N.S., 756, where decedent took two orphan children and cared for them, and they later sought to claim her estate, relief was denied them because the trial court found there was no contract to make a will and leave property to them, and because of the absence of proof of a definite and certain contract the adverse judgment was upheld on appeal.

The instant case is likewise readily distinguishable from the cases of Kurtz v. De Johnson, 42 Cal.App. 221, 183 P. 588; Christin v. Clark, 36 Cal.App. 714, 173 P. 109, and Parsons v. Cashman, 23 Cal.App. 298, 137 P. 1109, 1111.

In McCabe v. Healy, supra, decedent, a man of fifty-four years, resident of California, visited his old home in Ireland in 1881 and persuaded his nephew, a lad of fourteen years, to accompany him on his return to this state. He agreed with the boy and his mother and guardian that if the nephew would return with him to California, accept his care and instruction and in turn industriously learn and care for the uncle's business and property, the latter would make a will leaving the nephew his property. Our Supreme Court reviewed comparable cases in which equity has compelled the granting of relief, and affirmed the judgment for the nephew. It distinguished the case of Owens v. McNally, supra, observing that there the court had denied relief not only because the agreement lacked certainty and definiteness but also because subsequent to the making of the contract right of innocent third parties had intervened, and specific performance, if decreed, would be harsh and oppressive and unjust to those innocent third parties.

In Staples v. Hawthorne, supra [208 Cal. 578, 283 P. 70], a judgment adverse to plaintiff was upheld because of the unreliable nature of the evidence offered by plaintiff, the court on appeal stating, "we think there is ample evidence of facts and circumstances which tended to impeach the credibility of the evidence relied upon by the plaintiff".

In Monsen v. Monsen, supra, judgment for plaintiff was reversed because the evidence was insufficient to support the findings of the trial court as to the contract upon which the action was alleged to have been based. But in Steinberger v. Young, supra [75 Cal. 81, 165 P. 434], the judgment favorable to plaintiff was upheld because the evidence was "materially stronger than that presented in the Monsen case". It should be noted that the evidence thus approved in the Steinberger case included declarations of decedent, offered by plaintiff, which "were properly admitted as the declarations of a decedent against her pecuniary interest". Evidence offered in the same case by the heirs to show declarations of decedent in favor of their position was properly rejected. Rulofson v. Billings, 140 Cal. 452, 74 P. 35.

[7] It appears that the written agreement of July, 1908, was definite and certain. The allegation that the letter "reaffirmed the aforesaid oral contract" must be viewed as no more than the statement of a conclusion, which for purposes of our consideration on this appeal should be disregarded. The complaint alleges that the Fowlers received a letter from decedent asking them to do certain definite things: (1) move to Los Angeles, (2) bring Mrs. Vermillion with them, (3) establish a home where the mother could live with them, and (4) care and provide for the mother and administer unto her welfare and wishes and render unto her love and affection until the time of her death. In the same letter decedent promised as compensation that she would leave a will giving them one-half of her property. The complaint further alleges that the Fowlers fully and faithfully performed their part of the contract. It would be a strained and unwarranted construction of the quoted phrase to hold, as urged by respondents, that by inference it included language to the effect that decedent would fully pay the Fowlers for all they were doing for her mother, and that only in the event of her inability to do so would she make provision for them in her will. On the contrary, it appears from the pleading itself that the compensation intended by decedent for the peculiar and exceptional services and loving care and attention which they were giving to the mother—and their acts in taking up residence in a city other than that in which they had been living, and, we may assume, undergoing readjustments in their social and economic relationships—was to be, not any payment in dollars and cents during her lifetime, but that upon her death they should benefit to the extent of one-half of her estate. There is no indication in

the pleadings that during the twelve years from 1896 to 1908 Mrs. Bauer had paid anything for the care of her mother, or that she intended to do so from 1908 to the time she might pass away, except for the quoted phrase as to reaffirmation.

As we examine the complaint in considering whether the Fowlers carried out decedent's wishes in regard to her mother, we find a further allegation of an agreement under which Mrs. Bauer herself entered the home of plaintiff to be loved and cared for, and remained there until her death; and, as observed in Pugh v. Bell, 21 Cal. App. 530, at page 535, 132 P. 286, at page 288, such cases often "illustrate well the truth of the old saying that 'actions speak louder than words' ". Proof of these facts would justify an inference that Mrs. Bauer was so impressed by the way in which plaintiff's home had provided for her mother the priceless ingredients of affection and companionship as well as satisfaction of her material wants that she chose the same home as a haven during her own declining years.

[8] In analyzing the relationship of the parties to determine whether the relief sought by plaintiff would work an injustice or be unduly harsh toward the respondents, it appears evident that no injustice or harshness would ensue. In the case of respondent Ethelbell M. Hansen, decedent in her will says: "In this I will to my Granddaughter Ethelbell M. Hansen one dollar and no more because of her unkindness to me." As to the other respondent, she designates it "the old ladies Home located in Salt Lake Utah".

[9] As to the adequacy of consideration for decedent's promise, we have noted the allegation that Ella Fowler, as well as decedent, was a daughter of Mrs. Vermillion. Both daughters were legally and morally bound to support their mother, but that obligation was not as great as far as plaintiff was concerned. Mrs. Bauer chose to leave the tender personal ministrations for the aging mother to her younger sister, and to ask not only that the Fowlers assume full financial and personal care and attention to the mother, but also that, at Mrs. Bauer's request, they remove to another city and assume the burdens and readjustments incidental to such a change. In such a case either a benefit to the promisor or a detriment to the promisee is sufficient consideration. Civ.Code, § 1605; Parsons v. Cashman, supra, 23 Cal.App. at page 302, 137 P. 1109, 1111.

[10] Respondents urge that plaintiff is seeking to enforce in his own behalf a contract which he claims was made during the lifetime of his wife, and which provided for the making of a will by the terms of which both plaintiff and his wife would be beneficiaries. They question the sufficiency of the complaint in view of the fact that Mrs. Fowler passed away in 1930. We are not warranted in assuming that the adverse ruling of the trial court was based on such an objection, for it is self-evident that even if the benefits under the will, as contemplated by the contract, were to be several and not joint, that fact would not of itself bar plaintiff from his right to such recovery as from the evidence might appear equitable, and that element in the case could not justify an adverse judgment on the pleadings. It is a question to which the trial court will address itself at the appropriate time.

[11-14] Respondents further suggest that "appellant (plaintiff) must necessarily predicate his claim to equitable relief entirely upon the invalid oral agreement of 1931, because the earlier agreements were superseded and abandoned". It is argued that the agreement of 1931 had the effect of superseding and abandoning any agreements of 1896 or 1908, although it is admitted that in 1931 the parties were not all the same, the services to be rendered were different and conditions were changed. By the contract of 1908 decedent is alleged to have obligated herself to make a will leaving to plaintiff and his wife one-half of her estate in consideration of their services to the mother. The allegations concerning this contract are sufficient to state a cause of action. Further allegations that in 1931 decedent obligated herself to leave plaintiff, then a widower, one-half of her estate in consideration of his services to her personally do not adversely affect the cause of action previously stated. The allegation that in 1931 Mrs. Bauer "reaffirmed the terms of the aforesaid written agreement" is surplusage and must be disregarded. The services to the mother had been completed by plaintiff and his wife. There was nothing more to be done by them to entitle them to the benefits promised by decedent. The fact that Mrs. Bauer may have said in 1931 that she would do that which she was already bound to do, as a prelude to en-

tering upon a new and different contract, could in no way be so construed as to relieve her of the obligation to perform her part of the previous contract. No authority cited by respondents upholds any such theory.

[15] Plaintiff asked leave of the court, which was denied, to file an amended complaint. Among other allegations not included in the original complaint it was asserted that he received a letter about January, 1897, containing a request that the Fowlers keep and care for the mother and agreeing to leave a will giving them one-half of decedent's property, and that they accepted her offer and performed the services. From the record before us it appears that the amendment should be allowed.

Judgment reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 603

In re MONKS' ESTATE.

LEE et al. v. GIRAUDO.

GIRAUDO et al. v. LEE.

Civ. 2832.

District Court of Appeal, Fourth District, California.

Dec. 19, 1941.

Hearing Denied Feb. 16, 1942.

1. Appeal and error ⇐171(1)

Where the record shows that an assumption was entertained throughout the trial by the lower court and the parties concerning the facts, an appellate tribunal will not decide an appeal on a contrary state of facts.

2. Marriage ⇐50(1)

In will contest involving question whether decedent's marriage with woman to whom he bequeathed all of his property by the second of two wills was void as a violation of Arizona miscegenation laws, evidence was sufficient to support trial court's finding that woman was the descendant of a Negro having one-eighth Negro blood and seven-eighths Caucasian blood and that decedent was a member of the Caucasian race and a person of Caucasian blood. Rev.Code Ariz.1928, § 2166.

3. Constitutional law ⇐42

Where the trial court found on substantial evidence that woman to whom decedent bequeathed all of his property by the second of two wills and whom decedent married in Arizona was a descendant of a Negro and that decedent was a person of Caucasian blood, woman in her attack on validity of Arizona statute making null and void the marriage of persons of Caucasian blood or their descendants with Negroes, Mongolians, or Indians and their descendants was limited to the factual situation presented. Rev. Code Ariz.1928, § 2166.

4. Constitutional law ⇐42

A person cannot raise a constitutional objection to a part of a statute which is not applicable to his own particular case.

5. Constitutional law ⇐46(1)

A person attacking the constitutionality of a statute is limited to the factual situation raised by the issues, and the record must disclose the present necessity for the decision.

6. Constitutional law ⇐42

A charge of unconstitutional discrimination can only be raised in a case where the issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against.

7. Constitutional law ⇐38

A statute may be invalid as applied to one set of facts yet valid as applied to another.

8. Constitutional law ⇐48

Courts must view a statute in the light of every intendment favoring constitutionality, and its unconstitutionality must appear clearly to justify its being declared invalid.

9. Constitutional law ⇐48

The rules that the courts must view a statute in the light of every intendment favoring constitutionality, and that its unconstitutionality must appear clearly to justify its being declared invalid, apply where the statute of another state is under scrutiny.

10. Constitutional law ⇐42

Where the trial court found on substantial evidence that woman whom decedent had married in Arizona was the descendant of a Negro having one-eighth Negro blood and seven-eighths Caucasian blood and that decedent was a person of Caucasian blood, woman was in no position to assail the validity of the Arizona miscegenation statute declaring null and void the marriage of persons of Caucasian blood of their descendants with Negroes, Mongolians, or Indians and their descendants as violative of the Fourteenth Amendment. Rev.Code Ariz. 1928, § 2166; U.S.C.A.Const. Amend. 14.

11. Marriage ⇐8

Where the trial court found on substantial evidence that woman whom decedent had married in Arizona was the descendant of a Negro having one-eighth Negro blood and seven-eighths Caucasian blood and that decedent was a person of Caucasian blood, it was the presence of one-eighths Negro blood and not the presence of seven-eighths Caucasian blood which raised the bar so far as marriage was concerned under Arizona statute declaring null and void the marriage of persons of Caucasian blood or their descendants with Negroes, Mongolians, or Indians and their descendants. Rev.Code Ariz. 1928, § 2166.

12. Marriage ⇐40(10)

The presumption of the validity of a ceremonial marriage, however strong it may be, is rebuttable, and, even though it may not be dispelled by a mere conflict in the evidence as to the fact to which it is opposed, the court is not required to follow the presumption when the evidence overcomes it by proof that the elements upon which the presumption rests were not present.

13. Wills ⇐324(3)

Generally, the question whether false and fraudulent representations so affected the mind of a testator as to bear upon his testamentary disposition is a question of fact.

14. Wills ⇐324(3)

Where from the evidence offered in support of a contestant's case the inference can fairly be drawn that the intent behind the making of false representations was to influence execution of a will and that the will was a result of those false representations and but for them would not have been drafted as it was, the "prima facie case" necessary to take the case to the jury has been established.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

15. Wills ⇐166(1)

A contestant challenging a will on the ground that it was made as the result of false and fraudulent representations need not prove every fact and every conclusion of fact on which the issue depends, but legitimate and reasonable inferences may be drawn from every fact proved, and any inference fairly deducible from the evidence is as much proved for the purpose of making out a "prima facie case" as if it had been directly proved.

16. Wills ⇐166(1)

A contestant challenging a will on the ground that it was the result of false and fraudulent representations is not confined to the bare facts, but is entitled to the benefit of all inferences which may legitimately be drawn from the facts established.

17. Wills ⇐166(1)

Evidence supported trial court's conclusion that will offered for probate by sole beneficiary named therein whom decedent married about two years after executing will was the result of fraud and undue influence exerted on decedent by beneficiary.

18. Wills ⇐158

"Undue influence" to be sufficient to deny probate of a will must have been exerted either at the time of or prior to the execution of the testamentary document, and its effect must be discernible in the very act either by circumstances or by direct proof.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

19. Evidence ⇐43(3)

On appeal from judgment denying probate to will found to have been the result of fraud and undue influence exerted on decedent by sole beneficiary, the reviewing court could take judicial notice of matters contained in the record of the reviewing court on an appeal in another case where that record, though referring to matters occurring after execution of will, was illuminating on the long continued domination by beneficiary over decedent's affairs.

20. Wills ⇐302(1)

A regular and complete attestation clause makes out a "prima facie case" of due execution of the will, especially where witnesses are dead, unavailable, unable to testify or recollect, or are adverse or corrupt.

21. Evidence ⇐87

A "presumption" is independent evidence which may be weighed against positive testimony.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption".

22. Wills ⇐289

In a proper case the court may presume due execution of a will from proof of genuineness of signatures, though the witnesses attack the will.

23. Wills ⇐302(1)

A 1913 will presented to the trial court, vouched for with respect to due execution by a regular and complete attestation clause, supported by the testimony of the attorney who drew it with respect to due execution, and bearing a signature both identified as that of the decedent and denied to be his genuine signature, was properly admitted to probate under the evidence.

24. Wills ⇐229

The sole beneficiary named in a 1913 will which was properly admitted to probate was a "person interested" entitled to contest a 1928 will presented for probate. Probate Code, § 370.

See Words and Phrases, Permanent Edition, for all other definitions of "Person Interested".

25. Executors and administrators ⇐194(6)

Where a petition for family allowance was denied in view of trial court's finding that no valid marriage had ever been entered into between decedent and petitioner, and no appeal was taken from that order, the order became a "final order".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceedings in the matter of the estate of Allan Bradford Monks, deceased, wherein Ida Nancy Lee filed a petition for probate of a 1913 will, and wherein Antoinette Giraudo, etc., instituted a contest and also filed a petition for probate of a 1928 will which was contested by Ida Nancy Lee. Louisa D. Hempel filed her opposition to each of the wills, and after her death Chester D. Gunn, as special administrator of her estate, was substituted. From a judgment denying probate to the 1928 will and admitting the 1913 will to probate, Antoinette Giraudo, etc., appeals.

Affirmed.

See, also, Gunn v. Giraudo, Cal.App. 120 P.2d 177.

John Coker, George A. Mallette, and Lewis R. Kirby, all of San Diego, and Herbert S. Avery and Walter E. Doherty, Jr., both of Boston, Mass., for appellant.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent Ida Nancy Lee.

Thomas Whelan, Dist. Atty., and R. E. Jenson, Deputy Dist. Atty., both of San Diego, for respondent Chester D. Gunn.

WEST, Justice pro tem.

This is an appeal from a judgment of the superior court of San Diego county denying probate to a will of Allan Bradford Monks, deceased, dated August 4, 1928, and admitting to probate an earlier will of said deceased dated September 22, 1913.

The issues, in so far as presented here, arise by virtue of the trial court's determination first, that Monks in 1913 executed in the state of Massachusetts a valid testamentary document leaving all of his property to Ida Nancy Lee; second, that the will dated August 4, 1928, in which appellant was bequeathed the entire estate, was procured by fraud exercised by the appellant; third, that said later will was procured by reason of undue influence exercised by the appellant; and fourth, that the marriage of Monks and appellant on December 19, 1930, was void as in violation of miscegenation laws of the state of Arizona, and was therefore inoperative to revoke the 1913 will.

Respondent Ida Nancy Lee filed a petition for probate of the 1913 will. Appellant instituted a contest and also petitioned for probate of the 1928 will. Mrs. Lee contested the latter petition. Louisa D. Hempel, an aunt of Monks, and who alleged that she was his sole heir at law, filed her oppo-

sition to each of said wills. Mrs. Hempel died before the trial and Chester D. Gunn, as special administrator of her estate, was substituted. He did not appeal from the judgment and appears here only as a respondent by virtue of his successful attack on the 1928 will.

The record is very voluminous and presents a rather complete life history of the deceased and of the beneficiaries of his wills as bearing on his two testamentary declarations of 1913 and 1928, respectively, and his subsequent purported marriage to appellant in December, 1930.

Allan Bradford Monks was born in 1875. His grandfather, John P. Monks, had, during his lifetime, created a trust from which certain income had been paid to Monks, and in the principal of which he would share upon the death of the last surviving child of his grandfather. Monks had a boyhood friend, one Charles Tennant Lee, whose wife, Ida Nancy Lee, is one of the respondents. Monks made his home with the Lees at intervals totaling a considerable portion of the time from 1907 to 1925, and during a large portion of this period was engaged in business enterprises with Lee. On September 22, 1913, the date of the first will, the relationship just alluded to existed. This will was attested by three witnesses, two of whom testified at the trial, the other having died prior thereto. This will will be hereafter again referred to. In 1925, Monks and one Hanford engaged as partners in the city of San Diego in a motorcycle sales business, Monks making his home with the Hanford family. Sometime in the year 1927, the exact time being the subject of dispute, Monks and the appellant Antoinette Giraudo became acquainted. It appears that the acquaintanceship was at first casual and that the entire Hanford household, including Monks, participated in visits which were of a friendly nature only, although at the trial the appellant gave much testimony to the effect that she loaned Monks large sums of money during 1927 and 1928, and that she and the deceased were engaged to be married as early as October, 1927. In February, 1928, Monks and his partner Hanford were injured in a motorcycle accident. Monks was disabled for a period of time variously said to be from ten days to several weeks in duration. Hanford returned to work very soon after the accident but died about two months later, and thereafter Monks continued the operation of the business. As to his conduct and activities following the accident there was hopeless conflict in the evidence. Much testimony was adduced by respondents indicating a distinct personality change on the part of the deceased beginning soon after the injury and progressively continuing. In May, 1928, he had an argument with the Lees and ordered them from his store. Several witnesses stated that he became unkempt in his personal habits, whereas before his injury he had been immaculate and neat. He was seen on the streets during the daytime clad only in pajamas and robe. There was testimony that he became jumpy and would sit for long periods of time and stare into space, and that he apparently did not realize when he was being spoken to by persons who had occasion to converse with him. During a few months after his accident he wrote fervent love letters to appellant, whereas, his conduct prior to his injury, in so far as women were concerned, was generally one of lack of interest. Mrs. Hanford, in whose home he lived for several years before and for several months after the accident, stated that he became nervous and restless and was unable to sleep at night; that he complained of pain in his head; that she observed appellant giving tablets to him which appeared to induce a condition of stupor. One Todd, a police officer, testified that he had known Monks since 1914; that after the accident he noticed a distinct change; that Monks did not recognize him; and that upon attempted conversations his statements were irrational.

In July, 1928, Monks suddenly and without previous notice left the Hanford home and took quarters next door to appellant's residence. There was evidence to the effect that thereafter Mrs. Hanford asked for a statement of the affairs of the motorcycle business in which she had an interest by reason of her husband's death, and that Monks stated that appellant had given orders that she, Mrs. Hanford, could not see the books outside of the presence of appellant and that in an ensuing argument Monks slapped her.

Several persons testified as to the activities of appellant as relating to Monks' conduct and actions following his injury. A. L. Hubbell, attorney, testified that in the spring of 1928, appellant stated to him that Monks had lots of money and that appellant was going to get him away from the Hanford home. Credence is lent to this testi-

mony by reference to a letter written by Monks in May of 1928 to the appellant, a portion of which reads as follows: "I don't know what the Hanfords are going to do— * * * I ask no question—make no comments—and am pleasant to them—remembering what you said about not promising to stay with them * * * I am depending on you for help and advice when the time to move comes."

It appears that appellant was active in securing or attempting to secure from Monks a transfer of his interest in the motorcycle agency to herself. Hubbell testified that appellant asked him to take her to the motorcycle shop and upon arriving there stated to him: "Mr. Monks wants you to make a bill of sale to me of all his interest in this motorcycle shop." Another witness who had been financing the sales of motorcycles for the agency testified that Monks advised him that he had transferred the business; that he got no consideration therefor; and that he had had to do so to avoid trouble. As to the relationship generally, Mr. Hubbell testified: "At first Mr. Monks was madly infatuated with Miss Giraudo. It appeared to me from his actions like a man that was hypnotized. He did everything she told him. He always signed every paper that she asked him to sign. She would insult him and abuse him publicly many times and he never talked back, never said a word, never resented anything she said to him, and that was the condition all the time."

A considerable amount of testimony was produced bearing upon appellant's race, nationality and background. The appellant stated that she had told Monks that she was French, and one witness at least testified that she heard appellant tell Monks that she was a French countess and that she exhibited papers of some kind which purported to contain proof thereof. C. Tennant Lee testified that he suggested to deceased in April of 1928 that appellant had Negro blood. His testimony regarding Monks' reaction to this follows:

"Q. What was his reply to you? A. 'Oh, no,' he said, 'She is the daughter of a French consul and married to a Frenchman in New York, who had a seat on the stock exchange, and is the cantaloupe queen,' and so forth and so on."

On August 4, 1928, Monks executed a will which will hereinafter be referred to as the Giraudo will, leaving all of his property to the appellant. There was some conflict in the testimony as to whether or not appellant was present at the time that this will was executed. She contended that she had not seen Monks for several weeks before this date and that she did not see him for some time afterward. It appears, however, that at this time Monks was living next door to her house and that she was in San Diego both immediately before and immediately after the date of the will. It further appears that two of the subscribing witnesses to the will were persons who were living in her house at the time the will was executed.

On August 15, 1928, eleven days after the execution of the Giraudo will, Monks executed a number of promissory notes, the face amount of which totaled $30,000. These notes all named appellant as payee and were secured by a chattel mortgage by which the deceased hypothecated his interest in the trust estate of his grandfather. Sometime during the month of December, 1928, the deceased moved from the house in which he had been living since July and thereafter resided in the home of appellant until the marriage of Monks and appellant which took place at Yuma, Arizona, on December 19, 1930. Following the marriage and during portions of 1931 and 1932, it appears that Monks lived at various times in Pacific Beach, Oceanside, and Long Beach, and that while residing in these places his constant companion was a Japanese who had for years been an employee of the appellant. The record fairly discloses that at least while at Oceanside and Long Beach he was almost devoid of understanding. Monks was taken into custody in Long Beach in July, 1932, at which time his condition was portrayed as one of almost complete lack of mentality. He was subsequently committed to the Norwalk State Hospital, where he remained in a hopelessly insane condition until his death in 1937.

Little of the foregoing statement was the subject of agreement. Appellant denied any knowledge of the bill of sale. She stated that she did not at any time see such a document. She denied that she had exercised any influence over Monks but on the contrary contended that Monks was at all times desirous of immediate marriage and wished to get entirely away from his previous associations. She denied that there was any Negro blood in her veins, and testified that she was of pure French descent. She contended that she had, prior to the execution of the promissory notes and chattel mortgage, loaned to Monks and otherwise secured for him sums of money far in ex-

cess of the $30,000 represented by the notes, though the record indicates that she was in financial straits during the period when the alleged advances were made. She contended, and offered a number of witnesses in support of her contention, that there was no evident change in the mental capacity or personality of Monks up until long after the marriage of December 19, 1930.

The foregoing is but a brief summary of the large amount of evidence offered on all of the phases of Monks' career between his meeting with appellant and his death. It offers some indication of the nature of the testimony presented to the trial court.

The consideration of the points in issue will be in inverse order to the statement of them as set forth above, and some amplification of the facts will be necessary. The appellant vigorously assails the finding of the trial court that she was of Negro descent, but contends that even if such finding is supported by credible evidence, nevertheless the Arizona miscegenation statute is unconstitutional as imposing an absolute prohibition against marriage upon any person of mixed Negro and Caucasian blood. At to the first of these points little need be said. At the trial one Malcolm J. Rogers, an anthropologist, testified that in his opinion appellant "was at least one-eighth Negroid". Dr. James C. Anbers, a physician who had had much experience in the southern states and in Africa in his profession, gave as his opinion that appellant had, as near as he could determine, one-eighth Negro blood. A Mrs. Pentecost, a beauty parlor operator, testified that appellant told her that the beauty parlor in which the witness was employed had been giving appellant beauty treatments after shop hours. This witness was questioned further as to the reason for this arrangement. A portion of this testimony follows:

"By Mr. Walters: Q. Did she tell you why? A. Because she had Negro blood in her.

"By the Court: Q. What did she say about it? Is that what she said? A. Yes."

Another short quotation concerning the conversation between the witness and appellant follows:

"I told her it was too bad that the palms of her hands and her fingernails showed Negro blood in her; if it wasn't for that they could never tell she was Negro.

"Q. What did she say? A. She said yes."

Still another witness, a man who had been employed by the state labor commission, stated that appellant told him that she was a Louisiana Creole. In addition to the testimony just referred to the trial court had the opportunity to observe the appellant for many days during the trial and was entitled to draw conclusions from such observations.

[1, 2] It may be well here to briefly discuss one other contention raised in order to understand the constitutional question involved. Appellant urges that there was no evidence in the record to establish that Monks was a Caucasian or a descendant of a Caucasian. However, there was introduced into the record an affidavit execu cd by the deceased in connection with his application for a marriage license, which affidavit states that he was a member of the Caucasian race. Furthermore, the court had before it for observation photographs of Monks. Finally, the case was tried on the obvious theory that Monks was a Caucasian. Where the record demonstrates that an assumption has been entertained throughout the trial by the court and the parties as to the facts, an appellate tribunal will not decide an appeal on a contrary state of facts. Marra v. Aetna Construction Co., 15 Cal.2d 375, 101 P.2d 490. In our opinion there was substantial evidence to support the finding of the trial court that appellant "is the descendant of a Negro in that it is true that the said Antoinette Giraudo has one-eighth Negro blood and that she has seven-eighths Caucasian blood; that it is true that said decedent was a member of the Caucasian race and a person of Caucasian blood".

Appellant predicates her chief attack, so far as the validity of the marriage is concerned, upon the Arizona statute defining miscegenetic marriages as it existed on December 19, 1930, the date of the ceremony in Yuma. So far as pertinent to this discussion, the code provision (sec. 2166 of the Revised Code of Arizona, 1928) read as follows: "The marriage of persons of Caucasian blood, or their descendants, with Negroes, Mongolians or Indians, and their descendants, shall be null and void. * * *"

[3] It is contended that since the court found appellant to be seven-eighths Caucasian blood and one-eighth Negro blood she is of necessity a descendant of a Caucasian, and also a descendant of a Negro, and as such a person of mixed blood the statute prohibits her from contracting any valid

marriage in Arizona. This condition she claims is repugnant to the fourteenth amendment to the Constitution of the United States in that it deprives her and others of her racial classification of liberty to contract marriage. Her assertion is interesting but in our opinion not tenable for the reason that appellant is limited in her attack on the statute to the factual situation presented. If she, as a person found to be a hybrid, were facing a contention that her marriage to another of the same mixed blood was invalid, then it is obvious that the constitutional problem would be squarely presented. But she is not so situated. Her purported marriage was with a person found to be of unmixed Caucasian blood. This is the fair interpretation of the findings. Many states have statutes prohibiting such alliances, and we have had presented no instance of successful constitutional attacks upon them or any of them. It is true that the Arizona provision differs somewhat in form from the miscegenetic legislation of other states in that in lieu of the phrase "persons of Caucasian blood, or their descendants", most jurisdictions use the words "white", "white person", or "person not of African descent" as describing the one prohibited party and thus avoid the mixed blood difficulty arising from a consideration of the status of one who traces ancestry to both Caucasian and Negro forebears.

[4] Without, however, further considering the ramifications of the problem as it might appear under dissimilar facts to those presented here, we pass to the consideration of the statute as applicable to the relationship sought to be created by the ceremony of December 19, 1930. It was, for our purposes, an attempted marriage between a Caucasian man and a woman whose status must be treated as that of a descendant of a Negro. Such descendant, under the Arizona statute, is subject to the same restriction with respect to contracting marriage with a Caucasian as would be her Negro ancestor. This cannot be gainsaid under any logical construction of the code provision. Therefore the attack upon the validity of the statute is identical in effect with that made in the Arizona case of Kirby v. Kirby, 24 Ariz. 9, 206 P. 405, 406. In that case, which appears to be the only one in which the miscegenation law of the state has been construed, there was involved the validity of a purported marriage between a white man and a Negro woman. The former instituted an annulment action on the ground that the marriage was void because contracted in violation of the statute hereinbefore quoted. The defendant demurred to the complaint, attacking the statute as in violation of the Federal Constitution in that it was susceptible of the interpretation that a person of mixed blood of which Caucasian blood was a part, could not contract a lawful marriage in Arizona. The demurrer was overruled and a decree was entered annulling the marriage. Upon appeal the supreme court of Arizona affirmed the judgment and denied the attack on the validity of the statute upon the facts presented. A portion of the opinion is as follows:

"The defendant's objections to the validity of the law, to wit, that under it persons of mixed Caucasian blood cannot marry any person or lawfully contract any marriage in this state, if true, is an attack thereon which she is not entitled to make for the reason that there is no evidence that she is other than of the black race. In other words, it is not shown that defendant is a descendant of the Caucasian race. It will be time enough to pass on the question she raises by her demurrer when it is presented by some one whose rights are involved or affected. As was said by this court in Gherna v. State, 16 Ariz. 344, 146 P. 494, Ann.Cas.1916D, 94:

" 'We believe it to be the unquestioned rule that a person cannot raise a constitutional objection to a part of a statute which it not applicable to his own particular case. The authorities are overwhelmingly to this effect.' "

[5, 6] We believe the foregoing quotation is applicable to the situation presented here because while it is true that there was evidence that appellant is a descendant of the Caucasian race, as well as of the Negro race, the other contracting party was of unmixed blood and therefore the hypothetical situation involving an attempted alliance between two persons of mixed blood is no more present in the instant case than in the Kirby case. It is interesting that the supreme court of Arizona appears to recognize the possibility of a circumstance arising in which persons of mixed blood might have occasion to test the validity of the Arizona law, but it also must be said that Arizona appears to follow what is the established rule in California and is the purport also of federal court declaration, viz., that any person attacking the constitutionality of a statute is limited to the factual situation

raised by the issues, and that the record must disclose the present necessity for the decision. In People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3, 5, the Supreme Court said: "It is well established that a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against." See, also, Pacific Indemnity Co. v. Myers, 211 Cal. 635, 296 P. 1084; Fox-Woodsum Lumber Co. v. Bank of America, 7 Cal.2d 14, 59 P.2d 1019; Platt v. Philbrick, 8 Cal.App. 2d 27, 47 P.2d 302; Tennessee Publishing Co. v. American National Bank, 299 U.S. 18, 57 S.Ct. 85, 81 L.Ed. 13; Schauer v. Producers Wool & Mohair Co., 5 Cir., 86 F.2d 576.

[7] One of the clearest declarations of the principle that only the factual situation presented will be contemplated in passing on the validity of legislation is found in Max Factor & Co. et al. v. Kunsman, 5 Cal.2d 446, at page 468, 55 P.2d 177, at page 187, where it was said: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 42 S.Ct. 106, 66 L.Ed. 239. The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court."

[8, 9] It is fundamental that it is the duty of the courts to view a statute in the light of every intendment favoring constitutionality (Southern Pacific R. Co. v. Stibbens, 103 Cal.App. 664, 285 P. 374), and its unconstitutionality must appear clearly to justify its being declared invalid. People v. Waller, 64 Cal.App. 390, 222 P. 171. There is no greater reason certainly, and in fact less, to relax the foregoing rules where the statute of another state is under scrutiny. See In re Boswell, 9 Cir., 96 F.2d 239.

[10] We feel that no further discussion need be indulged in on the constitutional question raised. Under the facts presented the appellant does not have the benefit of assailing the validity of the statute.

[11] Another point incidentally arises by reason of appellant's ingenious argument that even though it should be determined that the Arizona statute is valid, it should not be so construed as to bar a marriage between Monks, who was found to be a person of Caucasian descent, and herself, also so descended, even though she be likewise a descendant from other blood. The prohibition of the statute, so far as applicable here, is as to marriage between a Caucasian and the descendant of a Negro. It is the presence of one-eighth Negro blood and not the presence of seven-eighths Caucasian blood which raises the bar, so far as appellant's marriage to a Caucasian is concerned.

[12] Appellant asserts that the ceremonial marriage is supported by the presumption of validity and that the burden of proof is cast upon those attacking it. She cites In re Estate of Chandler, 113 Cal.App. 630, 299 P. 110, which supports her contention. The presumption raised, however strong it may be, is rebuttable, and while it may be that it is not dispelled by a mere conflict in the evidence as to the fact to which it is opposed (Ohran v. Yolo County, 40 Cal.App.2d 298, 104 P.2d 700), yet it cannot be that the court is required to follow the presumption when the evidence overcomes it by proof that the elements upon which the presumption rests were not present, or more properly stated, when the facts are such as to make the presumption bow to the express statutory prohibition against the relationship sought to be maintained through the medium of the presumption.

The court predicated its refusal to admit the so-called Giraudo will of August 4, 1928 to probate on two grounds, namely, fraud and undue influence. The fraud alleged and found consisted of false and fraudulent representations by appellant to decedent that appellant was a member of the Caucasian race, of pure French descent and ancestry; that she was not a descendant of a member of the Negro race; that such representations were false, fraudulent and untrue, and that they were known by the appellant at the time they were made to be false, fraudulent and untrue. It was further found that in reliance upon the representations so made, decedent became affianced to appellant prior to August 4,

1928, in the belief that a valid marriage could and would be consummated, and that in further reliance upon the representations the will was executed. It cannot be doubted that appellant did represent to decedent that she was of pure French descent. She gave the following testimony: "Q. You told him you were pure French? A. That is what I told him." Other evidence respecting her representation to Monks as to her nationality has hereinbefore been alluded to as has evidence regarding decedent's belief that appellant was French.

[13-16] Generally, the question of whether or not false and fraudulent representations so affected the mind of a testator as to bear upon his testamentary disposition is one of fact. As was said in Re Estate of Newhall, 190 Cal. 709, 214 P. 231, 236, 28 A.L.R. 778: "If, from the evidence offered in support of contestant's case, the inference can fairly be drawn that the intent behind the making of the false representations was to influence the execution of the will, and that the will was a result of such false representations and but for such representations would not have been so drafted, then the prima facie case necessary to take the case to the jury has been established. From the very nature of the inquiry the proof must necessarily be largely or wholly circumstantial. The contestant is not required to prove every fact and every conclusion of fact upon which the issue depends. Legitimate and reasonable inferences may be drawn from every fact proved, and any inference fairly deducible from the evidence is as much proved for the purpose of making out a prima facie case as if it had been directly proved. The contestant is not confined to the bare facts, but is entitled to the benefit of all inferences which may legitimately be drawn from the facts established."

In Re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239, an appeal was taken by the contestants of a will from a judgment of nonsuit. The judgment was reversed. It appeared that there was no direct evidence that the inducing reason for the bequest to the fraudulent person contained in the decedent's will was the belief of the testatrix in the truth of the status represented to her, nor was there direct proof that the bequest would not have been made except for the belief, yet it was stated by the Supreme Court that such direct proof is unnecessary if the inference could reasonably be drawn from the facts that the belief in the truth of the representations was the inducing reason for the bequest. The court had before it substantial evidence in drawing the inference of fraudulent procurement of the will.

[17-19] Undue influence of appellant in bringing about and effecting the execution of the testamentary document of August 4, 1928, was found. While some question arises as to whether appellant in her pleadings denied the charge in this respect, we do not think it necessary to determine the matter upon such technical contentions.

The general nature of the relationship between the testator and his beneficiary has been set forth in the statement of facts. To summarize, we must say that the avowed intention of appellant to get Monks away from his friend and business associate, Mrs. Hanford, coupled with her significant remark that he had lots of money; her success in causing the removal of Monks from the Hanford home just a short time before the will was executed and into her own home a few months later; the attestation of the will by two residents of appellant's household; the activity of appellant in connection with the bill of sale involving Monks' interest in the motorcycle business; her securing of a purported lien on decedent's share in the Monks trust within a few days after the will was executed; her influence on Monks characterized by one witness with the words: "He did everything she told him"; his bondage with respect to his affairs which even caused him to refuse an examination of the books of his business to a person financially interested, without the consent of appellant; his personality change within the few months next preceding the will, including negligence in dress; extreme nervousness; preoccupation to the degree that he did not reply to questions and stared unseeing for long periods; his repudiation of old and valued friends;—all these supply evidence that the will was, to use the language of the Supreme Court in Re Estate of Caspar, 172 Cal. 147, 155 P. 631, 635, "the product of a mind upon which undue influence was exercised in the very matter of the testamentary act * * *". It is, of course, true that the undue influence, in order to be sufficient to deny probate to the will,

must have been exerted either at the time of or prior to the execution of the testamentary document, and its effect must be discernible in the very act either by circumstances or by direct proof, but the general nature of the relationship existing both before and after the execution of the will in the instant case tends to support the conclusion that decedent was dominated by the will of appellant. Under the circumstances here presented we may take judicial notice of the matters contained in the records of this court on an appeal in the case of People v. Mrs. Allan B. Monks, 133 Cal.App. 440, 24 P.2d 508, which record, while referring to matters occurring after the execution of the will before us, nevertheless is illuminating as to the long continued domination by appellant over the affairs of the decedent. That such judicial notice may be taken, we refer to Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333.

It is true that appellant offered much testimony which she contends indicated a desire of deceased to cut the old ties of friendship; which evidenced a great affection for appellant as the only person who had afforded him the society which he craved from the other sex, and which indicated that appellant's advice and help was of great concern to him. Conceding this conflict, we are impelled to say that there was substantial evidence that the will was procured by fraud exercised by appellant and also that there was substantial support for the finding that it was the product of undue influence over decedent's testamentary act, and therefore the judgment denying probate to the Giraudo will must be held to be justified on either of said grounds, if not on both.

The other question involved is as to the propriety of the court's judgment or order admitting to probate the Lee will of September 22, 1913. The court found that Monks was competent in every respect at the time of the execution of said will; that he signed it in the presence of three attesting witnesses who were all present at the same time; that he declared to the witnesses and each of them that the document so signed and attested was his will; and that the witnesses signed in his presence and in the presence of each other at his request; that there was no fraud, duress, menace or undue influence; and that said will was unrevoked. It appeared at the trial that one of the witnesses to the will had died. The lawyer who drew the will testified, as did the other two witnesses, at an earlier partial hearing of the proceeding which terminated because of the death of the trial judge. The transcript of the evidence of the attorney and the two witnesses was read into the record here and presents the same sharp conflict which characterized the testimony offered throughout the trial. John T. Finn, the lawyer, stated that Monks came to him on September 22, 1913, and asked him to prepare the will, which was done immediately in Finn's office in the town hall at Dedham, Massachusetts; that the three attesting witnesses were city employees who were found in the building and who came in at the request of Finn to complete the execution. He further testified that he introduced the witnesses to Monks, asked him if it was his last will, and upon receiving his affirmative answer, had him sign and the witnesses attest his signature, and that Monks was present at all times. On the contrary, one of the surviving witnesses, one Webb, gave evidence that Finn asked him to sign a paper which he did in the presence of the other witnesses but not in the presence of Monks; that he did not know Monks, and so far as he knew, he had never seen him, and that the paper he signed was not identified to him as a will. The other witness, Farrington, gave similar testimony, excepting, however, he admitted that the document executed by the three witnesses was identified as a will. To further complicate the factual situation thus presented, there was expert testimony produced by appellant that the purported signature of Monks to the will was a forgery, and just as positive was the testimony of another such expert called by respondents that it was the genuine signature of the decedent. In addition, there was considerable stress laid on the unnatural character of the will in that the respondent Ida Nancy Lee was unrelated to decedent and that decedent had relatives living at the time the will was made who were the natural objects of his bounty.

As already stated, the trial court found for the proponent of the Lee will and the judgment necessarily must rely almost entirely upon the presumption of due execution as supported by the testimony of Finn, to overcome the declarations of the attesting witnesses negativing validity. There was some indication on the part of one of the subscribing witnesses, the witness Webb, of some haziness of memory, which was not surprising in view of the passage

of nearly 26 years between the date of the will and the testimony of the witness. It also appeared that both witnesses were, while in San Diego, living in homes visited by the appellant. Suffice it to say that the 1913 will was presented to the trial court, vouched for as to due execution by a regular and complete attestation clause, supported by the testimony of the attorney who drew it as to due execution, and bearing a signature both identified as that of the decedent and denied to be his genuine signature.

[20-22] The situation here is comparable to that found in Re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90, 92, although there the formal attestation clause was lacking. However, the language used is enlightening as a statement of the rule to be applied here. It was said in that case: "The rule is well established that a regular and complete attestation clause makes out a prima facie case of due execution of the will. The authorities have clearly recognized that where witnesses are dead, unavailable, or unable to testify or recollect, or are adverse or corrupt, it is necessary to rely upon other evidence of the sufficiency of the instrument, and accordingly have applied the above-mentioned presumption. See, generally, Hawkinson v. Oatway, 143 Wis. 136, 126 N.W. 683, 139 Am.St.Rep. 1091; In re Sullivan's Will, 114 Mich. 189, 72 N. W. 135; Rood on Wills (2d Ed.) § 798a, p. 822; note, 76 A.L.R. 617."

Again quoting from the same decision: "They contend that even if the presumption is applicable to those situations, the presence of subscribing witnesses who give adverse testimony destroys the presumption. But in our opinion, if the presumption be recognized, it is seldom material to an appellate court whether the subscribing witnesses were unavailable, unable to remember, or gave affirmative testimony adverse to the will. A presumption is recognized in this state to be independent evidence which may be weighed against positive testimony, and in a proper case the lower court may follow the presumption of due execution from proof of genuineness of the signatures, though the witnesses attack the will."

[23] It is our opinion that in reliance on the presumption of due execution as bolstered by Finn's testimony, the court's admission of the will to probate was not erroneous.

[24] Appellant has challenged the right of respondent Lee to contest the Giraudo will. In view of what has heretofore been said, no question remains but that respondent was a "person interested" within the contemplation of section 370 of the Probate Code.

[25] The court had before it a petition for family allowance filed by the appellant. The petition was denied in view of the court's finding that no valid marriage had ever been entered into. No appeal was taken from this order and the same is final and is mentioned only because of reference made thereto in the briefs.

The judgment appealed from is affirmed.

BARNARD, P. J., and MARKS, J., concurred.



48 Cal.App.2d 622

GUNN v. GIRAUDO.

Civ. 2835.

District Court of Appeal, Fourth District, California.

Dec. 19, 1941.

Hearing Denied Feb. 16, 1942.

1. Action ⇐6

The statute authorizing declaratory relief before there has been any breach of the obligation in respect to which declaration is sought was adopted to provide a valuable enlargement of the judicial power of the courts. Code Civ.Proc. § 1060.

2. Action ⇐6

In special administrator's action for declaratory relief to determine validity of certain documents and purported oral contracts between decedent and defendant, where defendant did not deny that she was threatening to institute litigation on purported obligations and contended that she was the owner of a large number of enforceable contracts of decedent, an "actual controversy" existed authorizing the granting of declaratory relief, even though defendant had filed

no claim with administrator. Code Civ. Proc. § 1060; Probate Code, § 700.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Controversy".

3. Action ⇐6

The statute providing that declaratory relief may be had, before there has been any breach of the obligation in respect to which declaration is sought, looks to the relationship between the parties created by the contract and more specifically the interpretation of their respective rights and duties under it, and not merely to whether the breach of one or the other has raised an issue presently. Code Civ.Proc. § 1060.

4. Action ⇐6

Where special administrator, in addition to declaratory relief to determine validity of certain documents and purported oral contracts between decedent and defendant pleaded causes of action alleging lack of consideration, fraud, and undue influence with regard to execution of purported agreements, even if prayer for declaratory relief were denied, the court having before it a proper case for equitable relief would not refuse a complete scrutiny of the issues but would grant relief warranted by the proof even though it might not be the same as prayed for. Code Civ.Proc. § 1060.

5. Executors and administrators ⇐521

The allowance of a claim by an administrator in one jurisdiction is not only not conclusive against an administrator in another but it is not even "evidence".

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

6. Executors and administrators ⇐521

Any proceedings instituted in Massachusetts against an ancillary administrator would not affect a judgment for California special administrator in action for declaratory relief determining validity of certain documents and contracts and for cancellation thereof and would be no argument in favor of reversal of judgment, even if a judgment recognizing defendant's claim had been entered in Massachusetts before California action was instituted. Code Civ.Proc. § 1913.

7. Action ⇐6

A special administrator was not barred from seeking declaratory relief to determine validity of certain documents and purported oral contracts between decedent and defendant and to cancel and annul documents and contracts on ground that there were other remedies available to him in view of statutes providing that the court may make a declaration whether or not further relief is or could be claimed at the time and providing that declaratory remedies are cumulative and not restrictive of other remedies. Code Civ.Proc. §§ 1060, 1062.

8. Courts ⇐198, 200

A court sitting in probate may not exercise general civil jurisdiction and, conversely, sitting as a court of general civil jurisdiction it may not assume the functions of a probate court.

9. Courts ⇐198

The trial court was not precluded from exercising the functions of a Superior Court sitting in an action by a special administrator against the proponent of a will on the ground that it was also sitting in probate matter arising out of filing of petitions for probate of two purported wills, where the two causes were submitted on distinct pleadings, findings were separately made, and judgments were in no way confused one with the other.

10. Courts ⇐23

A stipulation consenting to the consideration of cases by a court would not vest jurisdiction if none otherwise existed.

11. Appeal and error ⇐1166

Even if the trial court erred in sitting as a probate court and also as a superior court in two cases, the judgment in the Superior Court case would not be reversed where the question of jurisdiction was not involved and there was no showing that any injury resulted to the appellant in any event. Const. art. 6, § 4½.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Chester D. Gunn against Antoinette Giraudo, etc., for declaratory relief, and for the cancellation and annulment of certain documents and purported oral contracts. From a judgment decreeing that defendant has no valid or enforceable claim against decedent, against assets of his estate, or against plaintiff as special administrator of the estate, defendant appeals.

Affirmed.

Lewis R. Kirby, George A. Malette, and John Coker, all of San Diego, and Walter E. Doherty, Jr., and Herbert S. Avery, both of Boston, Mass., for appellant.

Thomas Whelan, Dist. Atty., R. E. Jenson, Deputy Dist. Atty., Gray, Cary, Ames & Driscoll, and Burton D. Wood, all of San Diego, for respondent.

WEST, Justice pro tem.

This is an appeal by defendant from a judgment of the superior court of San Diego county decreeing that defendant has no valid or enforceable claim against Allan Bradford Monks, deceased, or against the assets of his estate, or against plaintiff as special administrator of the Monks estate, either by reason of certain instruments executed by decedent in his lifetime or by reason of any alleged oral agreements between decedent and defendant, and further rescinding, annulling and canceling said written instrument and directing the delivery of such instruments for cancellation.

Monks died on December 24, 1937. Thereafter plaintiff, as public administrator of San Diego county, was appointed special administrator of his estate with general powers. He instituted an action against defendant for declaratory relief to determine the validity of certain documents purportedly executed by deceased during his lifetime and of certain purported oral contracts between decedent and appellant, and sought to cancel and annul the same for lack of consideration and for fraud and undue influence allegedly resulting in their procurement.

Many of the facts out of which this litigation arose are stated in the opinion this day filed in Re Estate of Monks, 120 P.2d 767, a companion case to this, and no detailed repetition of the factual matters will be given. A brief statement here will suffice to clarify the issues, as no attack is made on any finding of fact on the ground of lack of evidentiary support, the challenge to the judgment being formal in nature. The complaint of plaintiff alleged that a "justiciable" controversy existed between the parties concerning the validity and enforceability of the written instruments and of the purported oral agreements, the nature of which is as follows: On August 15, 1928, decedent executed and delivered to appellant 21 promissory notes totaling the sum of $30,000, together with a chattel mortgage securing all of the notes and purporting to hypothecate his interest in the estate of his grandfather. In January, 1929, he executed a document acknowledging an indebtedness of $12,900 on account of the alleged purchase from appellant of certain jewelry. On September 5, 1929, he executed and delivered to one Watson, the foster-father of appellant, his note in the sum of $10,000, which note was thereafter assigned to appellant. On February 28, 1930, he executed a document purporting to be an acknowledgment of indebtedness to appellant in the sum of $45,894.07, on account of advances for his benefit and of payments to him by appellant. On December 30, 1930, he executed and delivered to appellant a document referred to as a "Reimbursement Power of Attorney", by which appellant was to collect principal and interest of decedent's share in the estate of the grandfather, hereinbefore referred to, by way of reimbursement to appellant for advances to him. On January 7, 1931, he executed a note for $30,000, purporting to secure payment of the 21 notes first referred to. In addition, it appears that appellant, by virtue of certain oral agreements concerning loans and also respecting the sale of a watch, claimed that decedent was further indebted to her in an additional amount of $5,300. It was alleged that defendant threatened to pursue claims based upon the oral and written contracts against a special administrator of decedent's estate appointed in the state of Massachusetts in an ancillary administration, and further that since all of the purported contracts had been entered into in California and that since decedent had resided for many years prior to his death in San Diego county a multiplicity of actions would be avoided by the determination of the respective rights and responsibilities of the parties in the suit filed.

In her answer defendant admitted the existence of the documents above referred to and also by her pleading admitted the existence of the obligations growing out of the purported oral contracts, but denied that any claim had been asserted by her against the plaintiff on account of the indebtedness represented. She did not answer any of the allegations contained in the causes of action seeking cancellation of the alleged contracts, written or oral. The case was not consolidated for trial with the trial of the will contests in the Estate of Monks, but was tried at the same

time and on much of the same evidence as was adduced in the probate case. This was done over the objection of the appellant. At the conclusion of the trial the court made findings to the effect that a controversy did exist between plaintiff and defendant; that the various purported obligations of decedent to defendant had been obtained by fraud and by undue influence and that there was no consideration for any of them; that no oral agreements requiring decedent to pay the money to defendant had been made; and finally, that recovery on each and all of said purported agreements, both oral and written, was barred by the statute of limitations. Judgment was entered for plaintiff and this appeal followed.

Appellant's contentions may be summarized as follows: First, that there was no proper situation presented for the granting of declaratory relief because no actual controversy existed; second, that the judgment entered could not affect Massachusetts proceedings presented on the same issues; third, that plaintiff had other established remedies available; and fourth, that the trial court, sitting as a court of probate, had no jurisdiction to hear the equitable issues presented.

Referring to the first of these contentions, it appears that appellant misinterprets the purpose for the adoption of section 1060 of the Code of Civil Procedure. She asserts that since she has filed no claim with the administrator under section 700 of the Probate Code, no rights against plaintiff have been claimed by her and therefore no case "of actual controversy relating to the legal rights and duties of the respective parties" existed. But it cannot be denied and was not denied by appellant that she claimed and asserted that she was the owner and holder of both written and oral obligations of decedent. Her answer in this regard merely denies that any claim has been asserted thereon against the plaintiff. Her construction of the statute is that there was no duty upon nor right vested in plaintiff to act with respect to the situation until creditors' claims were presented, and upon such presentation, if rejected, to await suit by appellant upon them.

[1] Appellant's contention is predicated upon what we deem to be a far too narrow view of the statute. If her view were accepted, the privilege would be taken from a person to be charged in determining his rights and liabilities arising by virtue of contracts, the attempted enforcement of which might well seriously invade his rights before his status could be determined. The very language of the statute does not contemplate such a situation. It provides in part: "Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." Code Civ.Proc., sec. 1060. Our courts have taken the view that the section was adopted to provide a valuable enlargement of the judicial power of our courts. As was said in Tolle v. Struve, 124 Cal.App. 263, 12 P.2d 61, 64: "It was a defect of the judicial procedure which developed under the common law that the doors of the courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed, upon a party who did not wish to violate the rights of another nor to have his own rights violated, thus compelling him, where a controversy arose with his fellow, to run the risk of a violation of his fellow's rights or to wait until the anticipated wrong had been done to himself before an adjudication of their differences could be obtained. Thus was a penalty placed upon the party who wished to act lawfully and in good faith which the statute providing for declaratory relief has gone far to remove."

[2, 3] It is manifest from appellant's pleading, in which she does not deny that she is threatening to institute litigation upon the purported obligations but in fact affirms that she has done so, that she contends she is the owner of a large number of enforceable contracts of the decedent, and while her recovery thereon is dependent upon future action in the prosecution of her claims, nevertheless, her ultimate rights would of necessity depend on the question whether they were procured validly and were supported by consideration. All of these questions and all of her rights to compel performance were determined by the judgment. This, it seems to us, is consistent with the existence of an actual controversy and inconsistent with her theory that none could be presented in this litigation. It is the relationship between the parties created by the contract and more specifically the interpretation of their respective rights and duties under it which the statute looks to, and not merely whether the breach of one or the other has raised

an issue presently. In Strong v. Hancock, 201 Cal. 530, 258 P. 60, 70, the question was presented whether the enactment of section 1060, supra, would alter the previously pronounced rule that the owner of property which was affected by covenants and restrictions running with the land could not, prior to breach, maintain an action to quiet his title against such covenants and restrictions. Other circumstances rendered the answering of the question unnecessary to the decision, but in a special concurring opinion it was stated: "It was held on the former appeal, following a recognized and controlling line of authorities, that a landowner in the tract had no standing in court in his endeavor to quiet his title against and to have declared void the restrictions on his lot, and that it was only when it was sought to enjoin a breach of such restrictions or to declare a forfeiture that equity would refuse, because of changed conditions, to lend its aid in the enforcement thereof. It was further held on the former appeal that it was 'premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach.' This action was commenced prior to 1921. In that year sections 1060, 1061, and 1062, relating to declaratory relief, were added to the Code of Civil Procedure. The supplemental complaint was filed after those additions to the Code. This change in the law was, in my opinion, sufficient to enable the substituted plaintiff to proceed thereunder and to have his status declared under the conditions as were then shown to exist, and this, notwithstanding the old rule which required him to be hazardously active in the breach of such restrictions and passive in litigation."

The foregoing language was quoted approvingly in Hess v. Country Club Park et al., 213 Cal. 613, 2 P.2d 782. In our opinion it sheds much light on the proper use of the remedy of declaratory relief.

We must conclude that an actual controversy did exist between the parties within the contemplation of the statute and as it has been interpreted and applied in California.

[4] It may be added that appellant has assumed that respondent is seeking declaratory relief only, and no other remedy. However, it appears that in addition to the cause of action brought under the provisions of section 1060, supra, plaintiff pleaded three other causes of action which respectively alleged lack of consideration, fraud and undue influence with regard to execution of the purported agreements, written and oral. We are constrained to say that even if the prayer for declaratory relief were denied under the factual situation here presented, nevertheless the court having before it a proper case for equitable relief, will not refuse a complete scrutiny of the issues but will grant the relief that the proof warrants, even though it may not be the same as prayed for. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 109 P.2d 34.

[5] Upon the question of whether the judgment would be followed by the Massachusetts court to which the same issues are tendered, little need be said. If there was jurisdiction vested in the trial court, no concern need be felt as to the attitude of another which might challenge either the propriety of the judgment or its validity. Appellant evidently contemplates that the tribunals of Massachusetts will at some time decide the same matters, for she states in her brief that "any judgment obtained in the courts of California by the plaintiff could not operate as res adjudicata of the proceedings pending in Massachusetts; therefore the prosecution of such proceedings would be an absolute futility". The question of whether the judgment here will bar a different one in another state may best be answered by the statement that we are not concerned with that. There is nothing in the record to indicate that anyone contends that there is privity between the plaintiff and the Massachusetts administrator. It is quite clear that anything done by plaintiff is under his authority as an officer of the California court and it is equally apparent that any action taken by the Massachusetts administrator is limited to his authority under the court's appointment there. In Richards v. Blaisdell, 12 Cal.App. 101, 106 P. 732, 734, it was said: "* * * it appears to be the settled rule that the allowance of a claim by an administrator in one jurisdiction is not only not conclusive against an administrator in another, but it is not even evidence."

[6] Any proceedings instituted in Massachusetts against the ancillary administrator would not affect the judgment here under attack and is no argument in favor of its reversal, and this would be true even if a judgment recognizing the Giraudo claim had been entered in Massachusetts before this action was instituted. Section 1913 of the Code of Civil Procedure pro-

vides as follows: "The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority."

[7] The judgment is also attacked on the theory that inasmuch as plaintiff had other available remedies, declaratory relief was not available to him. Appellant cites several cases in support of her position. No purpose would be served by discussing any of her authorities upon this point. An examination of them indicates that none of them bear in any measure upon the proposition which they are claimed to establish. Furthermore, the contention made is answered not only by the provisions of section 1060, supra, that the court may make the declaration "whether or not further relief is or could be claimed at the time", but by the language of section 1062 of the Code of Civil Procedure, which provides that the remedies are cumulative and are not restrictive of other remedies. There are also several cases in which the question has arisen. In Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 48 P.2d 738, 741, 742, it was said: "The third point raised by the appellant is that the action for declaratory relief will not lie when there is an available remedy in an ordinary action at law or in equity. The answer is that the Code does not so limit that right of action. Appellant cites Stenzel v. Kronick, 102 Cal.App. 507, 283 P. 93, and Hamburger & Sons v. Kice, 129 Cal.App. 68, 18 P.2d 115, in support of his argument. Neither case is in point. Both applied the provisions of section 1061 of the Code of Civil Procedure which gave the court discretion to refuse to exercise the power where it is not necessary or proper under the circumstances." See, also, Rolapp v. Federal Building & Loan Ass'n, 11 Cal.App.2d 337, 53 P.2d 974; Fritz v. Superior Court, 18 Cal.App.2d 232, 63 P.2d 872.

[8-11] The last point requiring consideration is that the trial court, sitting in the probate matter arising by virtue of the filing of petitions for probate of the two purported wills of decedent and the contests instituted, was without power to exercise the functions of the Superior Court sitting in the case of Gunn v. Giraudo. She cites cases, notably Richards v. Wetmore, 66 Cal. 365, 5 P. 620, and Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567. These citations are authority for the rule that a court sitting in probate may not exercise general civil jurisdiction and conversely that sitting as a court of general civil jurisdiction it may not assume the functions of a probate court. As a proposition of law, appellant's contention may be accurate, but it does not appear that such dual capacity was here assumed. The two proceedings were not heard as one matter. The record discloses that while the causes were tried at the same time and while much of the evidence adduced clearly affected both matters, nevertheless they were submitted on distinct pleadings, findings were separately made, and the judgments were in no way confused one with the other. The trial was lengthy and by the means adopted much time was saved for court, counsel and witnesses. There can be no question that the court had jurisdiction over each class of case presented. It is true that appellant objected to the consideration of the two matters at the same time. This cannot alter the fact that the propriety of doing so has been determined. In Re Estate of Arms, 186 Cal. 554, 199 P. 1053, it was held proper where the parties stipulated to do so. Such stipulation would not vest jurisdiction if none otherwise existed. Therefore, assuming that it was error for the court to proceed in a dual capacity, which we doubt, the question of jurisdiction was not involved. There was no showing that any injury resulted to appellant through the procedure in any event and thus the provisions of section 4½ of article VI of the Constitution may properly be invoked.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

In re RYAN'S ESTATE.*

Civ. 6715.

District Court of Appeal, Third District, California.

Dec. 16, 1941.

Hearing Granted Feb. 11, 1942.

1. Descent and distribution ⇐14

In statute bringing kindred of the half-blood within the normal rule of succession, the exception excluding the half-blood who are not of the blood of ancestor from whom the inheritance came by descent, devise or gift may apply only when there are kindred of the half-blood who are related to the decedent in the same degree. Probate Code, § 254.

2. Descent and distribution ⇐14

Where there are kindred of the whole-blood and kindred of the half-blood on both the paternal and maternal sides of decedent, the rule of exclusion of half-blood kindred from the inheritance cannot be applied. Probate Code, §§ 226, 230, 254.

3. Descent and distribution ⇐14

The exclusion of half-blood kindred under statute can only take place in favor of whole-blood kindred who are of the blood of the ancestor from whom the property inherited came by descent, devise or gift. Probate Code, § 254.

4. Descent and distribution ⇐14

The only half-blood kindred who can be excluded from inheritance under statute are those who are not of the blood of the ancestor from whom the property inherited came by descent, devise or gift. Probate Code, § 254.

5. Descent and distribution ⇐14

Where first cousins of decedent claiming in proceeding to determine heirship, included some of the whole-blood and some of the half-blood on both paternal and maternal sides, the statute limiting inheritance by half-blood kindred, where property came from ancestor by descent, devise or gift, was inapplicable, and all cousins of decedent were entitled to share equally in property inherited by decedent from her parents, irrespective of the source of title. Probate Code, § 254.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Proceeding in the matter of the estate of Katherine Ryan, deceased, wherein Elizabeth Leary filed petition to determine heirship. From an adverse judgment, petitioner and Helen Scully and others appeal.

Affirmed.

John F. Quinn and Irwin T. Quinn, both of Eureka, for Elizabeth Leary.

Hill & Hill, of Eureka, and Lewis T. Sterry, of Los Angeles, for Scully Heirs.

Denver Sevier, of Eureka, for Neville Heirs.

Chris R. Peterson, of Eureka, for respondents Donovan, MacLauchlam and Patrick Powers.

Michael McHugh and L. E. Mahan, both of Eureka, for respondents Mary A. Spillane and others.

TUTTLE, Justice.

This appeal, in an action to determine heirship, is taken by three first cousins of the decedent Katherine Ryan, who are of the whole-blood of the paternal ancestors, and by a first cousin of the whole-blood on the maternal side. The trial court ordered that the estate of the decedent be distributed in equal shares to the twenty-six first cousins of Katherine Ryan, without regard to the source of title.

It appears from the evidence that John Ryan, the father, and Julia Leary, the mother of deceased, were married in 1869. Katherine Ryan was born in 1872, and died on May 16, 1938. Her mother, Julia Leary Ryan, died February 5, 1901, and her father, John Ryan, died on July 12, 1913. Katherine Ryan left neither issue, spouse, parent, brother, sister nor decedent of a deceased brother or sister. Her next-of-kin, so far as disclosed, are four cousins of the whole-blood, who are the appellants, and twenty-two cousins of the half-blood, all in equal degree.

Appellants predicate error on the ruling of the trial court in refusing to admit testimony showing the ancestral origin of the estate of the deceased, Katherine Ryan, and urge that such refusal constituted prejudicial error. It is urged that proof that some of the property is of ancestral origin, would, under sections 226, 230 and 254 of the Probate Code, exclude the half-bloods, who are not of the blood of the ancestor from whom the estate descended, in favor of the kindred who are both of the whole-blood and the half-blood of the particular ancestor. The appellant, Elizabeth Leary,

* Subsequent opinion 133 P.2d 626.

who is of the whole-blood on the maternal side, also claims paternal ancestral property to the exclusion of the half-blood on the maternal side.

It is the contention of respondents, first, that the record on appeal does not disclose any error prejudicial to appellant, as it fails to show that there is any "ancestral" property in the estate within the meaning of section 254 of the Probate Code, and second, that even though the record should disclose that part of the "inheritance" is ancestral, within the meaning of section 254, that nevertheless, the facts in the present case will not permit the application of the rule excluding kindred of the half-blood from sharing in the inheritance. We shall first proceed upon the assumption that the property, or a portion thereof, would be proven ancestral.

Section 254 of the Probate Code (formerly section 1394 of the Civil Code) is worded as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are."

The record discloses that the heirs to the estate of Katherine Ryan, deceased, are twenty-six first cousins. They are all related to deceased in the fourth degree. Three of the cousins are of the whole-blood on the paternal side. These cousins, together with one other cousin who is of the whole-blood on the maternal side, are the appellants in this suit. Six cousins are of the half-blood on the paternal side, and the remaining sixteen cousins are of the half-blood on the maternal side.

The appellants contend that the ancestral property which came to Katherine Ryan, the decedent, from her father cannot be shared in by the half-blood cousins of Katherine Ryan, who are of the blood of Katherine Ryan's mother, but who are not of the blood of her father. It is urged, also, by appellants, that any ancestral property shown to have come from the mother of decedent cannot be shared in by the half-blood cousins of decedent who are of the blood of decedent's father, John Ryan, but who are not of the blood of decedent's mother.

The position taken by appellants, assuming that the estate of the decedent is made up of ancestral property having been acquired by descent, devise or gift, from either her father or mother, would result in the distribution of the John Ryan ancestral property to the four appellants and to those respondents who are of the half-blood of the deceased and of the blood of John Ryan, to the exclusion of the respondents who are of the half-blood of the decedent and not of the blood of John Ryan; and as to any ancestral property having come from the mother of deceased, the appellants, and those respondents who are of the half-blood of the deceased and of the blood of deceased's mother, would share in the distribution thereof to the exclusion of those respondents who are of the half-blood of the deceased, and who are not of the blood of the mother.

The determination of the right of appellants to share in ancestral property to the exclusion of any of the respondents, turns upon the construction to be given to section 254 of the Probate Code.

The first clause of section 254, supra, reading, "Kindred of the half blood inherit equally with those of the whole blood in the same degree," simply brings the kindred of the half-blood within the normal rule of succession. The second clause of this section of the Code, commonly referred to as the "exception" to the rule announced in the first clause thereof, does, however, under certain circumstances, operate so as to deny the kindred of the half-blood the right to inherit. The language of this "exception" clause is as follows: "* * * unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are."

[1] It is now well settled in this jurisdiction that the "exception" to section 254, supra, excluding the half-blood not of the blood of the ancestor, may apply only when there are kindred of such blood who are related to the decedent in the same degree. In re Estate of Smith, 131 Cal. 433, 63 P. 729, 82 Am.St.Rep. 358; In re Estate of Belshaw, 190 Cal. 278, 212 P. 13; In re Estate of Sayles, 215 Cal. 207, 8 P.2d 1009.

The twenty-six relatives in the instant case are all in the same degree of consanguinity, each being a first cousin of decedent, some of the whole and some of the half-blood, and all related to the decedent in the fourth degree.

[2-4] If we were to literally apply the provisions of section 254 of the Probate Code to the factual structure of this case, it would, as we will later point out, result in considerable confusion, and also contravene the holding in several cases in this state where certain phases of the case have been considered. A careful consideration of such cases, where section 254, supra, has been construed, compels us to conclude that where, as in the instant case, there are kindred of the whole-blood and kindred of the half-blood both on the paternal and maternal side, the rule of exclusion as to half-blood kindred cannot be applied so as to exclude any of the half-blood from a share of the inheritance. In support of this view, we do not deem it necessary to enter into a lengthy discussion as to the effect to be given the numerous decisions in which section 254 of the Probate Code and section 1394 of the Civil Code (the immediate source of section 254), have been considered. Some of the decisions, because of the fact that the claimants were not related to the intestate in equal degree, and others where no question of half-blood kindred was involved, contain language pertaining to the construction of those statutes which unquestionably is mere dictum. It does appear, however, from a study of these cases, that at least two rules of law pertaining to the construction of the foregoing Code sections have developed. One rule is that the exclusion of half-blood kindred can only take place in favor of whole-blood kindred who are of the blood of the ancestor, and the other rule which would clearly appear to follow from the language used in section 254, that the only half-blood kindred who can be excluded are those who are not of the blood of the ancestor. Obviously, these two rules cause a conflict when applied to the circumstances in the present case, but, nevertheless, they are rules of construction which have come down in decisions wherein the application of the "exception" clause of section 254 has been considered, and as heretofore stated, these rules of law prevent the application of the "rule of exclusion" where the heirs are kindred of the whole-blood and of the half-blood, both on the maternal and paternal side.

In the Estate of Sayles, 215 Cal. 207, 8 P.2d 1009, the court in its opinion discussed the application of the "exception clause" of section 254, and reviewed with considerable thoroughness the prior decisions construing the language contained in section 254. Although the question before the court in that case was whether or not section 254 could apply where the kindred were not related to decedent in the same degree, we nevertheless are of the opinion that the court there has correctly construed the prior decisions wherein has been raised the applicability of the "rule of exclusion" under the Code section involved, and we believe that the rule of law announced supports our conclusion in the instant case. In discussing the prior decisions wherein the construction of the "exception" clause was at issue, the court (at page 209 of 215 Cal., at page 1010 of 8 P.2d) said:

"After maturely considering each of these points, the opinion in Re Estate of Belshaw", 190 Cal. 278, 212 P. 13, "following the decision in Re Estate of Smith", 131 Cal. 433, 63 P. 729, 82 Am.St.Rep. 358, "advisedly concludes that the last clause of the quoted Code section constitutes but an 'exception' to the rule announced in the first clause thereof, and that said second clause is therefore operative only when there are kindred of the whole blood who are of the blood of the ancestor and 'in the same degree' as those of the half blood. In other words, as construed in the Estate of Belshaw, kindred of the half blood, under the first clause of the section, inherit equally with those of the whole blood 'in the same degree,' while under the second or last clause of the section, if the property be of ancestral origin, the kindred of the half blood, not of the blood of the ancestor, are excluded only in favor of those of the whole blood 'in the same degree,' providing, of course, that those of the whole blood are also of the blood of the ancestor.

"The construction of the section announced in the Estate of Belshaw and in the Estate of Smith, is a reasonable one, and we see no reason for now overruling those cases, or departing from their interpretation of the statute."

Keeping in mind the two rules of law which we have concluded apply to the "exception" clause of section 254, an attempt to apply the "exclusion rule" to any of the kindred in the present case, immediately discloses the confusion and conflict that would arise. If the sixteen respondents, who are of the half-blood on the maternal side, were to be excluded from property of paternal ancestral origin, they could be excluded only in favor of the three appellants who are kindred of the whole-blood on the

paternal side, because the rule is invoked only in favor of those who are to be preferred by reason of being of the whole-blood of the ancestor. The exclusion, therefore, cannot take place, as to paternal ancestral property, in favor of the half-blood on the paternal side, nor in favor of appellant Elizabeth Leary, who is of the whole-blood on the maternal side. There would also be a conflict with the rule that the only half-bloods who can be excluded are those who are not of the blood of the ancestor, if the paternal half-blood were excluded from property of paternal ancestral origin. The kindred of the whole-blood and the half-blood on the paternal side cannot be excluded in favor of the half-blood on the maternal side, as to maternal ancestral property, as this would violate the rule that the exclusion can only take place in favor of the heirs of the whole-blood who are also of the blood of the ancestor. The kindred of the whole-blood on the maternal side cannot exclude the kindred of the half-blood on the maternal side, and an attempt by the whole-blood and the half-blood on the maternal side to exclude the half-blood on the paternal side, would result in the maternal half-blood being preferred to the paternal half-blood, and again violate the last-mentioned rule.

The impossibility of applying the "exclusion rule" of section 254, supra, so as to favor any of the kindred in the sharing of ancestral property in the present case has, we believe, been sufficiently illustrated. We might add that "the rule of the common law excluding the half blood has never met with favor in the United States". 16 Am.Jur., sec. 62, p. 833.

[5] The ruling of the court in excluding the proffered evidence was therefore proper, as it was immaterial and irrelevant. The judgment was a proper one, and should therefore be affirmed. It is so ordered.

THOMPSON, Acting P. J., concurred.

48 Cal.App.2d 663

PEOPLE v. ZABZAK.

Cr. 3513.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

1. Criminal law ⇐1144(13)

On appeal by defendant District Court of Appeal viewed the evidence in the light most favorable to the People.

2. Rape ⇐51(4)

Evidence sustained convictions of forcible rape on ground that victims' resistance was overcome by force and violence and that defendant was identified as the perpetrator of the offenses.

Appeals from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Steve Zabzak was convicted of two counts of forcible rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty on two counts of forcible rape after trial before the court without a jury, defendant appeals. There are also appeals from the orders denying his motions for a new trial.

[1] Viewing the evidence in the light most favorable to the People (respondent), the essential facts are:

Between ten and eleven p. m., January 21, 1941, Miss D———, age sixteen was walking along a street in the city of Long Beach when she was grabbed from behind by the defendant, who struck her several times with his fist and dragged her to the rear of an adjacent house, where he told her to keep her voice down, and with his fist over her, had sexual intercourse with her against her will.

January 19, 1941, at about eleven p. m., Mrs. D——— was walking on a street in the city of Long Beach, when she was grabbed by defendant, who placed his hand over her mouth and dragged her between two houses and into the rear yard of one, where with his hand over her mouth he had an act of sexual intercourse with her against her will. Thereafter he extracted one dollar from her purse and tore her wrist watch from her arm.

Defendant relies for reversal of the judgments upon the proposition *that there is no substantial evidence to sustain the findings of the trial court that (1) defendant perpetrated the crimes of which he was convicted or (2) the prosecuting witnesses resisted defendant's advances and their resistance was overcome by force or violence.*

[2] This proposition is untenable. An examination of the record discloses substantial evidence, taken together with inferences which the trial judge may reasonably have drawn therefrom, to sustain each and every material finding of fact upon which the judgments were necessarily predicated, including the identity of defendant as the perpetrator of the crimes of which he was convicted and the fact that the prosecuting witnesses resisted defendant's advances and their resistance was overcome by force and violence. For example, (1) Each prosecuting witness positively identified the defendant as the man who perpetrated the crime against her; and (2) Mrs. D——— testified that she had a silver tube in her throat, and that when defendant put his hand over her mouth and around her throat her breathing was almost completely stopped, and she knew that if she struggled and the tube became dislodged it would kill her. She further testified that the act of sexual intercourse was without her consent and against her will. This testimony warranted the trial court in finding that she had resisted defendant's advances and that her resistance was overcome by the force and violence used by defendant.

Miss D——— testified that defendant beat her, threatened her with his fist, and admonished her to be quiet; that she submitted to him because of the fear thus engendered; and that the act of sexual intercourse was perpetrated without her consent. The foregoing testimony alone was substantial evidence to sustain the trial court's finding that she resisted defendant's advances and that her resistance was overcome by force and violence.

Further discussion of the evidence is unnecessary. For a complete discussion of the applicable rules see People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685.

For the foregoing reasons the judgments and orders are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



BUTCHER v. BROUWER.*

Civ. 13238.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Rehearing Granted Jan. 14, 1942.

1. Judgment ⇐217

A judgment is not a "final judgment", other than for purposes of appeal therefrom, so long as the action in which it is made is pending, and an action is deemed "pending" until it is finally determined on appeal or until time for making a motion for new trial or taking an appeal therefrom has elapsed.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Pending".

2. Prohibition ⇐31

Where an order of District Court of Appeal prohibited superior court from attempting to enforce a judgment until proof that order granting or denying judgment debtor's application for a discharge as a bankrupt in a pending bankruptcy proceeding had become final, superior court was without authority to enter an order directing that execution issue on the judgment, upon proof that the application for discharge was denied, but before time for appeal from order denying the application had elapsed. Jud.Code, § 128(c), 28 U.S.C.A. § 225(c); 28 U.S.C.A. § 230.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Suit by R. L. Butcher against John C. Brouwer, wherein a money judgment was entered in favor of plaintiff. The plaintiff thereafter assigned the money judgment to Sally Williams. From an order for issuance of an execution more than five years after entry of the judgment, which order was granted upon motion of assignee of the money judgment, the defendant appeals.

Reversed.

George Acret, of Los Angeles, for appellant.

Emmett A. Tompkins, of Los Angeles, for respondent.

McCOMB, Justice.

From an order directing that an execution issue pursuant to section 685 of the Code of Civil Procedure, more than five years after the entry of judgment, defendant John C. Brouwer appeals. The order was granted upon the motion of Sally Williams, the assignee of a money judgment in favor of plaintiff.

So far as material here these are the essential facts:

January 10, 1929, the appealing defendant was adjudicated a bankrupt. June 27, 1929, plaintiff obtained a default judgment against him in the sum of $2,083.22, together with costs amounting to the sum of $22. Thereafter partial payments in the sum of $485.21 and $165.18 were made upon the judgment. December 16, 1932, the judgment was assigned to Sally Williams. On the same day a writ of execution was issued and caused to be levied upon the property of John C. Brouwer, the appealing defendant. Thereafter Mr. Brouwer applied to this court for a writ of mandate requiring the superior court to quash the writ of execution which had been issued. This court issued such an order and also ordered the superior court "to desist from all attempt to enforce" the judgment "against petitioner John C. Brouwer until he is finally either granted or denied a discharge as a bankrupt in the bankruptcy proceeding now pending, and until the proper *presentation of proof of such final* grant or denial to respondent court." (Brouwer v. Superior Court, 130 Cal.App. 163, 168, 19 P.2d 834, 836. (Italics added).

February 6, 1933, a special master heard the application of the appealing defendant for his discharge in bankruptcy, and made and filed a report recommending that such application be denied. This report was confirmed on February 27, 1933, by the

*For subsequent opinion see 121 P.2d 800.

United States District Court. May 19, 1933, plaintiff's assignee filed in the Superior Court of Los Angeles County a copy of the minute order of the United States District Court denying the appealing defendant a discharge in bankruptcy which order was dated February 27, 1933. September 30, 1940, plaintiff's assignee instituted the present proceeding, which resulted in the trial court's making an order on March 5, 1941, directing the issuance of a writ of execution against the property of the appealing defendant.

This is the sole question necessary for us to determine:

Was there proof presented to the superior court that defendant John C. Brouwer's application for a discharge in bankruptcy had been finally denied?

[1, 2] This question must be answered in the negative. The law is established in California that a judgment is not final (other than for the purposes of appeal therefrom) so long as the action in which it is made is pending; and an action is deemed pending until it is finally determined on appeal or until the time for making a motion for new trial or taking an appeal therefrom has elapsed. (Pacific Gas & Elec. Co. v. Nakano, 12 Cal.2d 711, 714, 87 P.2d 700, 121 A.L.R. 417; Gillmore v. American Cent. Ins. Co., 65 Cal. 63, 66, 2 P. 882.) In the instant case the appealing defendant had ninety days within which to appeal from the district court's order denying his application for a discharge in bankruptcy (U.S.C.A. Title 28, secs. 225(c) and 230.) The district court's order was entered February 27, 1933, and a copy thereof was filed in the superior court May 19, 1933. Eighty-one days only, therefore, had elapsed from the date of the making of the order until a copy of it was filed in the superior court. It is clear that the time for appeal from such order had not elapsed, and under the law above stated such order had not become final.

Since the order issued by this court in Brouwer v. Superior Court, supra, prohibited the trial court from attempting to enforce the judgment in the instant case until proof that the order granting or denying the appealing defendant's application for a discharge in bankruptcy had become final (and such proof, according to the record, has not been submitted to the trial court) one of the essential prerequisites for the order which the trial judge made in the instant case was lacking, and therefore the order was erroneous.

In view of the conclusions we have reached, it is unnecessary for us to discuss the other arguments urged upon this appeal.

For the foregoing reasons the order is reversed.

MOORE P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 660

VAN WYE v. ROBBINS.

Civ. 13329.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

1. Negligence ⇐32(1)

If one invites another to use his premises and invitee is injured due to negligent manner in which premises are maintained, invitor is responsible for resulting injury to invitee.

2. Landlord and tenant ⇐167(1)

A market operator, who rented space upon adjoining service station premises for free parking of his customers' automobiles, was under a duty to exercise reasonable care to see that parking space was kept in a safe condition.

3. Landlord and tenant ⇐169(8)

Proof that a market operator, who rented space upon adjoining service station premises for free parking of his customers' automobiles, never inspected parking space to see whether it was free of grease, supported finding that operator did not use reasonable care to keep premises free from grease, which was the "proximate cause" of injuries to customer who slipped upon a spot of grease negligently left upon the premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

4. Appeal and error ⇐842(4)

Where evidence justified finding that a spot of grease had remained upon surface of a free parking space provided by a market operator for his customers for more than 20 minutes before a customer slipped thereon, whether a sufficient time had elapsed to constitute "constructive notice" to market operator of unsafe condition of the premises was a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice" and "Question of Fact".

5. Appeal and error ⇐1010(1)

Where determination of trial court, sitting without jury, finds substantial support in the evidence, the determination will not be disturbed.

6. Landlord and tenant ⇐169(8)

In action by customer against market operator for injuries sustained as result of fall when customer stepped on a grease spot in a free parking space rented by market operator, evidence that customer was a man 80 years of age and was carrying two large bundles in his arms, which partially obstructed his view, supported finding that customer was not contributorily negligent.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Cornelius B. Van Wye against Al Robbins for personal injuries sustained as the result of a fall in an automobile parking lot. From a judgment for plaintiff, the defendant appeals.

Affirmed.

George P. Kinkle and John S. Hunt, both of Los Angeles, for appellant.

Wendell W. McCanles, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages resulting from personal injuries, defendant Al Robbins appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

March 18, 1940, plaintiff parked his automobile in a service station operated by Sidney Smilo, which service station was adjacent to the market building of the Bi-Rite Market operated by defendant Al Robbins. In April of 1939 Mr. Robbins had entered into an oral agreement with Mr. Smilo whereby the customers of Mr. Robbins' market were allowed to park their cars free upon the service station premises. In consideration for this right defendant Robbins paid Mr. Smilo a monthly rental. On the wall of the market building adjacent to the parking area said defendant caused to be printed the words "Free Parking." After leaving his car on the parking space above described, plaintiff, a gentleman eighty years of age, together with his wife, entered Mr. Robbins' market, purchased merchandise which filled two shopping bags and, with one on each arm (which obstructed his view of the ground ahead of him to some extent) started to return to his car. While walking across the parking area, plaintiff's wife noticed a grease spot on the surface of the lot. The spot consisted of heavy, black grease, approximately one-eighth of an inch thick and five inches in diameter, which in all probability had fallen from a car which was being greased on a rack located on the service station premises. She turned to warn plaintiff, but before she had done so he stepped upon the grease spot, fell, and sustained personal injuries.

Defendant Robbins relies for reversal of the judgment on these propositions:

First: Assuming that the grease upon which plaintiff stepped and fell was left there negligently by the proprietor of the parking lot or his agents, such negligence could not be imputed to defendant Robbins.

Second: There is no substantial evidence to sustain a finding that Robbins had either actual or constructive notice of the dangerous condition of the parking lot.

Third: Where a spot of heavy grease, five inches in diameter, is near an automobile which plaintiff sees is being greased, his view being unobstructed, plaintiff is contributorily negligent as a matter of law if he steps upon the grease and as a result receives injuries.

[1-3] The first proposition is untenable. The liability in the present case is not predicated upon the fact that Smilo was the agent of defendant Robbins. The latter's liability rests on the rule that if one invites another to use his premises and the

invitee is injured due to the negligent manner in which the premises are maintained, the invitor is responsible for the resulting injury to the invitee. (Burdick v. Cheadle, 26 Ohio St. 393, 398, 20 Am.Rep. 767; Collins v. Hazel Lumber Co., 54 Wash. 524, 103 P. 798, 800; Beaulac v. Robie, 92 Vt. 27, 102 A. 88, 90; Frear v. Manchester Traction, Light & Power Co., 83 N.H. 64, 139 A. 86, 89, 61 A.L.R. 1280; Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128.) Applying the above stated rule to the facts of the instant case, it is apparent that defendant Robbins, having invited plaintiff to use the service station as a place for parking his car, was under a duty to exercise reasonable care to see that the property was kept in a safe condition. Defendant Robbins concedes that he never inspected the parking area to see whether it was free of grease or not. Therefore it is obvious that the trial court was justified in finding that he did not use reasonable care to keep the premises free from grease, which was the proximate cause of the injuries to plaintiff.

[4, 5] Defendant Robbins' second proposition is likewise without merit. It appears from the evidence that the trial court was justified in finding that the spot of grease had remained upon the surface of the parking lot for more than twenty minutes. Whether or not sufficient time had elapsed to constitute constructive notice to defendant Robbins of the unsafe condition of the premises was a question of fact for determination by the trial judge (Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 600, 86 P.2d 829); and where, as in the instant case, his determination finds substantial support in the evidence, it will not be disturbed upon appeal. Stoddard v. Roberts Public Markets, Inc., 27 Cal.App.2d 166, 80 P.2d 519, is not applicable to the facts of this case. In that case it was held that a landlord would not be liable to an invitee for the negligence of his tenant. There is nothing in the case holding that an invitor is not liable to an invitee for the negligent condition in which premises are maintained.

[6] Defendant's final proposition is likewise without merit. Plaintiff was a man eighty years of age and was carrying two large bundles in his arms, which partially obstructed his view. There being substantial evidence thus to sustain the findings of the trial judge that plaintiff was not contributorily negligent, such findings are binding upon this court (Hamilton v. Pacific Elec. Ry. Co., supra, 12 Cal.2d at page 603, 86 P.2d at page 831).

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 646

BLOOM v. WAXMAN et al.

Civ. 12704.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Hearing Denied Feb. 19, 1942.

1. Appeal and error ⇐187(4)

In absence of an objection in trial court to an order permitting the filing of a complaint in intervention, a party may not urge error in the making of such order for first time on appeal.

2. Appeal and error ⇐187(4), 236(1)

Where plaintiff, after receiving notice of intervener's motion to be permitted to intervene in action, did not by motion or otherwise raise objection in trial court to order permitting intervention, plaintiff could not on appeal from judgment for intervener urge that trial court erred in permitting complaint in intervention to be filed.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by B. Bloom against Jack Waxman, and others, for declaratory relief, wherein Andre Witier filed a complaint in intervention. From a judgment in favor of intervener against plaintiff B. Bloom, and others, plaintiff appeals.

Affirmed.

Mitchel S. Meyberg, of Los Angeles, for appellant.

Alexander W. Staples and Harold B. Pool, both of Los Angeles, for respondent Andre Witier.

Jack G. Schapiro, of Los Angeles, for respondents Waxman.

McCOMB, Justice.

May 17, 1937, plaintiff filed an action for declaratory relief in the superior court. September 2, 1937, Andre Witier was permitted to file a complaint in intervention. June 29, 1939, judgment was rendered in favor of the plaintiff in intervention against plaintiff Bloom and others. Plaintiff urges that the judgment should be reversed for the reason that the plaintiff in intervention (respondent) had no right to intervene in the action.

This is the sole question necessary for us to determine:

In the absence of an objection to the filing of a complaint in intervention, either by demurrer, motion to strike or other appropriate proceeding, may a party for the first time on appeal raise the objection that the order of the trial court permitting the intervention was improper?

[1, 2] This question must be answered in the negative. The law is established in California that in the absence of an objection in the trial court to an order permitting the filing of a complaint in intervention a party may not urge error in the making of such order for the first time on appeal. (People v. Reis, 76 Cal. 269, 273, 18 P. 309; Smith v. Penny, 44 Cal. 161, 164; McKenty v. Gladwin, Hugg & Co., 10 Cal. 227, 228; County of Yuba v. Adams & Co., 7 Cal. 35; Carlin v. Masten, 118 Cal.App. 373, 375, 5 P.2d 65.) Since it appears from the record in the instant case that plaintiff, after receiving notice of plaintiff in intervention's (respondent's) motion that he be permitted to intervene in the case, did not by motion or otherwise raise the objection in the trial court which he is now presenting in this court, the above rule is applicable and he is foreclosed from urging alleged error of the trial court in permitting the complaint in intervention to be filed.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 650

BUTCHER v. BROUWER.

Civ. 13248.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Execution ⇐390

The trial court did not abuse its discretion in modifying provisions of a restraining order prohibiting judgment debtor from disposing of his property other than in transacting his business "in the ordinary course," by permitting debtor to renew a chattel mortgage existing upon his property, where it appeared that such renewal was necessary for continued operation of debtor's business, especially where it appeared that under the procedure followed the security for the judgment would be increased.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by R. L. Butcher against John C. Brouwer. From an order modifying a restraining order prohibiting defendant's disposition of property, the plaintiff appeals.

Affirmed.

Emmett A. Tompkins, of Los Angeles, for appellant.

George Acret, of Los Angeles, for respondent.

McCOMB, Justice.

From an order modifying the provisions of a restraining order issued against defendant John C. Brouwer, which prohibited him from disposing of his property, plaintiff's assignee appeals.

So far as material here these are the essential facts:

September 30, 1940, the trial court entered an order substantially prohibiting defendant Brouwer from disposing of his property other than in transacting his business "in the ordinary course." On October 17, 1940, the trial court made an order purporting to modify its previous order, permitting defendant Brouwer to renew a chattel mortgage existing upon certain of his property.

This is the sole question necessary for us to determine: *Did the trial court abuse its*

discretion in making the order of October 17, 1940, supra?

This question must be answered in the negative. In support of his motion defendant Brouwer filed an affidavit which read in part as follows:

"That on or about October 3, 1940, affiant borrowed said sum of $3,000.00 as an additional loan, and he has since paid back to said agency out of his said dairy business the sum of $4525.00; that the former chattel mortgage on said business is now reduced to approximately $4700.00; that affiant desires and requires for the further operation of said business an immediate new loan from said agency in the sum of $4,000.00 additional upon the aforesaid basis; that said additional loan is necessary in said amount to the continued operation of affiant's said business; that after the making of said loan affiant's total indebtedness will be about $700.00 less than it was on October 3, 1940."

Clearly, upon the facts stated in the foregoing excerpt from Mr. Brouwer's affidavit the trial court was justified in permitting him to renew his chattel mortgage. In fact, it appears that under the procedure followed the security for the judgment was increased rather than diminished.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

19 Cal.2d 244

BRIVIESCA v. CORONADO.

L. A. 17152.

Supreme Court of California.

Dec. 30, 1941.

1. Banks and banking ⇐139
Bills and notes ⇐429
Gifts ⇐30(1)

Where deceased, after his injury in an automobile accident, signed a check payable to defendant for balance of his bank account and requested his employer to deposit check to defendant's account as her agent in same bank upon which check was drawn, and employer, acting as defendant's agent, opened an account in name of defendant by depositing the check, and received a deposit slip in name of defendant before deceased's death, the deposit constituted "payment" of the check by bank, thus completing "gift" before deceased's death, notwithstanding that rubber stamp indorsements on the check and entry of defendant's account in bank's ledger were both made after deceased's death.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift" and "Payment".

2. Banks and banking ⇐140(3)
Bills and notes ⇐429

A transaction whereby payee deposits check in drawee bank in his own name does not constitute an "acceptance" of the check by the bank, but rather constitutes "payment" to payee. Civ.Code, § 3213.

See Words and Phrases, Permanent Edition, for all other definitions of "Acceptance".

3. Banks and banking ⇐124

Where payee deposits check in drawee bank in his own name, liability of bank to payee is not based upon the check or any promise by bank to pay the check, but arises from relationship of debtor and creditor that exists between a bank and a depositor. Civ. Code, § 3213.

4. Executors and administrators ⇐129(3)

In action by administratrix of estate of deceased against deceased's wife to quiet title to two parcels of realty, evidence supported judgment in favor of wife, excepting a one-half interest in one of the parcels, where record showed that one of parcels was owned by deceased and wife, as joint tenants and that other parcel was owned by deceased and wife as tenants in common.

5. Executors and administrators ⇐129(3)

In action by administratrix of estate of deceased to quiet title to two parcels of realty and a bank deposit, where plaintiff sued only in her representative capacity and not as an individual, trial court committed no error in excluding evidence offered by plaintiff to show that she, as well as defendant, had been married to the deceased.

In Bank.

Appeal from Superior Court, Riverside County; Wm. D. Dehy, Judge Assigned.

Action by Andrea Briviesca, as administratrix, etc., against Rosario Coronado, to quiet title to two parcels of real property, and a bank deposit. From a judgment for defendant excepting a one-half interest in one of the parcels of real property, the plaintiff appeals.

Affirmed.

John H. Myers, of Los Angeles, for appellant.

Gordon P. Shallenberger, of Wilmington, for respondent.

TRAYNOR, Justice.

Plaintiff, administratrix of the estate of Luz Briviesca, brought this action to quiet title to two parcels of real property and a sum of money on deposit in a bank, claimed by defendant. The trial court entered judgment for defendant, excepting a one-half interest in one of the parcels of real property, and plaintiff has appealed, challenging the sufficiency of the evidence in support of the judgment.

[1-3] Luz Briviesca, the deceased, was injured in an automobile accident. Shortly before his death he stated to his employer that he was about to die, signed a check payable to defendant for the balance of his bank account, and requested the employer to deposit the check to defendant's account as her agent in the same bank upon which the check was drawn. The employer, acting as agent for defendant, entered the bank just before closing time, opened an account in the name of defendant by depositing the check, and received a deposit slip in the name of the defendant. The rubber stamp endorsements on the check and the entry of defendant's account in the bank's ledger

were both made the following day. The deceased died a few hours after the deposit was made.

Plaintiff contends that the execution of a check in favor of defendant cannot constitute a valid gift passing title to the funds on deposit to defendant before acceptance or payment by the bank, and that the death of decedent before the check was endorsed or the account entered in the ledger revoked the check before acceptance or payment.

The check, however, was deposited in the drawee bank to the account of defendant-payee before the death of the donor. This deposit constituted payment of the check by the bank to the defendant, thus completing the gift before the death of the donor. It is well settled that if the payee deposits the check in the drawee bank in his own name, he thereby receives payment of the check. Utah Const. Co. v. Western Pacific Ry. Co., 174 Cal. 156, 164, 165, 162 P. 631, Greenzweight v. Title Guaranty & Tr. Co., 1 Cal.2d 577, 581, 36 P.2d 186, see cases cited in Brannon's Negotiable Instruments' Law (6th Ed.), p. 893; 14 Minn.L. Rev. 284; 2 Morse, Banks and Banking, sec. 451.) In effect he receives the money from the bank and immediately deposits it therein. Ibid. Such a transaction is not an acceptance of the check by the bank. An acceptance is a promise by the drawee to pay the amount of the bill or check to the holder or subsequent holders to whom it may be negotiated. The acceptance must be in writing and is usually on the instrument itself. Civ.Code, sec. 3213. It contemplates further negotiation of the instrument. When a check is deposited in the drawee bank, it is removed from circulation and cancelled. No further negotiation is contemplated. The liability of the bank to the depositor-payee is not based upon the check or any promise by the bank to pay the check, but arises from the relationship of debtor and creditor that exists between a bank and a depositor. (See cases cited in 7 Am.Jur. 313, sec. 444.) In the instant case this relationship came into existence at the time the deposit was made, not at the time the check was stamped and the account posted in the ledger.

[4] The record shows that Parcel I of the real property was owned by the deceased, Luz Briviesca, and Rosario Briviesca or Roseta Briviesca as joint tenants, and Parcel II was owned by Luz Briviesca and Mrs. Luz Briviesca as tenants in common. The trial court found that Roseta Briviesca and Mrs. Luz Briviesca were the same person, namely, the defendant in this action. It therefore held that defendant was entitled to all of Parcel I as surviving joint tenant and to one-half of Parcel II as tenant in common. The other half of Parcel I was awarded to plaintiff as administratrix of the estate of Luz Briviesca, the other tenant in common. The trial court was justified in finding that the defendant was the person named in the deeds as co-owner of the parcels of realty in question, and the record contains no evidence that plaintiff, as administratrix, was the owner of any more than a one-half interest in Parcel II. See 23 Cal.Jur. 122, sec. 11.

[5] Since plaintiff sued in her representative capacity and not as an individual, the trial court committed no error in excluding evidence offered by plaintiff to show that she, too, had been married to the deceased.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.



19 Cal.2d 236

RICHARDS v. METROPOLITAN LIFE INS. CO.

L. A. 18023.

Supreme Court of California.

Dec. 29, 1941.

Rehearing Denied Jan. 27, 1942.

1. Automobiles ⇐194(4)

Where insurance agent's duties were to solicit insurance, deliver policies to policyholders, collect premiums, and deliver premiums to office of insurance company, and agent received a salary and in addition thereto was paid commissions on certain premiums but had no fixed hours for work, the agent was not an "independent contractor" but was an "agent", as regards the insurance company's liability for the agent's negligent operation of automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Independent Contractor".

2. Automobiles ⇐245(30)

Where duties of insurance agent were the soliciting of insurance, delivery of policies to policyholders, collection of insurance premiums and delivery of premiums to insurance company's office, and attendance of agents' meetings at company's office, and agent was on his way to company's office to attend meeting of agents and to deliver premiums collected on previous day at time his automobile collided with another automobile, occupant of which was fatally injured, whether the agent was acting within the "course of his employment" at time of accident was for jury, in death action.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Addie B. Richards against Charles Lehman and his employer, the Metropolitan Life Insurance Company, to recover damages for death of plaintiff's daughter. From a judgment of nonsuit for the Metropolitan Life Insurance Company, plaintiff appeals.

Reversed.

For prior opinion of the District Court of Appeal, see 113 P.2d 703.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Rodney F. Williams, Charles A. Son, and Joseph D. Taylor, all of Los Angeles, for appellant.

Chase, Barnes & Chase and Laurence A. Peters, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal by the plaintiff from a judgment of nonsuit in behalf of defendant Metropolitan Life Insurance Company. At the close of plaintiff's evidence said defendant moved for a nonsuit, which was granted, followed by the present judgment.

On March 17, 1937, the daughter of plaintiff while riding as a guest in an automobile, was injured in a collision between the automobile in which she was riding and an automobile driven and owned by the defendant Charles Lehman. The injuries received resulted in the death of plaintiff's daughter. This action was instituted to recover damages sustained by plaintiff by reason of the death of her daughter, and both Charles Lehman and his employer, Metropolitan Life Insurance Company, were named as defendants in the action.

At the time of said accident defendant Lehman was, and for a year and one-half prior thereto had been, in the employ of the defendant Metropolitan Life Insurance Company. His duties were the soliciting of insurance, the delivery of policies to policyholders, the collection of insurance premiums upon policies secured, and the delivery of said premiums to the defendant company at its office in the city of Los Angeles. He testified as follows: "I would spend about an hour or an hour and a half a day in the office, compared with from 6 to 12 hours a day in the field, some of which time was spent before I went to the office, and some of the time after I went to the office in the morning. If I had a sale or some other service call to make early in the morning I would make it before going to the office, but rarely would I ever spend over half an hour in the field prior to reporting to the office in the morning."

He used his own car in soliciting insurance, in delivering policies, in collecting premiums and in trips to the office, and he paid all expense of maintaining and operating the same. He traveled from 35 to 75 miles daily in the course of his work. His agreement with the company required him to make a daily report and payment of money collected to the company at its office. As a rule he deposited the day's collections the next morning after they were made, but frequently he would carry the money around with him a day or two after it was collected. He was required to attend daily meetings at the office in the morning. He was on a salary and in addition thereto, was paid commissions on certain premiums collected. He had no certain hours when he was required to work for the company, but he had done no other work than that pertaining to his present employment since he began to work for the company.

On the morning of the accident Lehman was on his way to the office of the company to attend a meeting of the agents and to deliver premiums collected on the day previous. He made no calls that morning on behalf of the company, but went directly from his home, and on his way to the office he met with the accident.

Under a stipulation of the parties to the action the trial court first received evi-

dence upon the issue as to whether the defendant Metropolitan Life Insurance Company (hereinafter referred to as the company) was liable for the acts of Lehman. This issue involved the status of Lehman in his relation to the company; that is, was he an agent of the company or an independent contractor, and if he was an agent of the company, whether or not he was at the time of the accident acting in the course and scope of his employment. Upon the facts as hereinbefore set out, the trial court granted the defendant company's motion for a nonsuit on the ground that there was no evidence which tended to prove that Lehman was an agent of the defendant Metropolitan Life Insurance Company, or if he was an agent of said company, that he was acting within the course and scope of his employment for or on behalf of the company at the time of the occurrence of the accident. From this judgment the plaintiff appealed.

[1] It is unnecessary here to reiterate the well-established rule in this state respecting the power of the court to grant a nonsuit, as stated in innumerable decisions of this court, a number of which are cited in Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768, and in Robinson v. George, 16 Cal.2d 238, 241, 105 P.2d 914. Neither do we think the facts of this case justify any extended discussion of the question as to whether Lehman was an agent of the company or an independent contractor. Clearly under the facts before the trial court and as hereinbefore set out, Lehman was not an independent contractor, but, on the other hand, was an agent of the company in soliciting insurance for the company and in the performance of his other duties incidental thereto. Press Publishing Co. v. Industrial Acc. Com., 190 Cal. 114, 121, 210 P. 820; Hillen v. Industrial Acc. Com., 199 Cal. 577, 581, 250 P. 570; Globe Indemnity Co. v. Industrial Acc. Comm., 208 Cal. 715, 718, 284 P. 661; Robinson v. George, supra; Pearson v. M. M. Potter Co., 10 Cal.App. 245, 248, 101 P. 681; Dillon v. Prudential Ins. Co., 75 Cal.App. 266, 272, 242 P. 736; Curcic v. Nelson Display Co., 19 Cal.App. 2d 46, 51, 64 P.2d 1153.

The one serious question involved herein is whether Lehman was at the time the accident occurred, acting within the course and scope of his employer's business. In support of the judgment of nonsuit the respondent relies upon the following cases: Nussbaum v. Traung Label & L. Co., 46 Cal.App. 561, 189 P. 728; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; Gordoy v. Flaherty, 9 Cal.2d 716, 72 P. 2d 538; Humphry v. Safeway Stores, Inc., 4 Cal.App.2d 589, 41 P.2d 208; Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Mauchle v. Panama-Pacific International Exposition Co., 37 Cal.App. 715, 174 P. 400; Postal Telegraph Cable Co. v. Industrial Acc. Comm., 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460; and Holopoff v. Industrial Acc. Comm. 131 Cal.App. 554, 21 P.2d 649.

In the Nussbaum case the employee, who used his employer's car in the performance of his duties, at the close of business left the car at a garage and the next morning drove the car from the garage, and on his way to breakfast he met with an accident; and in the Martinelli case the employee, who used his employer's car in the performance of his duties, was on his way home to lunch when he met with an accident. In each of these cases it was held, and we think properly, that the employee was on an errand of his own at the time of the accident and was not acting within the course or scope of his employer's business. In the Gordoy and Humphry cases the employees departed from the course of their employers' business, one to take the mother of a fellow employee home, the other to mail a report. In those cases it was held that the accident did not happen when the employees were in the course of their employers' business. In the Kish case, [190 Cal. 246, 212 P. 29] the employees had finished their day's work, returned to their hotel, changed their clothes and were on the way to supper in their employer's machine, which was being driven by one of them, when the accident happened. It is true that they were using their employer's machine, but it was held that that fact did not make their employer liable, as the use of the machine in going to their meals "was permitted solely for the accommodation of the employees themselves."

The facts of the present case do not bring it within any rule announced in either the Nussbaum, Martinelli, Gordoy or Humphry decisions, as the employee in each of those four cases had admittedly departed from his employer's business and was engaged in an errand of his own at

the time of the accident. The employee Lehman on his way to the place of business of his employer, did not on the morning of the accident deviate from the direct and usual route from his home to said place of business. While the accident occurred before he reached his employer's place of business, no claim is made that it did not happen on the direct route from Lehman's home to the office of the company. Neither can it be said that the Kish case has any application to our present problem. There, as already stated, the employees of the company after the completion of their day's work, returned to their home and after changing their clothes, left the house for the purpose of having supper down-town. They were then on a mission of their own, in which their employer had no direct interest. In each of the remaining three cited cases—the Mauchle, Postal Telegraph and Holopoff cases—the employer had a fixed place of business to which the employee was required to report before he began his day's work and which he left at the close of the day when his work for the day was finished. In the Mauchle case the employee was on his way home from his employer's place of business, after he had finished his day's work, and he met with an accident. In the Postal Telegraph case the employee was a messenger boy and was on his way to the office of his employer to begin his day's work when he met with an accident. And in the Holopoff case the employee was a delivery boy and he, too, was on his way to his work on the morning of the accident. These three last-mentioned cases were held to be within the so-called "going and coming" rule, and compensation was denied the injured employees on the ground that neither of them was at the time he sustained his injury, acting within the scope of his employment nor was he at that time performing any service for his employer.

[2] In the present case while Lehman was required to report daily to his employer at its place of business, there is no evidence to show that his duties for the day did not begin until he had reached the office or place of business of his employer. On the other hand, there is positive evidence to the contrary, which is not denied, and in this case where a motion for a nonsuit was granted, it would make no difference if it were denied. Lehman's duties were twofold: one part to be performed in the office of the company and the other, outside of the office and in the territory allocated to him by the company. He spent as a rule an hour and a half in the office and from 6 to 12 hours a day in the field. There was no requirement that he should attend to his office duties before he began his work in the field. Some times he went to the office first and at other times he spent time in the field before going to the office. This is shown by the following excerpt from his testimony: "Some of which time [referring to his day's work] was spent before I went to the office and some of the time after I went to the office in the morning." The present case, therefore, differs from those cases wherein the duties of the employee were to be performed at a designated place or did not commence until he had arrived at his employer's place of business. In the latter class of cases the "going and coming" rule applies and governs the rights of the parties. In the present case as the employee left his home in the morning, it was optional with him whether he would first go to the office of the company or whether he would go into the field for the purpose of collecting a premium or delivering a policy. In the performance of each of these acts the employee was acting within the course and scope of his employment; or, to put it differently, the scope of his employment comprehended and included both an office visit and a visit to a policyholder or to a prospective policyholder, and there was no requirement of the company as to which of these two acts he was to perform before the other. These duties to report to the office and to perform service in the field defined the scope of his employment, and when he was engaged in either, it cannot be said that he was not acting within the course of his employment.

The present case is in many respects strikingly similar to the case of Dillon v. Prudential Ins. Co., supra. That was an action to recover damages for personal injuries sustained by the plaintiff by reason of the negligence of the agent of the defendant insurance company. The contract under which the agent of the Prudential Insurance Company was employed was in all material respects like that under which Lehman was employed by the defendant Metropolitan Life Insurance Company. The accident happened in the morning while the agent was on his way to

the office of his company to report to his company and attend a meeting of agents, but before he had reached the company's office. In the respects just related the facts of the two cases are precisely alike. The appellate court sustained the judgment in plaintiff's favor and in so doing, ruled, at page 271 of 75 Cal.App., at page 738 of 242 P., that the agent "was employed to 'cover' a specified territory, in which the accident happened, and to perform a multitude of duties therein. As a part of his duties, he was obliged to go to the meeting at the company's office. His duties were field duties. * * * This distinguishes this case from the authorities dealing with situations where an employee was on his way to a restricted, definite, exclusive business office or place of employment." This language is convincingly applicable to the situation in the present case in view of the similarity between the facts of the two cases. There the court held that the place of the agent's employment was not at the office of the company, but it covered a specified territory in which the agent was to perform his duties. So in the case now before us, the place of Lehman's employment was not at the office of the company, although he did spend some time there, but it covered the entire territory in which he solicited insurance, as well as the company's office.

In the case of Kish v. California State Automobile Ass'n, supra, the employees were employed by the association in the work of installing road signs and used in this work a truck of the defendant association. In the course of its opinion the court stated at page 250 of 190 Cal., at page 29 of 212 P.: "It may be conceded that the use of the truck for transportation to and from their work to their home was for the benefit of the employer indirectly for the reason that it permitted them to devote more time to accomplish the results of installing road signs, for which they were employed. Also, from the fact that they had what may be termed a 'roving commission,' having no fixed hours of employment and no fixed place of employment, it may be admitted that their employment commenced when they left the house in the morning and did not terminate until they returned in the evening. This point was, however, the utmost boundary of their employment and was not enlarged by the fact that they were permitted the use of the truck in going to places to get their meals."

Under these authorities it cannot be questioned, had Lehman at the time of the accident been on his way from his home to one of the policyholders of the company for the purpose of delivering a policy or collecting a premium, or on his way to a prospective policyholder for the purpose of selling insurance in his company, that he would have been acting in the scope and course of his employment, and the company would be liable for any tort committed by him on either of said occasions. Lehman's duty to report to the office of the company to deliver premiums collected and to attend agents' meetings was in the same class with the duties performed by him in the field, and could be performed either before or after the field duties. As there was no requirement that he should first report to the office before he began his day's duties, he was deemed to have entered upon his duties when he left his home to proceed to the first place to which his duty called him. Fenton v. Industrial Acc. Com., 44 Cal.App.2d 379, 112 P.2d 763. In that case the rule is stated at pages 383, 384 of 44 Cal.App.2d, at page 765 of 112 P.2d, as follows: "In 27 California Jurisprudence, at page 383, it is said that when a workman is engaged in traveling from place to place without the necessity of reporting at a particular place of business, he may be deemed to enter upon his employment when he leaves his home to proceed to the first place to which his duty calls him, and 'where an employee is not required to report for work at any particular place but travels in the course of his duties, since in such case he immediately enters upon his employment when he leaves his home to proceed to the first place to which duty calls him'. The foregoing text is supported by several cases cited in the Industrial Accident Reports." In the Fenton case the Industrial Accident Commission had denied compensation to the wife of the employee who was killed while investigating applications for relief in behalf of the California State Relief Administration. The court annulled the action of the commission and directed it to make an award in favor of the wife of the deceased.

In the present case we are not called upon to hold that Lehman was acting within the course of his employment at the

time of the accident, but only to determine whether there was any substantial evidence before the court at the time the motion for a nonsuit was made and granted, which tended to show that Lehman at that time was performing such a service in behalf of his employer. As we view this evidence, we are of the opinion that it was sufficient to have supported a verdict in favor of the plaintiff had the court permitted the case to have gone to the jury.

The judgment is reversed.

GIBSON, C. J., and SHENK, HOUSER, and CARTER, JJ., concurred.



47 Cal.App.2d 393

PEOPLE v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 13242.

Supreme Court of California.

Dec. 20, 1941.

Dissenting opinion filed Jan. 12, 1942.

In Bank.

Prior opinion of District Court of Appeal, 118 P.2d 47.

Holloway Jones, Clifford D. Good, George C. Hadley, and Lincoln V. Johnson, all of San Francisco, and Francis J. Carr, of Redding, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, and George H. Francis, of Independence, for respondents.

PER CURIAM.

Respondents' petition for a hearing after judgment by the District Court of Appeal is denied.

CARTER and HOUSER, JJ., dissenting.

CARTER, Justice (dissenting).

In my opinion, respondents' petition for a hearing should be granted and this case should be heard and determined by this court. The background forming the basis for the decision here in question is that the State of California commenced an action in eminent domain against Frank Monteleone and wife, and others to condemn various parcels of land and right of access therefrom, to and onto the public highway. The property was sought to be thus acquired for highway purposes. Upon commencement of the action the state, pursuant to Article I, Section 14 of the Constitution of California, obtained an order for immediate possession of the property and rights to be taken and damaged, and took possession of the same thereunder. Thereafter, the state proceeded with and completed the construction of the highway. Defendants' property involved in that action abuts on Cottage Home Street, a short street in Los Angeles, which stopped at a hill on one end and intersected Figueroa Street at approximately a right angle on the other end. There are no cross streets intersecting Cottage Home Street between the points above-mentioned and the only means of access to that street and to the property abutting thereon was Figueroa Street. The state's plan of construction as set forth in its complaint in the action called for the taking and using of a portion of the side of defendants' lot for a foundation for a fill, the plan being that the improvement of Figueroa Street would require its elevation to a point 14 feet higher than that formerly existing. After commencement of the action, the state changed its plan in that the sides of Figueroa Street where that street crossed Cottage Home Street would consist of perpendicular concrete walls thus eliminating the necessity of a resting place for the toe of a fill on defendants' lot. It proceeded to grade Figueroa Street in that fashion with the result that defendants' property is on a street which is closed by a hill at one end, and a 14 foot wall along Figueroa Street at the other. All right of access from defendants' property to Figueroa Street is thereby destroyed. *Thus, the state in no way abandoned or discontinued its project to take defendants' right of access and damage their property.* On the contrary it proceeded according to plan to accomplish and did accomplish that precise result. After all this had transpired, the state then filed a notice of motion to dismiss its condemnation action as to defendants. To that motion defendants pleaded equitable estoppel, and the trial court denied the motion. In the instant proceedings the District Court of Appeal granted a writ of mandate compelling

the trial court to grant the motion to dismiss.

The statutory authority for the dismissal by a condemner of its action in eminent domain is Section 1255a of the Code of Civil Procedure. Although this section authorizes the abandonment of the "proceedings" by the condemner, I think it is clear that it was not contemplated that it should be applicable when the condemner has already under authority of its action taken or damaged the property involved therein. Furthermore, the word "proceedings" is sufficiently comprehensive to include the execution of the improvement by the condemner. In the case at bar *the state has not abandoned its project, the basis of its action, but has carried it to completion.* It did not dismiss as to the other defendants, and therefore the proceedings are not abandoned.

The defendants' right of access, a real property right, has been taken, and as a result thereof their lot has been damaged. There is and can be no dispute about that. Title to that right of access has passed to the state. There is no logical reason, just or otherwise why the defendants should be compelled to initiate an action on their own behalf to obtain the just compensation to which they are apparently entitled under the constitutional guarantee. Let us suppose that a condemner acquired possession of property upon which there were extensive and valuable improvements by virtue of its eminent domain action. Thereafter, but before the trial of the action, the condemner commences construction of its project and in the process demolishes the buildings and makes deep excavations in the land. It then asks for a dismissal of the eminent domain action. Under the principles enunciated in the decision of the District Court of Appeal, the dismissal would be permitted. The land owner would be compelled to commence his action for damages and assume the burdens incident thereto. He would suffer delay in obtaining the compensation to which he is entitled, which would necessarily occur before the matter could be finally adjudicated. He could not recover interest on the amount of the award until the date of the judgment, even though the condemner had taken possession long prior thereto. This would deny to the property owner a right which this court held he was entitled to in Metropolitan Water District v. Adams, infra. Furthermore, the condemner might not be financially able to pay the amount of the judgment when recovered. There is no difference between that illustration and the case at bar. Here the defendants' right of access has been irrevocably taken and destroyed.

The decision of the District Court of Appeal is predicated upon the premise that the state may or may not, as it chooses, take or damage the owner's property in the exercise of its sovereign power of eminent domain, and thus may dismiss its action commenced in the aid of that power when it determines not to take or damage the property. As a general principle that is entirely sound. The fallacy exists in its application to the instant case. Here, although the state asserted in its motion to dismiss that it is not taking or damaging defendants' property, its actions speak with more force than its assertion. The facts as evinced by its actions show beyond cavil that it has already taken and damaged the defendants' property whatever it may claim to the contrary. It might logically follow from the judicial determination that the state may dismiss, that one of the factors adjudicated in the dismissal is that the state is not damaging or taking defendants' property, and when the owners claim in their subsequent action that the taking and damaging has occurred, the state will plead res judicata on that issue. The case of Pool v. Butler, 141 Cal. 46, 74 P. 444, relied upon by the District Court of Appeal is not in point because it is not concerned with a case where there was in fact a taking or damaging prior to the request for dismissal. In Metropolitan Water District v. Adams, 16 Cal.2d 676, 107 P.2d 618, there existed nothing more than a taking of possession by the condemner. There was no abandonment or dismissal in that case.

The decision of the District Court of Appeal entirely ignores the case of People v. Joerger, 12 Cal.App.2d 665, at page 668, 55 P.2d 1269, at page 1271, where the rule is stated:

"It follows that if entry into possession by plaintiff under the order mentioned, and *the various acts of ownership performed by plaintiff constitute a 'taking,'* then appellants were entitled to the compensation. Our Supreme Court has decided very definitely that the act of the state in entering into possession of the property and proceeding to *construct the highway was a 'taking' of the property* as that term is used

in the provisions of the Constitution above quoted. [Emphasis added.] In 1897 the Legislature of California * * * attempted to place in the Code of Civil Procedure by an amendment to section 1254, a law which is almost identical to the amendment of section 14, article 1 of our Constitution, adopted in 1918. The constitutionality of section 1254 was challenged in the case of Steinhart v. Superior Court, 137 Cal. 575, on page 577, 70 P. 629, 630, 59 L.R.A. 404, 92 Am.St.Rep. 183. The court there states, that the most important proposition is whether or not taking possession and using the property during the pendency of the condemnation proceeding is a taking, within the meaning of the Constitution. In disposing of the matter, the court says: 'To hold that possession of land may be given to a person seeking to acquire a right of way by condemnation, during the pendency of the proceeding, and before the amount of compensation has been determined and paid to the owner, or into court for him, would be to hold that this so-called temporary possession is not a taking of private property for a public use. But both on authority and reason it is so.' The section was held unconstitutional, and the trial court was prohibited from making any order for possession thereunder. Once before the precise point came up in the Supreme Court. In 1863 the legislature attempted to give the railroads this same power of possession, pending an action in condemnation. In the case of Davis v. San Lorenzo R. Co., 47 Cal. 517, the enactment was held unconstitutional, and we find the following language pertinent to the question here involved: 'However the rule may be in respect to the time at which the entire title and estate of the owner will be deemed to have been taken for public use, it is indisputable that the qualified estate which the corporation acquires when it enters under the authority of the Court must be deemed a *taking pro tanto,* from the time of the entry.' These cases follow the general rule. *'It may be stated as a general rule that there is a taking where the grantee of the power of eminent domain enters upon the land, not for the mere purpose of examination or survey, and does some act evidencing an intention to appropriate it.'* 20 C.J., p. 723, § 182. The evidence of an intent upon the part of the plaintiff in the instant case to 'appropriate' the property of appellants is overwhelming and beyond dispute."

The fundamental rules on this subject are stated in 20 Corpus Juris at page 1078:

"The abandonment (dismissal by the condemner) must be in good faith and must be a complete surrender of the project so far as the land involved is concerned. The condemning party cannot resort to experimental suits and assessments, nor can it, while persisting in the avowal of its purpose to condemn the land, withdraw from the inquisition and the judgment thereon because dissatisfied with the result, in order to seek by other methods to procure a smaller valuation of the desired property. And where an abandonment of the proceedings would violate a contract made with the owner or private rights have otherwise attached which would be prejudiced by the abandonment, it will not be allowed."

The effect of the decision of the District Court of Appeal in this case and the order of this court denying a hearing therein is to permit the state or any of its political subdivisions to take or damage private property for a public use by means of the artifice or device of commencing an action in eminent domain to condemn such property, obtain an order for immediate possession thereof, construct the public improvement contemplated, and then before the action is tried and the amount of compensation and damages to which the property owner is entitled are determined, dismiss the action, withdraw the amount deposited as security to the property owner upon obtaining the order for possession, and relegate the property owner to an action for damages for the taking and damaging of his property in violation of Section 14 of Article I of the Constitution of California. I am firmly of the opinion that such procedure was never contemplated by the framers of our Constitution or the Legislature in enacting the Code provisions under which it is now claimed by petitioner it is permissible, and it is clear to my mind that such constitutional and statutory provisions are not susceptible of the interpretation contended for by petitioner.

In my opinion the trial judge was right in denying plaintiff's motion to dismiss the action and petitioner's application for a writ of mandate should likewise be denied.

HOUSER, J., concurs.

In re PERKINS' ESTATE.

MIDDLEBROOK v. PERKINS.

L. A. 17928.

Supreme Court of California.

Dec. 31, 1941.

Rehearing Granted Jan. 29, 1942.

1. Executors and administrators ⇐314(12)

Although an administratrix may not appeal from a decree of distribution, Supreme Court looking to the interests of parties to litigation as of primary importance will liberally construe such notice of appeal as one in which designation of administratrix may be considered as descriptio personae.

2. Executors and administrators ⇐315(1)

An order of probate court that son of intestate's deceased husband was entitled to all of intestate's estate except amount received by intestate as bequest was not erroneous on ground that nature of proceedings before probate court was to determine son's heirship, where in objections to petition for distribution son alleged facts regarding parentage and that entire estate was the separate property of his father and came to intestate by bequest, and answering such objections, administratrix admitted relationship of the son but specifically denied the other allegations. Probate Code, § 229.

3. Husband and wife ⇐6(1)

Under common law, aside from the right of dower which was inchoate until husband's death, wife had no present interest in husband's property.

4. Descent and distribution ⇐61

In determining descent of property under statute returning husband's separate property to his family upon death of wife intestate and without issue, California courts will not reclassify husband's property owned in New York and which wife acquired while a resident there, where to do so would be to reach beyond its borders and impose a substantially different classification upon a former owner and a former ownership which obtained in New York. Probate Code, § 229; Const.N.Y. art. 1, § 14.

5. Descent and distribution ⇐61

Where, in accordance with New York Constitution adopting the common law subject to legislative alterations, the New York Legislature gave a wife certain rights to succeed to her husband's realty and personalty in lieu of her dower right, securities purchased by husband in New York from his income and proceeds of insurance upon his life which were paid in New York did not constitute husband's "separate property" within California descent statute returning husband's separate property to his family upon death of wife intestate and without issue. Probate Code, § 229; Const.N.Y. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

In the matter of the estate of Ella Wallace Perkins, deceased. From a part of a judgment directing distribution of the estate in favor of Clifford L. Perkins and from an order granting a new trial, Lillian Middlebrook, as administratrix, etc., appealed, and Clifford L. Perkins moved to dismiss the appeal.

Motion to dismiss denied, and judgment reversed, with directions.

George Appell and Harry A. Mock, both of Los Angeles, for appellant.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for respondent.

EDMONDS, Justice.

The probate court overruled the respondent's objections to a petition for distribution of the estate of Ella Wallace Perkins and entered judgment that he is not entitled to any part of her estate. Thereafter, it granted a motion for a new trial in part and entered another judgment which ordered distribution of all of the decedent's estate, except $4,313, to him. This judgment followed the terms of "modified findings of fact" and "modified conclusions of law." The case is here upon a notice of appeal by "Lillian Middlebrook, administratrix of the estate of" Mrs. Perkins, reciting that she appeals from the modified judgment, except that portion of it which orders distribution of the $4,313 to herself and her two sisters, and "from that certain motion for new trial granted in said estate." From this notice it appears that the appeal is directed to a minute order made by the probate court following the hearing of the respondent's motion therefor.

The question for decision concerns the character of the property left by Mrs.

Perkins. The respondent claims all of her estate as separate property of her deceased husband which she acquired by gift from him. By its second judgment the probate court sustained the respondent's contention as to all of her property except a portion valued at $4,313, which had come to her by bequest.

Ella Wallace Perkins died intestate in this state leaving three sisters, Lillian Middlebrook, Rose Dunlap Franklin, and Jessie W. Chapman, as her sole survivors. Forty-two years before she married Wallace T. Perkins, and prior to his death in 1931, they resided in the state of New York. There were no children of the marriage; Clifford L. Perkins, the respondent, is the son of Wallace T. Perkins by a prior marriage.

Wallace T. Perkins was successful in his business and bought insurance upon his life for $90,000. The policies representing this insurance named his wife as the beneficiary of $30,000, his son as the beneficiary of the same amount and a friend as the beneficiary of the remainder. Of this insurance, $10,000 was purchased under a group policy issued to the bank of which Mr. Perkins was an officer. The premiums on the group policy were paid by the bank; all of the other premiums were paid by Mr. Perkins from his income.

Shortly after the death of her husband, Mrs. Perkins came to California bringing with her about $19,000 in cash and some stock and bonds. There is evidence to the effect that while a resident of Los Angeles she made a number of investments and also received legacies amounting to $4,313.

Following the death of Mrs. Perkins, Lillian Middlebrook was named as administratrix of her estate. In due time the administratrix filed her first and final account, together with a petition for distribution of the estate to herself and her two sisters. The respondent filed written objections to the petition for distribution, claiming the entire estate under section 229 of the Probate Code as the separate property of Mrs. Perkins' predeceased spouse. Upon a hearing the probate court ruled against the respondent and decreed distribution to the three sisters of the decedent. No appeal was taken from this decree and the administratrix distributed the estate in accordance with its terms and procured her discharge.

Within the statutory time therefor, the respondent moved the court to grant a new trial. This motion was granted in part, the court filing "modified findings of fact and conclusions of law" reciting that the entire estate of Ella W. Perkins, except the sum of $4,313, was her separate property acquired by gift from Wallace T. Perkins. As a conclusion of law the court found that the respondent is entitled to all of the estate except that amount. A "modified judgment" in accordance with this decision was thereupon entered.

The appellant presents several points as grounds for reversal of the order granting a new trial and of the judgment. First, she contends, since the nature of the proceedings before the probate court was to determine the heirship of the respondent, the order should have been limited to that issue. A second point is that the money received by Ella W. Perkins as the proceeds of insurance upon the life of her husband was not a gift to her within the meaning of section 229 of the Probate Code. In this connection she asserts that the removal of Mrs. Perkins to California did not change the legal character of the money which was paid to her in New York.

The respondent takes the position that an administratrix is not a party aggrieved by the judgment, hence the present appeal should be dismissed. Upon the merits, he argues that the court acted entirely within its powers in granting the motion for a new trial and modifying its findings and judgment to accord with the evidence and the law governing the rights of the parties.

[1] Considering first the respondent's contention that the appeal should be dismissed, the record shows that it was taken by "Lillian Middlebrook, administratrix of the estate of" Mrs. Perkins. Although it is a fundamental principle that an administratrix may not appeal from a decree of distribution, this court, looking to the interests of the parties to litigation as of primary importance, has very liberally construed such a notice as one in which the designation of administratrix may be considered as descriptio personae. Estate of Strong, 10 Cal.2d 389, 74 P.2d 231. Notwithstanding the fact that in other papers presented by the appellant in connection with the present appeal it is stated that she is appealing "as said administratrix," the rule of the Strong case will be applied in the interests of justice.

[2] Turning to the points urged by the appellant, the statement that the purpose of the proceeding in the probate court was

to determine the heirship of the respondent is incorrect. In his objections to the petition for distribution, he alleged the facts regarding his parentage and "that the entire estate of * * * Ella Wallace Perkins was the separate property of * * * Wallace T. Perkins * * * and came to * * * [her] by gift, descent or bequest from * * * [him]." Answering these objections the administratrix admitted the relationship of the respondent, but she specifically denied that the property owned by Mrs. Perkins at the time of her death was the separate property of Mr. Perkins, or that it came to his wife by gift, descent or bequest. The issues, therefore, presented for determination by these allegations concern only the legal character of the property owned by Mrs. Perkins at the time of her death. Stated more specifically, the probate court was called upon to determine, and the same question is the principal one for decision upon the appeal, whether either the securities purchased by Mr. Perkins or the proceeds of the insurance upon his life were his separate property and came to his wife by gift from him. The respondent is entitled to any property of Mrs. Perkins which falls within this classification because of the provisions of section 229 of the Probate Code, which reads: "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest * * * such property goes in equal shares to the children of the deceased spouse * * *."

The testimony concerning the source of the funds with which Mr. Perkins purchased securities and life insurance is rather complete and uncontradicted. Mr. and Mrs. Perkins married in 1897. He was then in the banking business in Denver. In 1904, he and his wife removed to New York, where he became an executive officer of one of the large banks there. The record includes no evidence of any property he had either when he married Ella W. Perkins or when they became residents of New York. But the testimony shows that after he went there as a successful banker he bought life insurance and also stock in a number of corporations. The certificates representing this stock were either issued in his name or in the name of his wife. As his secretary expressed it: "When Mr. Perkins acquired his own holdings, he would either purchase some in smaller amounts for Ella, or he would ask for a transfer or division of the amount that he bought, some in his name and a smaller amount in hers."

It appears that during this time the salary of Mr. Perkins was $40,000 per year and that his income from dividends and investments amounted to as much more. His salary checks and the checks representing his income from other sources were deposited in a bank account from which he paid both his living expenses and for the securities which he bought from time to time. From this account also he paid the premiums upon his insurance policies. The question then narrows itself down to the legal character of this money, for unless it was his separate property, the respondent is not entitled to succeed to any portion of the estate of Mrs. Perkins.

Almost the identical factual situation was recently before this court in Estate of Allshouse, 13 Cal.2d 691, 91 P.2d 887, 891, where it was held that, for purposes of succession, the origin of an estate may be traced into a foreign jurisdiction and the California classification of property applied to the property acquired there. But an important qualification is that the nature of the foreign ownership must be substantially the same as that which the property would have if acquired in this state. Also, the court pointed out that such a comparison may not be made if the California classification would vary or defeat rights in property which had not come into this state.

That case concerned an estate whose source was the earnings of a husband in Missouri, which by the laws of that state belonged to him in sole ownership, subject to a dower right in the wife. Such ownership, it was declared, "differs in substantial aspects from that of either community or separate property as those terms are employed in a community property jurisdiction. It differs from community property in that it vests a greater right in the husband. It differs from the husband's separate property in that it includes the wife's right of dower, which although inchoate is exceedingly valuable. Chrisman v. Linderman, 202 Mo. 605, 100 S.W. 1090, 10 L.R.A.,N.S., 1205, 119 Am.St.Rep. 822. It therefore cannot properly be reclassified as either by the new jurisdiction while its situs and the domicile of its owner remain in the old."

[3, 4] The State of New York, by its Constitution, has adopted the common law, subject to such alterations as the legislature shall make concerning it. Sec. 14, art. I, Const. of New York. Aside from the right of dower, which was inchoate until the husband's death, the common law gave the wife no present interest in the husband's property Vernier, American Family Laws, Vol. 3, p. 202. In accordance with the constitutional provision, the legislature has given a wife certain rights to succeed to her husband's real and personal property in lieu of her dower right. Under these circumstances, to reclassify the property which Mr. Perkins owned in New York and which Mrs. Perkins acquired while she was a resident there "would be for this state to reach beyond its borders and impose its substantially different classification upon both a former owner and a former ownership which obtained in a foreign jurisdiction. This may not be done." Estate of Allshouse, supra.

[5] As the source of the estate now in controversy was not separate property of Mr. Perkins, the respondent may not succeed to any part of it. The judgment is, therefore, reversed, with directions to the probate court to enter judgment in favor of Lillian Middlebrook, Rose Dunlap Franklin and Jessie W. Chapman.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.



Lillian MIDDLEBROOK, Individually and as Administratrix, etc., Petitioner, v. SUPERIOR COURT of LOS ANGELES COUNTY et al., Respondents.

No. 18000.

Supreme Court of California.

Dec. 31, 1941.

Rehearing Granted Jan. 30, 1942.

See 134 P.2d 241.

In Bank.

Proceeding to review an order of the Superior Court of Los Angeles County requiring an administratrix to repossess property distributed. Order annulled.

George Appell and Harry A. Mock, both of Los Angeles, for petitioner Lillian Middlebrook.

C. H. Hartke and Freeman R. Brant, both of Los Angeles, for Clifford L. Perkins.

EDMONDS, Justice.

In an original proceeding, a writ of certiorari was issued to review an order made by the probate court in the matter of the estate of Ella Wallace Perkins, deceased, requiring the administratrix to repossess property which had been delivered to her, Rose Dunlap Franklin, and Jessie W. Chapman pursuant to a judgment which was later modified. The controversy turns upon the right of Clifford L. Perkins to that property. As it has been decided in Estate of Perkins, 120 P.2d 658 that he is not entitled to any part of the estate, the order is annulled.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.



19 Cal.2d 248

In re COFFEE'S ESTATE.

COFFEE v. RILEY, State Controller.

L. A. 17663.

Supreme Court of California.

Dec. 31, 1941.

1. Husband and wife ⇨273(4)

That Legislature in 1923 placed a semicolon instead of a comma after the words "belongs to the surviving spouse" in section 1401, the predecessor of section 201 of the Probate Code, providing that, upon death of either spouse, "one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent", etc., did not indicate legislative intent that only that portion of community property which is subject to testamentary disposition of decedent is liable for debts and charges stated in the following section, that community property is chargeable with husband's debts and is

subject to general provisions concerning administration of property of a decedent, since the two statutes are different in scope. Probate Code, §§ 201, 202.

2. Statutes ⇐200

Although punctuation may be of some assistance in construction of a statute, it is not of controlling importance.

3. Husband and wife ⇐273(4)

If Legislature had desired in 1923 to change the law relating to liability of community property for debts, it is presumed that it would have done so by express enactment and not by substituting a semicolon for a comma in section 1401, the predecessor of section 201 of the Probate Code, providing that, upon death of either spouse, "one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent", etc. Probate Code, § 201.

4. Husband and wife ⇐273(4)

The portion of community property which belongs to surviving wife is the one-half which remains after payment of husband's debts and expenses of administration apportioned between community and separate property in accordance with value thereof, notwithstanding husband's share of community together with his separate property is ample to pay those debts and expenses. Gen.Laws 1937, Act 8495, § 1; Probate Code, §§ 201, 202.

5. Taxation ⇐895(6, 7)

In calculating inheritance tax payable by estate of husband who possessed community and separate property, debts and expenses of administration must first be deducted from value of entire property apportioned between community and separate property in accordance with value thereof, so that only the wife's one-half of community property remaining after payment of such debts and expenses is not subject to the tax, as against contention that one-half of community property as of date of husband's death was no part of husband's estate within Inheritance Tax Act. Gen.Laws 1937, Act 8495, § 1; Probate Code, §§ 201, 202.

6. Taxation ⇐895(6)

Even if testator had made a designation of property for payment of his debts and expenses of administration, and executrix had paid the testator's debts from his one-half of the community property, the amount excluded from computation of inheritance tax as the wife's one-half of community property would not be thereby increased, since the one-half belonging to wife is one-half of the community after payment of husband's debts although wife may be given more by provision in will making husband's debts payable out of other parts of the estate. Gen.Laws 1937, Act 8495; Probate Code, § 750.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceedings in the matter of Harry Coffee, deceased, wherein Anna Coffee, individually and as executrix, etc., filed objections to the report of the inheritance tax appraiser. From an order sustaining objections to the report of the inheritance tax appraiser and fixing the inheritance tax, Harry B. Riley, State Controller, appeals.

Reversed with directions.

For prior opinion, see 111 P.2d 663.

James W. Hickey, Inheritance Tax Atty., and Alvin P. Jacobs, Asst. Inheritance Tax Atty., both of Sacramento, for appellant.

Dearing & Jertberg, Gilbert Jertberg, and Kenneth G. Avery, all of Fresno, for respondent.

EDMONDS, Justice.

The Controller has appealed from an order fixing the inheritance tax in the estate of Harry Coffee, deceased, which, in effect, allows his widow to take one-half of their community property without deduction for debts, expenses of administration or inheritance taxes.

The following facts stand undisputed.

Harry Coffee died testate. He owned separate property as well as that held by him and the respondent as joint tenants. By his will, all of his property was left to his wife. The total value of his estate subject to distribution by the probate court is $141,000. At the time of his death, community property and separate property had been transferred within the meaning of the Inheritance Tax Act of 1935 (Stats. 1935, p. 1266, Deering's Gen.Laws 1937, Act 8495) or was held in joint tenancy by him and his wife, of a total value of $68,500. He also owned life insurance policies providing for the payment of $73,000 to

named beneficiaries, which amount is not chargeable with inheritance taxes.

Excluding insurance, the value of the community property is $149.50. The inheritance tax appraiser allowed as credits against the amount of $209,500 (the value of all property except life insurance policies), commissions of the executrix and her attorneys upon $141,000, also debts, expenses of administration and the federal estate tax, a total of $22,700. He then computed the inheritance tax upon a clear market value of $186,800, after excluding $60,700 for the widow's share of the community property and deducting her statutory exemption of $24,000. She objected to this report upon the ground that one-half of the community property of herself and her husband is no part of his estate within the meaning of the Inheritance Tax Act; that it is not subject to his debts, or the expenses of administration and cannot be considered in calculating the inheritance tax thereon. This objection was sustained by the probate court which found that Harry Coffee left property subject to administration of a fair market value of $90,700; that there is other property also taxable under the inheritance tax law of a fair market value of $44,100; therefore, the total value of property which may be considered for inheritance tax purposes is $134,800. Allowing deductions for commissions of the executrix and her attorneys upon $90,700 together with debts, expenses of administration and the federal estate tax, in a total amount of $19,400, the court concluded that the taxable property of the decedent has a clear market value of $115,400. The amount of $90,700 represents the value of the property being administered upon in the probate court less one-half of the value of the community property included in the inventory and appraisement. Adding $44,100 to that amount and also $74,700, the value of one-half of the community property claimed by the wife, gives a total of $209,500, the value of all property except the insurance.

The Controller contends that the entire community property, proportionately with the husband's separate property, is subject to his debts and the expenses of administration, and that the widow is only entitled to take one-half of the community property remaining after the payment of these charges. He also asserts that the commissions of the executrix and of her attorneys should be based upon the value of the community property and the separate property subject to distribution by the probate court. In support of the probate court's order, the respondent argues that upon the death of the husband, one-half of the community property is no part of his estate and, further, that it may not be used for any purpose in computing the inheritance tax because section 1 of the Inheritance Tax Act of 1935, supra, declares "the one-half of the community property which belongs to the surviving spouse * * * shall not be subject to" its provisions.

In 1873, section 1401 of the Civil Code, which was a part of Title VII concerning "Succession," provided that upon the death of the wife, the entire community property, without administration should belong to the surviving husband, except such portion of it as had been set aside to her by judicial decree for her support and maintenance. At that time section 1402 of the Civil Code provided: "Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, * * *. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." Both sections were recast by the legislature of 1923. Section 1401 became: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section [1402] of this Code." The following section was amended to read: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expense of administration * * *." In 1931, these were enacted without substantial change of language as sections 201 and 202, respectively, of the Probate Code.

[1-3] Because in 1923, says the respondent, the legislature placed a semi-colon instead of a comma after the words "belongs to the surviving spouse" in section

1401, only that portion of the community property which is subject to the testamentary disposition of the decedent is liable for the debts and charges which were stated in section 1402 and are now specified by section 202 of the Probate Code. But this argument overlooks the difference in scope between the two provisions. Section 201, like its predecessor, is a statute of succession; section 202 is a legislative declaration that "the community property" is chargeable with the husband's debts and is subject to the general provisions concerning the administration of the property of a decedent. Also, although punctuation may be of some assistance in the construction of a statute, it is not of controlling importance. Certainly, it is reasonable to suppose that if the legislature had desired to change the law relating to the liability of community property for debts, it would have done so by express enactment and not by substituting a semicolon for a comma in the statute relating to succession. See Estate of Matthiessen, 23 Cal.App.2d 608, 73 P.2d 1267; In re Davis, 18 Cal.App.2d 291, 63 P.2d 853.

Moreover, in construing the enactments of 1923, this court held that they changed the law concerning community property in two particulars. "First, the wife was given the right, equal with that of the husband, to make testamentary disposition of the one-half of the community property to which she would be entitled if she survived the husband, a right which she did not before possess; and, secondly, it changed the rule of inheritance by substituting the surviving wife for the husband's descendants as successor to his half of the community property in case he made no disposition thereof up to the time of his death." Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 354, 26 P.2d 482, 483. Although the point now presented was not then before the court, its enumeration of the effects of the new enactments purports to include all of the changes which the legislature had made. It is most significant that no mention was made of any difference between the old and new legislation in other particulars.

For many years, the rule in this state has been that during the lifetime of a husband, the community property is liable for his debts. Grolemund v. Cafferata, 17 Cal.2d 679, 111 P.2d 641; Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170. And section 202 of the Probate Code, said the United States District Court in a recent case, "subjects all community property passing from the control of the husband, by his death or otherwise, to administration, to his debts, and to certain other charges. This is a provision more or less typical of the law in all community property states and should be construed as correlative to the principle that during the husband's life the community property is subject to his debts. Both are apparently corollaries to his right of management and control." Sampson v. Welch, D.C., 23 F.Supp. 271, 281.

[4, 5] It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses.

[6] According to the respondent, as executrix she paid the decedent's debts from his one-half of the community. The basis for this statement is not clear as the record does not show that there was any actual segregation of assets. But she relies upon section 750 of the Probate Code which provides that the decedent's debts and expenses must be first paid out of such property of the estate as the decedent designates by will for such purpose, or, if insufficient, such debts and expenses must be paid out of that portion of the estate not disposed of by will and, if that is not sufficient, out of the property given to the residuary legatees and devisees. The testator in the present case made no designation of property for the payment of his debts and expenses of administration, but even if he had, the amount excluded from the computation of the tax as the wife's one-half of the community property would not be thereby increased. The one-half that belongs to the wife is one-half of the community after payment of the husband's debts although she may be given more by a provision in the will making the husband's debts payable out of other parts of the estate. See Estate of Irwin, 196 Cal. 366, 237 P. 1074.

The judgment is reversed with directions to the probate court to compute the inheritance tax in accordance with the conclusions which have been stated.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concurred.

CARTER, Justice (Concurring specially).

I concur in the judgment of reversal. In my opinion, the debts of the deceased, expenses and charges of administration, etc., should be first deducted from the gross value of the property subject to administration, including all of the community and separate property. These deductions should be apportioned between the community and separate property in accordance with the value thereof, giving effect to the provisions of section 750 of the Probate Code when applicable. One-half of the net value of the community property belongs to the surviving spouse and is not subject to inheritance taxes. Section 201, Probate Code. The other half which is subject to the testamentary disposition of the deceased spouse, together with the separate property of such deceased, is taxable under the provisions of the Inheritance Tax Act. Stats.1935, p. 1266, Deering's General Laws 1937, Act 8495. Before computing such tax, the widow in the case at bar is entitled to an exemption of $24,000, and the tax should be computed upon the balance remaining after the deduction of such exemption.



48 Cal.App.2d 731

GOODMAN v. BOARD OF EDUCATION OF SAN FRANCISCO UNIFIED SCHOOL DIST. et al.

Civ. 11666.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1941.

Hearing Denied Feb. 26, 1942.

1. Schools and school districts ⇐72

Under statutes authorizing school boards to grant use of school buildings or grounds for public, literary, scientific, recreational or educational meetings or for the discussion of matters of general or public interest, some discretionary but not arbitrary power is reposed in such a board, and the right of use is permissive. School Code, §§ 6.740–6.742.

2. Mandamus ⇐79

A school board could be compelled by writ of mandate to permit use of a school room for purpose of meeting and discussing the Socialist Party's position on peace, where application alleged that board had granted use of school rooms or auditoriums to sundry associations organized for political and partisan purposes for discussion of political, economic, and moral matters, since whatever discretion was reposed in board by statute, it was not intended that one public group should receive favors denied another of like character because the latter holds views contrary to those of the first group. School Code, §§ 6.740–6.742.

3. Schools and school districts ⇐72

Under statutes vesting management, direction, and control of civic center schoolhouses in a board of trustees or board of education, authorizing free use of schoolhouses for civic meetings and recreational activities unless admission fees are charged or contributions are solicited, and stating that use of public schoolhouses should not interfere with use for school purposes, the duties and activities of a board are "ministerial". School Code, §§ 6.751, 6.760–6.762, 6.770, 6.771 and § 6.772, as amended by St.1939, p. 2420, § 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Ministerial".

4. Schools and school districts ⇐72

Under statute authorizing governing boards of school districts to authorize use of civic center schools by recreational, educational, political, economic, or artistic organizations but prohibiting use by any individual or organization which has as its object the overthrow or the advocacy of the overthrow of the present form of federal or state government, the only discretionary power conferred on such a board is that it may deny permission to use a schoolhouse by subversive organizations. School Code, § 6.750, as amended by St.1939, p. 2419, § 1.

5. Schools and school districts ⇐72

Under statute giving a school board discretionary power to deny permission to use a

civic center school by a subversive organization, the board has the burden of proving the character and affiliation of the organization desiring to use a school, and if the board is unable to prove the subversive nature of the organization, the school may be used and the organization may meet and discuss all subjects and questions which in its judgment may appertain to the political interests of the citizens. School Code, § 6.750, as amended by St.1939, p. 2419, § 1.

6. Schools and school districts ⇐72

Under statute authorizing the governing boards of school districts to authorize the use of school buildings and grounds by organization formed for recreational, educational, political, economic, artistic, or moral activities, the intent and purpose is to bestow an absolute right of user with regulatory power in the governing boards as limited by the statute. School Code, § 6.750, as amended by St.1939, p. 2419, § 1.

7. Constitutional law ⇐70(3)
Statutes ⇐176

A reviewing court may not be hesitant in declaring its conclusion when interpreting a statute, but it is not within the province of the reviewing court, regardless of its opinion on the matter, to state that a statute is wise or unwise.

8. Statutes ⇐227

Permissive words in a statute may be given a mandatory meaning and mandatory words may be given a permissive meaning, dependent on a clearly stated policy and the evident intent of the legislature.

9. Schools and school districts ⇐72

Under statute authorizing governing boards of school districts to permit the use of school buildings and grounds by organizations formed for political activities, the word "political" should not be read to mean "public", but even if the word "public" were substituted for "political", a school board could not refuse to permit the use of a school room for the purpose of meeting and discussing the Socialist Party's position on peace, since that subject might be of interest to the community either as a public or a political question. School Code, § 6.750, as amended by St. 1939, p. 2419, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Political" and "Public".

10. Schools and school districts ⇐72

The rule of a school board so far as it prohibits discussion of political subjects by an organization seeking to use a school room contravenes the statute authorizing governing boards of school districts to permit the use of school buildings and grounds by associations formed for recreational, educational, political, economic, artistic, or moral activities. School Code, § 6.750, as amended by St.1939, p. 2419, § 1.

11. Schools and school districts ⇐91

The statutes authorizing school boards to grant the use of school buildings or grounds for public, literary, scientific, recreational, or educational meetings, or for the discussion of matters of general or public interest are not unconstitutional as resulting in the diversion of funds required to be raised for public school education to other activities, since where the primary purpose to be subserved is legitimate, the expenditure of moneys secured through taxation is legal notwithstanding incidental uses are made thereof for otherwise unauthorized purposes. School Code, § 6.740, 6.770, 6.771, and §§ 6.750, 6.772, as amended by St.1939, pp. 2419, 2420, §§ 1, 3; Const. art. 9, § 6.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding by Lillian Goodman against the Board of Education of the San Francisco Unified School District and others for a writ of mandate to compel defendants to permit the use as a civic center of an auditorium or schoolroom in a designated free public schoolhouse for the purpose of meeting and discussing the Socialist Party's position on the question of peace. From a judgment denying the writ after sustaining a general demurrer without leave to amend, plaintiff appeals.

Reversed.

Wayne M. Collins, of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for respondents.

WARD, Justice.

An appeal from a judgment denying petitioner a writ of mandate entered following

the sustaining of respondents' general demurrer without leave to amend. The writ is sought to compel respondent board of education and the individual members thereof, its secretary and the superintendent of public schools of the San Francisco Unified School District to permit the use, as a civic center, of an auditorium or school room in a designated free public schoolhouse. The application therefor set forth that the use of the premises was desired "for the purpose of meeting and discussing the Socialist Party's position on the question of 'Peace', a subject appertaining to the political, economic and moral interests of the citizens of their respective community in which they reside * * * said meetings to be open to members of said association and any other persons interested in discussing the aforesaid topic without any admission charge." Attached to the petition is the report and recommendation of the superintendent of schools, which was adopted by the Board of Education. It reads in part as follows: "'"Request has been made, through the Civil Liberties Union, by Mrs. Lillian Goodman, representing the Socialist Party, for the use of the auditorium * * * to discuss the position of the Socialist party on the question of 'Peace'. The Superintendent believes discussions of this nature violate the rule of the Board of Education prohibiting the use of a school building for sectarian, political or partisan purposes, and respectfully recommends that the request be denied."'"

[1, 2] Sections 6.740, 6.741 and 6.742 of the "Use of School Property" act (div. 6, pt. 3, ch. 1 of the School Code) respectively provide: "Boards of school trustees and city boards of education are hereby authorized to grant the use of school buildings or grounds for public, literary, scientific, recreational or educational meetings, or for the discussion of matters of general or public interest upon such terms and conditions as said board may deem proper, and subject to the limitations, requirements, and restrictions set forth in this Chapter." "Said use shall not be inconsistent with the use of said buildings or grounds for school purposes, nor interfere with the regular conduct of school work." "Said use shall not be granted in such a manner as to constitute a monopoly for the benefit of any person or organization."

It appears from the above that some discretionary, but not arbitrary, power is reposed in the board, and that the right of use is permissive. Assuming this conclusion to be correct, it follows from the allegations of the complaint that the judgment, based upon the order sustaining a general demurrer to the complaint, is erroneous and that the writ should issue. The complaint alleges that respondent board has granted the use of school rooms or auditoriums to sundry associations of citizens organized for political and partisan purposes for the discussion of political, economic and moral matters and issues. Whatever discretion was reposed in respondent board, it was not intended that one public group should receive favors denied another of like character because the latter holds views contrary to those of the first group.

It is not necessary to discuss § 6.740 further as the petition herein is based squarely upon chapter 2 of the same part of the School Code, which confers upon certain groups a right, instead of a permissive user, to the use of such civic center for the specific purposes and under conditions enumerated in the chapter.

[3] The management, direction and control of a civic center schoolhouse are vested in its board of trustees or board of education (School Code, § 6.760), subject to reasonable rules and regulations by such boards for the conduct of civic meetings and recreational activities, in connection with which a supervising officer may be appointed. School Code, §§ 6.761, 6.762. The legislature has determined that such use of schoolhouses, property and grounds by the associations and groups shall be free (School Code, § 6.770), except that "In the case of entertainments or meetings where admission fees are charged or contributions are solicited and the net receipts of such admission fees or contributions are not expended for the welfare of the pupils of the district or for charitable purposes a charge must be made for the use of said schoolhouses, property and grounds." School Code, § 6.771. Necessary expenses of lighting, heating, janitor service, etc. "shall be provided for out of the county or special school funds of the respective school districts in the same manner and by the same authority as such similar services are now provided for." Stats.1939, p. 2420, § 6.772. A restriction is placed upon the use of such public schoolhouse and grounds in that it "shall in nowise interfere with such use and occupancy of said

public schoolhouse and grounds, as is now, or hereafter may be required, for the purposes of said public schools of the State of California." School Code, § 6.751. Up to this point, on this particular subject the duties and activities of the board are ministerial.

[4, 5] Section 6.750 of the School Code provides: "There is hereby established a civic center at each and every public school building and grounds within the State of California, where the citizens, parent-teachers' association, Campfire Girls, Boy Scout troops, farmers' organizations, clubs and associations formed for recreational, educational, political, economic, artistic and/or moral activities of the respective public school districts within the State of California may engage in supervised recreational activities and where they may meet and discuss, from time to time, as they may desire, any and all subjects and questions which in their judgment may appertain to the educational, political, economic, artistic and moral interests of the citizens of the respective communities in which they may reside. Governing boards of the respective school districts within the State may authorize the use, by such citizens and organizations of any or all other properties under their control, for supervised recreational activities.

"Such use, however, by any individual, society, group or organization which has as its object or as one of its objects, or is affiliated with any group, society, or organization which has as its object or one of its objects the overthrow or the advocacy of the overthrow of the present form of government of the United States or of the State of California by force or violence or other unlawful means shall not be granted, permitted or suffered." Stats.1939, p. 2419, ch. 837.

The only discretionary power conferred upon the board is that it may deny permission to use the schoolhouse by subversive organizations, the burden of proving the character and affiliation of the group being upon the board. The statute is silent upon the method of determining whether the object of an applicant group is in fact advocacy of the overthrow of the government of the United States or of the State of California.

If, as above stated, the board is unable to prove the subversive nature of the applicant society or organization, then the public schoolhouse may be used and the group "may meet and discuss * * * all subjects and questions which in *their judgment* may appertain to the * * * political * * * interests of the citizens of the respective communities in which they may reside." (Italics added.)

[6] The question is not presented upon this appeal, but it may be assumed that the violation of, or intention to violate, a statute or ordinance would justify the refusal to grant the use of school property, or the revocation of permission theretofore granted. Aside from that, the intent and purpose of the chapter plainly appears to be to bestow an absolute right of user, with regulatory power in the board, limited as set forth in the chapter. In reaching this conclusion we are mindful that entertainments may be staged "where admission fees are charged or contributions are solicited" (§ 6.771, supra); that a social dance may be permitted (McClure v. Board of Education, 38 Cal.App. 500, 176 P. 711), unless it necessitates the removal of school desks, furniture, etc. It may be conceded that the giving of entertainments, dances, etc., in public schools may not meet with the approval of citizens in some districts, and may in others; there may be a diversity of opinion on the advantage to the community of discussing in an open meeting subjects pertaining to politics, art or morals; the advocacy of certain social and economic views may be denounced by a majority of the citizenry of a community as repugnant to the constitution of this country; such advocacy may tend to undermine in adult and youth, moral responsibility, or may stir up antagonism and hatred to constituted authority, but, unless it is sought thereby to overthrow the government by force or violence, or other unlawful means, the *group* determines whether the discussion of the subject is in the interests of the citizens of the community. In this respect there is no ambiguity in the language used by the legislature. It must be assumed that such body acted wisely in not conferring upon the board, except as in the statute provided, a "discretion" in the matter of subjects to be discussed.

[7] In the interpretation of a statute, a reviewing court may not be hesitant in declaring its conclusion. It is not within the province of this court, regardless of its opinion on the matter, to state that a statute is wise or unwise. Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177.

[8] Appellant and respondents argue exhaustively upon numerous citations, the use of the words "may" in section 6.750, and "shall" and "must" in other sections. It is sufficient to say that in many instances permissive words are given a mandatory meaning, and mandatory words, a permissive meaning, dependent upon a clearly stated policy and the evident intent of the legislature.

[9, 10] Respondents' contention that the word "political" as used in the section should be read to mean "public" is without merit. Assuming that the word "public" should be substituted for "political," it would be without assistance to respondents in the present proceeding. The subject to be discussed—"Peace"—might be of interest to the community either as a public or a political question. The rule of the board in so far as it prohibits discussion of "political" subjects contravenes the provision of the section.

Assuming, but not deciding, that "sectarian" refers to religious denominational groups, no opinion is expressed herein on the propriety of the rule prohibiting the use of public school property for sectarian purposes. That question would require consideration of constitutional questions not involved on this appeal.

[11] Respondents claim that it is unconstitutional to allow school buildings to be used for purposes set forth in appellant's request. Const.Cal., art. IX, § 6. In brief, the argument appears as follows: "Nowhere in the state constitution do we find any provision for the use of school buildings or any portion thereof for outside purposes." It is further argued that if the two statutes under consideration (§§ 6.740 and 6.750) are held to be constitutional, such grant of authority by the legislature would result in funds, required to be raised for public school education, being diverted to other activities, and, regardless of how desirable such activities may be, they were not contemplated by constitution to be paid for from funds of the public school system.

Some consideration has been given to the use of public school property for other than strictly school purposes in states wherein the constitution is silent on the subject and no statutory authorization is given, thus making the grant of use illegal. This theory would not be applicable in California wherein an express statute authorizes use for other purposes.

The objection with relation to the diversion of funds is answered by the following: "Except in a few of the so-called extreme cases which deny the power to permit other uses of school property, the second objection [as to the diversion of moneys raised by taxation for a specified purpose, and that such moneys may not be used for private purposes] is given little consideration as being conclusive of the illegality of the use, on the theory that, where the primary purpose to be subserved is legitimate, the expenditure of moneys secured through taxation is legal notwithstanding incidental uses are made thereof for otherwise authorized purposes. Consequently the wording and import of the statutes prescribing the powers and duties of those charged with the care of school property is to a large extent determinative of whether the particular use in question will be allowed." 86 A.L.R. p. 1195. The legislature undoubtedly gave thought to the expenditure of school funds for incidental purposes, as shown by sections 6.770, 6.771, 6.772, supra, of the School Code.

Under all of the circumstances, in view of the weight of authority, it must be held that unless there is a violation of an express provision of the constitution, respondents' position is not well taken. If the board is aggrieved, relief may be sought through the legislature, not by judicial decision.

The judgment is reversed.

PETERS, P. J., and B. C. JONES, J. pro tem., concurred.

CRISWELL v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 12690.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1942.

Rehearing Denied Jan. 28, 1942.

Hearing Denied March 2, 1942.

1. Street railroads ⇐118(4)
Trial ⇐296(3)

An instruction upon right of motorman, if exercising ordinary care, to presume that any person approaching the intersection would perform his legal duty to look and listen for approach of street cars, was improper as adding unnecessarily to plaintiff's burden of proof, in that it did not take into account all traffic conditions present at time of collision and in that it assumed to limit duty of motorman to operate street car as though it and plaintiff's automobile were the only vehicles on the street, but did not constitute reversible error, where other instructions were given properly setting forth rule governing operators of vehicles. Const. art. 6, § 4½.

2. Appeal and error ⇐1170(9)

In action arising out of collision between automobile and street car at street intersection, where evidence on negligence of street railroad was conflicting and evenly balanced and it appeared from evidence that the provision in city ordinance limiting speed of street cars to 15 miles an hour was applicable to conditions as they existed at intersection at time of the collision, an instruction that speed limit of street cars at intersections was 20 miles an hour constituted reversible error. Const. art. 6, § 4½.

3. Highways ⇐18

The term "public highways" includes streets in cities.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Highway".

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by W. A. Criswell against the Pacific Electric Railway Company and another, for injuries sustained as result of a collision between an automobile and an electric street car. From a judgment for defendants, the plaintiff appeals.

Reversed.

Conroy & Conroy, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

This is an action for damages for alleged negligence which caused a collision between an automobile and an electric street car at an intersection of two streets in Hollywood. At the time of the collision, it was late afternoon but still daylight; it had been raining and the tracks were wet, but the weather was then clear. Traffic was very heavy.

The plaintiff was driving south on Argyle Avenue to where it meets Hollywood Boulevard. He made the boulevard stop, and started across Hollywood Boulevard, in the center of which there is a two-track electric railway line, belonging to the defendant, Pacific Electric Railway Corporation.

By reason of traffic conditions, the plaintiff went slowly across the intersection, and either came to a stop or was proceeding very slowly across the defendant's car tracks, when his automobile was struck by a street car traveling easterly on Hollywood Boulevard and belonging to the defendant street car company and operated by a motorman, also a defendant.

Among other things, there is conflict in the testimony as to the speed, respectively, of the automobile and the street car; as to when the brakes were applied on the street car; and as to whether the plaintiff and the motorman looked for and observed approaching traffic, as it was their duty so to do.

After argument, and the reading of the court's instructions, the issues were submitted to a jury, which returned a verdict in favor of the defendants.

Plaintiff concedes that there is sufficient substantial evidence in the record to sustain the verdict, but argues that the evidence upon the issues of negligence was very evenly balanced, and that alleged errors as to instructions given by the trial court could well have been the means of influencing the jury's conclusions on these issues.

The instructions complained of will be considered under two heads: First, what we may denominate the "look and listen" instruction; and, second, instructions as to speed at the intersection.

The "look and listen" instruction is as follows: "You are instructed that the motorman, if exercising ordinary care in operating the street car in this case, had a right to presume that any person approaching the intersection would perform the duty which the law imposed upon him to look and listen for the possible approach of cars and no duty rested upon the motorman to slow down or stop his car until he had reason to believe that the plaintiff approaching the intersection was not performing or likely to perform his duty in that respect, when the motorman saw or in the exercise of ordinary care concluded that the plaintiff would attempt to cross in front of his car, if the motorman then used ordinary care to stop his car, that was all that was required of him in that respect."

The speed at intersection instructions are:

1. "You are instructed that under the provisions of Section 80.43 of the Municipal Code of the City of Los Angeles that the speed limit at which the operator of a street car might cross the intersection of Argyle Avenue and Hollywood Boulevard is twenty (20) miles per hour."

2. "You are instructed that it was not a violation of the Municipal Code of the City of Los Angeles for the operator of the street car to enter and cross Argyle Avenue at a speed of twenty (20) miles per hour or less."

3. "You are instructed that Section 80.43 of the Los Angeles Municipal Code—Ordinance No. 77,000, as amended, provides as follows:

'Street Car Speed.

'(a) The operator of any street car shall not drive said street car at a speed exceeding the following:

'1. Fifteen (15) miles per hour when traversing another street car crossing or a highway crossing or when turning upon curves, in either event when the operator does not have an unobstructed view along such intersecting rails or highway or around such curve within a distance of two hundred (200) feet; also when passing schools while persons are entering or leaving the grounds thereof.

'2. Twenty (20) miles per hour in business districts.

'3. Twenty-five (25) miles per hour in residence districts.

'4. Forty-five (45) miles per hour in all other places.

'(b) The provisions of this section shall not apply when a street car is being operated upon a private right of way which is effectively protected from vehicular traffic.'"

The italicized portion of this instruction was deleted by the trial court.

4. The following instruction was proposed by the plaintiff but was refused: "You are instructed that the intersection of Hollywood Boulevard and Argyle Avenue is a highway crossing within the meaning of Section 80.43 of the Municipal Code of the City of Los Angeles, and that the operation of a street car traversing said intersection at a speed in excess of 15 miles per hour would constitute a violation of said Code."

[1] Standing alone in the record, we would not be disposed to send the case back for a new trial because of the giving of the "look and listen" instruction. We do not think the instruction was proper, because it added unnecessarily to the plaintiff's burden of proof. But the jury was elsewhere given instructions which correctly set forth the rule governing operators of vehicles in cases of this kind. These instructions apparently were based upon the recent case of Wright v. Los Angeles Railway Corp., 14 Cal.2d 168, 93 P.2d 135, 137, in which the Supreme Court says: "However, it is generally conceded that, on approaching an intersecting street, the duties of a street-car motorman and those of the driver of an automobile which is about to cross the street-car tracks at such intersection, are reciprocal and that each is required to approach the intersection with due regard for the rights of the other. Smith v. Southern Pac. Co., 201 Cal. 57, 255 P. 500; Shipley v. San Diego Elec. Ry. Co., 106 Cal.App. 659, 289 P. 662. In that regard it was said in the case entitled Aungst v. Central California Traction Co., 115 Cal.App. 113, 116, 1 P.2d 56, 57: '* * * "that where both street car companies and automobiles have the right to use the public streets, the right of each must be exercised with due regard to the rights of the other, and in such a manner as not unreasonably to infringe upon the rights of the other." While street cars must run upon the tracks provided for them, they have no absolute or pre-eminent right of way over intersections, but must use the same with due regard to the safety

and rights of the general public. O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809.'"

The vice of the instruction is that it does not take into account all traffic conditions present at the time of the collision, but assumes to limit the duty of the motorman to drive his street car as though it and the plaintiff's automobile were the only vehicles on the street at the time. The first part of this instruction is not a "stop, look and listen" instruction, but is simply a "look and listen" instruction. In the late case of Hopkins v. Pacific Elec. Ry. Co., —— Cal.App. 2d ——, 118 P.2d 872, at page 876, the District Court of Appeal, Fourth District, after citing and discussing many authorities, in this connection says: "* * * there is no absolute duty imposed on a motorist or a pedestrian to stop, as well as to look and listen, before proceeding onto the tracks of a railway company situated at a crossing of a city street in a closely built up district; that under such circumstances the question of a plaintiff's negligence in failing to so stop generally is one of fact for a jury and not one of law for the court."

Therefore, reading the instructions as a whole, despite the giving of this instruction complained of, we would not be inclined to disturb the judgment of the lower court. Portman v. Keegan, 31 Cal.App.2d 30, 87 P.2d 400; De Fries v. Market Street Ry. Co., 31 Cal.App.2d 463, 88 P.2d 256.

[2] But when we come to a consideration of the instructions which told the jury that at the intersection here in question the speed limit of the street car was 20 miles an hour, whereas, in fact it was 15 miles an hour, we have a different situation. After giving due consideration to the effect of section 4½ of article VI of the Constitution on this case, we think there was error in thus instructing the jury, and that this error was of sufficient gravity to require a reversal of the judgment of the lower court.

A review of the record, and a reading of the City Ordinance, of which Instruction 3 was a copy, indicates that it was the duty of the motorman of the street car to travel at a speed not exceeding 15 miles an hour crossing this intersection. If the jury had known that this was the law, their verdict on a close and evenly balanced conflict in testimony may well have been in favor of the plaintiff.

[3] "The term 'public highways' includes streets in cities." Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 118, 116 P. 557, 562; B. & H. Transportation Co. v. Johnson, 122 Cal.App. 451, 10 P.2d 506.

Respondents suggest that there is nothing in the record which would indicate that the motorman could not see up Argyle Avenue for the distance required by the ordinance, and, therefore, the 20-mile clause in the ordinance was in effect. A complete answer to this contention is to be found in the map introduced in evidence, which shows a business structure upon the northwest corner of Argyle Avenue and Hollywood Boulevard, which obstructed the motorman's view in that direction, and which made the 15-mile provision in the ordinance applicable to conditions as they existed at the intersection at the time of the collision.

The judgment is reversed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 648

BUMMER v. LIBERTY LAUNDRY CO.

Civ. No. 13208.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

1. Appeal and error ⇨931(1)

On appeal from judgment for plaintiff after trial without jury, evidence was viewed in the light most favorable to plaintiff.

2. Automobiles ⇨181(1, 2)

An employee who was being driven to work in employer's truck, merely as a courtesy and without definite arrangement, was not furnishing "compensation" and hence was a mere "guest," and could not recover for injuries suffered in fall when door came open, without proof of wilful misconduct or intoxication of driver. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation" and "Guest".

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Nettie Bummer against the Liberty Laundry Company, for injuries suffered by employee in fall from employer's truck. From a judgment for plaintiff, defendant appeals.

Reversed.

Mills, Hunter, Dunn & Liljestrom, of Los Angeles, for appellant.

Jones & Hoyt and George A. Elstein, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for personal injuries, defendant appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

On November 26, 1938, plaintiff was employed as "Floor Lady" in defendant's laundry. She had been working for defendant for seven or eight months prior to November 26, 1938. Some time prior to the accident Mr. Wilde, foreman for defendant, informed plaintiff that the opening time had been changed from 7 a. m. to 6 a. m., at which time plaintiff said, "Well, all right, but that makes me get up an hour sooner." Mr. Wilde asked plaintiff where she lived and, when she told him on West Sixty-fourth Street, he said that he went right by her place and could stop and pick her up and bring her to work. This he did, excepting on one or two occasions when Mr. Taylor, another employee, picked plaintiff up and took her to work.

November 25, 1938, Mr. Wilde asked Mr. Taylor if he would stop by and pick up plaintiff the next morning, since he would not be able to do so himself. November 26, 1938, Mr. Taylor picked up the plaintiff in a laundry truck owned by defendant laundry and, while driving to work, the door, which we may assume had been maintained in a negligent manner, came open and plaintiff fell out of the truck and suffered personal injuries. Plaintiff concedes that she does not come under the provisions of the Workmen's Compensation Act. Therefore, because of the view we have taken of the law applicable to this case, we need not consider any question relative to said act.

The trial court found upon substantial evidence that defendant was not guilty of any willful misconduct.

[2] This is the sole question for us to determine:

In view of section 403 of the Vehicle Code, St.1935, p. 154, was plaintiff entitled to recover damages for the injuries which she suffered, under the foregoing state of facts?

This question must be answered in the negative. Section 403 of the Vehicle Code reads as follows:

"No person who as a guest accepts a ride in any vehicle upon a highway *without giving compensation* for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or *wilful misconduct* of said driver." (Italics added.)

It is unquestioned that plaintiff was a guest in the truck of defendant. The trial court likewise found that defendant was not guilty of wilful misconduct and there is no evidence to sustain a finding that the driver of the car was intoxicated.

Therefore, by the terms of section 403 of the Vehicle Code, defendant would not be liable for the injury received by plaintiff, unless plaintiff was giving compensation for the transportation which she received. Plaintiff testified that she had made no arrangement with the defendant to be furnished transportation to her work and there was no other evidence of compensation. Therefore, from the evidence which was received defendant was merely extending a courtesy to plaintiff in providing her transportation, for which she was not furnishing compensation. As a result she was a mere guest in the vehicle at the time of the accident, and, pursuant to section 403 of the Vehicle Code, defendant was not liable for her injury. Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023; Piercy v. Zeiss, 8 Cal.App.2d 595, 47 P.2d 818; Duclos v. Tashjian, 32 Cal.App.2d 444, 90 P.2d 140; and Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201, are factually different from the facts in the instant case. In each of the cases cited defendant was receiving

a benefit from the transportation of the plaintiff. For example, in Piercy v. Zeiss, supra, defendant was an insurance salesman who was taking plaintiff from the place of her employment to the place of her residence and while doing so was endeavoring to sell her insurance. An examination of each of the other cases will disclose facts from which it is readily apparent that the defendant was being compensated in some way for the transportation of the plaintiff.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 739

SCHOENFELD et al. v. GERSON.

Civ. 11785.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1941.

1. Appeal and error ⇐957(1)
Judgment ⇐139

Motions for relief from default under statute are addressed to discretion of trial court, and, in absence of a clear showing of abuse, the exercise of that discretion will not be interfered with by an appellate court. Code Civ.Proc. § 527.

2. Appeal and error ⇐957(1)

Appellate courts will not disturb action of trial court on motion for relief from default under statute where there is room for doubt as to the sufficiency of the excuse for a default. Code Civ.Proc. § 527.

3. Costs ⇐277(1)

The trial court has inherent power to stay proceedings pending payment of a judgment for costs in a prior action.

4. Costs ⇐277(7)

An order granting defendant five days in which to plead to complaint from ruling on defendant's motion to stay proceedings pending payment by plaintiffs of costs awarded to defendant in a prior action involving same parties and subject matter, if treated as a preliminary injunction under statute, was not in excess of trial court's jurisdiction on ground that it was granted without "notice", where notice, duly served upon plaintiffs, set a definite day and hour, and place and court, when and where the motion would be made, since such notice was equivalent of an "order to show cause" within the statute, why such order should not be made at time and place designated. Code Civ.Proc. § 527.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice" and "Order to Show Cause".

5. Judgment ⇐143(10)

Although ignorance of law on part of an attorney is not ordinarily a sufficient ground for setting aside a default judgment under statute, a court has discretion to grant relief from an attorney's mistake of law as to legal effect of an order. Code Civ.Proc. § 473.

6. Judgment ⇐143(10)

Where the uncontroverted affidavit of defendant's attorney recited that he had requested court to issue a restraining order staying proceedings pending a hearing of motion to stay proceedings, that he was inadvertently under belief that the order made was such an order, and that it was therefore impossible for him to file a pleading on behalf of defendant prior to entry of default, trial court could properly have decided that default was entered through "mistake" of defendant's attorney of legal effect of the order, and trial court did not abuse its discretionary power in granting relief under statute from default. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake".

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Suit by Zelda Schoenfeld and others against Rena Gerson to enforce a trust in which plaintiffs were beneficiaries and to recover damages from defendant for her alleged misconduct as trustee. From orders granting defendant's motion to set aside a default and default judgment, the plaintiffs appeal.

Affirmed.

Irving Sugarman, Louis L. Bernheim, and Herbert Chamberlin, all of San Francisco, for appellants.

Edward Levin, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiffs appeal from a minute order and a written order granting defendant's motion to set aside a default and default judgment.

Plaintiffs, beneficiaries of an express trust, filed a complaint on October 31, 1940, to enforce the trust and to recover damages from the trustee for her alleged misconduct. The summons was served on November 4, 1940. Defendant subsequently procured three orders of court extending to December 16, 1940, her time to plead to the complaint. On December 14, 1940, she served on plaintiffs a "notice of Motion to Stay Proceedings" until plaintiffs paid judgments for costs in the sum of $160 entered in favor of defendant in a prior proceeding between the parties involving the same subject matter; the notice of motion stated that the motion would be heard on December 24, 1940. An accompanying affidavit by former counsel for defendant recited that the prior action had been tried twice and was finally dismissed by plaintiffs; the affiant alleged upon information and belief that plaintiffs were motivated by malice and were deliberately harassing defendant. On December 14, 1940, the presiding judge of the superior court made the following order at the foot of defendant's notice of motion to stay proceedings: "Good cause appearing therefor, it is hereby ordered that defendant may have five days from and after ruling on motion to stay proceedings in the above entitled matter in which to demur, move, answer or otherwise plead to plaintiffs' complaint on file herein."

Upon application of plaintiffs the clerk of the court entered the default of defendant on December 20, 1940, and the court entered a judgment by default in favor of plaintiffs in an amount in excess of $23,000 on December 27, 1940. Defendant's motion to stay proceedings was never heard, but, on December 21, counsel for plaintiffs notified counsel for defendant in writing that they would not be present in court to oppose the motion. On January 3, 1941, defendant filed a "Notice of Motion to Set Aside Default" on the grounds that the default was prematurely entered, that the default and judgment were entered through mistake, inadvertence, surprise and excusable neglect on the part of the clerk of the court and of defendant and her counsel, and that the judgment was rendered in favor of Harry M. Goldberg, as trustee, plaintiff, who was not a party plaintiff in the action. The notice of motion was accompanied by a demurrer and a verified answer which defendant proposed filing. Three affidavits were filed in support of the motion. Defendant's affidavit recited that because of the illness of her former attorney she had employed other counsel to represent her subsequent to the time that she received a copy of the summons and complaint and that she had left the matter of pleadings and defense to said action to him. Said counsel stated in his affidavit that when he secured the order of December 14, 1940, from the presiding judge through his inadvertence it was caused to read only as an extension of time, whereas he was under the belief that it was a temporary restraining order staying all proceedings pending the hearing of the motion; he therefore concluded that it was impossible for him to file a pleading prior to the entry of the default. On January 7, 1941, the court entered its minute order granting defendant's motion to set aside the default. Thereafter the court signed a written order granting the motion to set aside the default and the default judgment in favor of plaintiffs and permitting defendant to file her proposed demurrer and answer. Plaintiffs appeal from both orders.

The single issue presented on this appeal is whether the trial court abused its discretion in granting respondent's motion to set aside the default and the judgment entered thereon. It is appellants' contention that there was such an abuse of discretion because the default was not entered prematurely and because it was not entered through mistake, inadvertence, surprise or excusable neglect of the clerk, or of defendant and her counsel.

[1, 2] The authorities are unanimous to the effect that motions for relief from default under section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse the exercise of that discretion will not be interfered with by an appellate court (McNeil v. Blumenthal, 11 Cal.2d 566, 567, 81 P.2d 566; Stub v. Harrison, 35 Cal.App.2d 685, 689, 96 P.2d 979; 14 Cal.Jur. 1072 and cases cited therein). Because of this well settled

principle of law the appellate tribunals follow the practice of not disturbing the action of a trial court in any case where there is room for doubt as to the sufficiency of the excuse for a default. Coleman v. Rankin, 37 Cal. 247, 249; Bailey v. Taaffe, 29 Cal. 422, 424.

Appellants argue that the default was not entered prematurely because the order made by the presiding judge on December 14, 1940, was either an extension of time to plead to the complaint which was in excess of the power conferred upon the court by section 1054 of the Code of Civil Procedure or a restraining order which was invalid under section 527 of the Code of Civil Procedure, and in either case did not constitute a valid order to prevent the entry of the default.

[3, 4] It is not necessary to decide either of these questions in the manner presented. The trial court had inherent power to stay the proceedings pending the payment of the judgment for costs in the prior action. Weile v. Sturtevant, 176 Cal. 767, 169 P. 685. Whether such action is to be treated as an injunction under the terms of section 527 of the Code of Civil Procedure or as a common law order of abatement, we need not decide. If it be treated as an injunction we find no excess of jurisdiction in the order made. The code section provides that no "preliminary injunction" shall be granted without notice. Such notice was duly given. The same section provides that no "temporary restraining order" shall be granted without notice unless injury would result before the matter could be heard. We must assume that the trial court was duly informed of the probable injury. It provides that when a "temporary restraining order" is granted without notice it shall be accompanied by an order to show cause. Now the notice served upon the plaintiffs set a definite day and hour, and the place and court, when and where a motion would be made "for an order staying all proceedings" until the other judgments were paid. Such notice is the legal equivalent of an order to show cause why such order should not be made at the time and place designated. McAuliffe v. Coughlin, 105 Cal. 268, 270, 38 P. 730.

[5, 6] The motion was noticed for December 24th; the order complained of was entered on December 14th; the default was taken on December 20th. In entering the default the plaintiffs had full notice that the defendant was seeking the relief stated in her notice of motion and was not willingly delaying the proceedings or surrendering her legal rights. When therefore the motion to set aside the default was heard the trial court was confronted with a situation presenting either a mistake, an inadvertence, or misunderstanding of the nature and effect of the prior proceedings on the part of counsel for both sides. Whether on the hearing of the motion to set aside the default the trial judge took the view that the order of December 14th was merely an extension of time to plead or whether it took the view that it was a temporary restraining order effective only for the ten day period until the motion for a preliminary injunction could be heard we do not need to conjecture. It is sufficient to say that the trial court had before it the uncontroverted affidavit of respondent's present attorney which recited that he had requested the presiding judge to issue a restraining order staying all proceedings in the action pending the hearing of the motion to stay proceedings, that he was inadvertently under the belief that the order of December 14, 1940, was such a temporary restraining order, and that it was therefore impossible for him to file a pleading on behalf of respondent prior to the entry of default. Although ignorance of the law on the part of an attorney is not ordinarily a sufficient ground for setting aside a default judgment under section 473 of the Code of Civil Procedure (Beard v. Beard, 16 Cal.2d 645, 648, 107 P.2d 385), it is well settled that a court has discretion to grant relief from an attorney's mistake of law as to the legal effect of an order of the court. (Williams v. Thompson, 60 Cal.App. 658, 660, 213 P. 705; Mitchell v. California & Oregon Coast Steamship Company, 156 Cal. 576, 580, 105 P. 590; Broderick v. Cochran, 18 Cal.App. 202, 204, 122 P. 972; see also examples cited in 14 Cal.Jur. 1044 where the courts have set aside defaults for various mistakes on the part of attorneys.) The trial court could properly have decided that the default was entered through a mistake on the part of respondent's attorney of the legal effect of the order, and it committed no error in setting aside the default, or at least, it did not abuse its discretionary power in treating this as a proper case for relief.

The orders appealed from are affirmed.

SPENCE, J., and DOOLING, Justice pro tem, concurred.

WULFF-HANSEN & CO. v. SILVERS et al.*

Civ. 6649.

District Court of Appeal, Third District, California.

Dec. 30, 1941.

Hearing Granted Feb. 27, 1942.

1. Mandamus ⇐97
Municipal corporations ⇐525

When assessments upon property securing payment of bonds issued by a municipality under the improvement bond act were in default, the municipality could, at its option, either sell the property in same manner as other property of a municipality is sold for delinquent taxes or commence an action in foreclosure, and, where municipality had commenced such an action and an order for foreclosure was made, the county tax collector, who collected taxes for municipality, was relieved of any further duty in regard to assessments, and municipality could not be compelled by mandamus to adopt the alternative remedy of a tax sale by collector. Gen.Laws 1931, Act 8199; Act 8209, §§ 11(c), 12, 16.

2. Municipal corporations ⇐525

Where assessments upon property securing payment of bonds issued by a municipality under the improvement bond act are in default, foreclosure under section 11 of the act is a "cumulative remedy", so as to permit town to proceed by tax sale or foreclosure sale, a "cumulative remedy" being defined as a remedy created by statute in addition to one which still remains in force. Gen.Laws 1931, Act 8199; Act 8209, §§ 11(c), 12, 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative Remedy".

3. Judgment ⇐585(3)

Judgments in prior actions between a municipality and holders of bonds issued by municipality under improvement bond act which adjudicated rights of parties with respect to bonds were not a bar to a subsequent mandamus proceeding by bondholders to compel municipality to sell property securing payment of bonds at a tax sale, where question concerning the right of a bondholder to compel municipality to sell property at a tax sale was not adjudicated. Gen.Laws 1931, Act 8199; Act 8209, §§ 11(c), 12, 16; Code Civ.Proc. § 1911.

4. Judgment ⇐720

A judgment rendered by a court having jurisdiction of parties and subject matter, whether correct or not, is conclusive as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action.

5. Taxation ⇐614

Proceedings on tax sales are "in invitum" and to be valid must be stricti juris.

See Words and Phrases, Permanent Edition, for all other definitions of "In Invitum".

6. Constitutional law ⇐70(1)

Where language of statute was so plain that there was no room for interpretation, District Court of Appeal could go no further than to declare the law according to its plain and obvious import.

Appeal from Superior Court, Lake County; W. D. L. Held, Judge Assigned.

Mandamus proceedings by Wulff-Hansen & Company, a corporation, against M. A. Silvers and others. From a judgment for defendants, plaintiff appeals on the judgment roll.

Affirmed.

Hearing granted; HOUSER, J., not participating.

Charles Kasch, of Ukiah, for appellant.

Lovett K. Fraser and Burt W. Busch, both of Lakeport, for respondents.

TUTTLE, Justice.

On December 10, 1936, plaintiff filed a petition for a writ of mandate to compel respondents to levy a tax, and to have it adjudged that certain defendants purchased the real property involved under foreclosure, subject to street assessment liens which were delinquent prior to filing said action in foreclosure, and that said liens were not extinguished by the decree of foreclosure. The facts were undisputed. Findings and judgment were entered in favor of defendants, denying the writ, it being ordered that plaintiff take nothing by said action. The appeal is based upon the judgment roll alone, it being the contention of appellant that the findings justify the relief sought by it.

The findings disclose that in 1925, respondent, town of Lakeport, undertook to do street work under the Improvement Act of 1911 (Stats. 1911, page 730, Deering's General Laws 1931, Act 8199). Thereaft-

* Subsequent opinion 131 P.2d 373.

er, bonds were issued to cover the cost of said work, under the provisions of the Improvement Bond Act of 1915 (Stats. 1915, page 1441, Deering's General Laws 1931, Act 8209). Assessments, upon the property here involved, under the latter act became delinquent for the years 1927, 1928, 1929, 1930 and 1931. On May 14, 1931, respondent town (a municipal corporation), commenced an action to foreclose the lien of said assessments, and a decree of foreclosure was made and entered on April 26, 1932, directing the sale of said real property. A sale was had, and defendants Silvers, Godfrey, Morey and Martin, each purchased a group of lots, subject to all unpaid installments, interest and penalties under the same proceedings. A certificate of sale and deed were duly issued to defendant Silvers. Assessments levied by the defendant, town of Lakeport, upon the real property hereinafter described, (and a lien thereon and payable subsequent to the delinquency thereof occurring during the year 1931), have not been paid and remain wholly due, owing, payable and unpaid, and are now delinquent. Said bonds are unredeemed and now due and unpaid, except that on the 2nd day of September, 1936, there was paid on said bonds, and on each of them, 38 per cent of the principal thereof, and at various dates prior to said September 2, 1936, there was paid all interest and coupons on said bonds to July 2, 1936; that said bonds, and each of them, never were, and are not now, secured by any lien upon the real property described in said First Amended Complaint and hereinafter described, but said bonds, and each of them are, and is secured by a lien upon the redemption fund provided in and by said Act 8209 of Deering's General Laws 1931, and by the unpaid assessments made for the payment of said work only. On January 18, 1937, the city council of the defendant, town of Lakeport, a municipal corporation, duly adopted and passed resolutions ordering all assessments remaining due and unpaid on said real property hereinabove described, at the dates thereof, be collected by suit to foreclose the liens thereon which secured such assessments, that the tax collector be credited upon the assessment roll then in his hands with the amount charged against him on account of such assessments ordered to suit and be relieved of further duties in regard thereto on the 22nd day of July, 1930, on the 4th day of May, 1931, on the 21st day of April, 1932, on the 21st day of July, 1933, on the 5th day of June, 1934, on the 22nd day of May, 1935, on the 4th day of May, 1936, and on the 18th day of January, 1937. On January 20, 1937, respondent town commenced an action to secure judgment for the total aggregate amount of the principal and interest installments due and delinquent *not theretofore ordered to suit by foreclosure* by said town of Lakeport, a municipal corporation, for the said improvement work on said Main Street in the said town of Lakeport, and for interest, costs and penalties, attorneys' fees, and to adjudge and declare the same to be a lien upon each of the lots, pieces, or parcels of land here involved, and for the foreclosure of said lien, for the sale of each of said lots, pieces, or parcels of land in the manner provided by law, and that the proceeds of said sale be applied in the manner and for the purpose provided by law. Said action is still pending and undetermined. At the time of the trial of this action there was a balance of $4,987.50 in the Delinquent Street Assessment Fund and a balance of $2,418.48 in the Main Street Improvement Bond Fund of the defendant, town of Lakeport, a municipal corporation, the said Main Street Improvement Bond Fund being the fund of defendant, town of Lakeport, a municipal corporation, from which is paid the principal and interest on said Main Street Improvement Bonds and Delinquent Street Assessment Fund of said defendant, town of Lakeport, a municipal corporation, being the fund into which moneys are collected and paid into from a special tax at the rate of ten cents on each $100 of assessable property for the purpose of paying for the lands purchased, or to be purchased, at tax sales as provided by section 16 of said Act 8209 of Deering's General Laws, 1937. That the Main Street Improvement Bond Fund of said defendant, town of Lakeport, a municipal corporation, varied because of payments into and out of said fund from time to time between the date of filing the complaint in this action, to-wit, September 17, 1936, and September 30, 1936. Plaintiff is the owner and holder of bonds numbers 102, 103, 104, 105, 106, 107 and 108, each of the par value of $1,000, and that all of said bonds matured on the 2nd day of July, 1936, and that each and all of said bonds owned by said plaintiff were duly presented for payment on the 2nd day of July, 1936, in the manner and form required by law, after the maturity thereof, and that payment thereof was delayed, and that after the 2nd day of July, 1936, and prior to the date of

the answer of defendant, M. A. Silvers, there was paid upon each of said bonds, in this paragraph hereinabove enumerated, 38 per cent of the principal thereof and all the coupon interest thereon to date of maturity, or to July 2, 1936, and that each of said bonds continue to bear interest from said July 2, 1936, on the unpaid balance of principal thereof at the rate specified in said bonds until the same have been duly paid. Other facts were found which may be referred to later herein.

The pertinent portions of the said bond act of 1915 are as follows:

Section 12 (in part): "Upon default in payment, the lands securing such installments and assessments *shall be sold* in the same manner in which real property in such city is sold, for the nonpayment of general municipal taxes, and be *subject to redemption within one year* from date of sale in the same manner as such real property is redeemed from such delinquent sale, and upon failure of such redemption shall in like manner pass to the purchaser. The *city may be the purchaser* at any delinquent sale in like manner in which it becomes or may become the purchaser of property sold for nonpayment of the general municipal property tax, and in the event of its so becoming the purchaser *shall pay and transfer into said redemption fund the amount of the delinquent assessment and of the delinquent interest* thereon upon which said sale is made. In cases where the municipal property tax is collected by county or city and county officials and sales for nonpayment of such taxes are made to the state, the state shall be the purchaser at any such sale hereunder, but shall hold the title acquired at such sale upon behalf of the city and shall account to the city for any moneys received upon redemption or from the sale of such property, *the city* for the purposes of this act *being deemed the real purchaser.*" This last provision applied to respondent city, the taxes of which are collected by the county tax collector. The section further provides: "In the event of there being no *available funds* in the treasury with which to make such payment, the tax collector shall delay the entry of the certificate of sale until such funds are available, *making demand in the meantime upon the city council that a suitable amount be included in the next tax levy for* the purpose of providing funds with which to make such payment; provided, however, that the period of redemption from such tax sale shall not be extended thereby nor the rights or privileges of the property owner be thereby in anywise affected."

Section 11(c) of the Improvement Bond Act of 1915 reads: "(c) In the event of nonpayment of any assessment or reassessment or installment thereof, or of any interest thereon, together with any penalties and other charges accruing under the taxation ordinance of the city and not later than four years after the due date of the last installment of principal, as a *cumulative remedy,* the same when due and delinquent may by order of the council be collected by suit brought in the superior court to foreclose the lien thereof. * * * The foreclosure suit shall be governed and regulated by the provisions hereof, and also where not in conflict herewith by the codes of this state. * * * *Upon the ordering of any such foreclosure suits the tax collector shall be credited upon the assessment-roll then in his hands with the amount charged against him on account of such assessments or reassessments ordered to suit and be relieved of further duty in regard thereto.*"

Section 16, subdivision (a), provides: "The city council *may,* and in the event of demand by the tax collector therefor as provided in section twelve hereof *must,* at the time of fixing the annual tax rate and levying the taxes to be collected for general municipal purposes, levy a *special tax* upon the taxable property in the city for the purpose of paying for the lands *purchased or to be purchased* at such tax sales, but not to exceed for each local improvement *ten cents on each one hundred dollars of assessable property.*" (Italics ours.)

It is the contention of appellant that whenever an assessment under the said Act of 1915 is in default, it becomes the mandatory duty of the tax collector to sell the property. By the provisions of said act, when such a sale is had, and the city becomes the purchaser of the property secured by the bonds, it becomes its duty to pay the amount of the delinquent assessment into a bond redemption fund. Such funds are thereupon used to redeem the bonds. If there are no funds available to the city to make such payment, it is the mandatory duty of the city to levy a tax under sections 12 and 16 of said act. The foregoing principles have been announced in an action concerning this same bond issue—American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622. The bond act has been construed several times by our courts

in connection with the duty of the municipality to levy the tax, but the question here —whether or not a tax sale can be forced by *mandamus*—has never been decided or commented upon.

[1] Respondents contend that, by the provisions of the bond act, when assessments are in default, the city has two independent courses which it may, at its option, pursue. One is the sale by the tax collector in the same manner as other property of a municipality is sold for delinquent taxes, and the other is by an action in foreclosure. They point out that they have commenced such an action, and therefore they connot be compelled to adopt the other alternative and levy a tax.

We think the contention of respondents must prevail. The bond act (section 11(c) expressly provides that: *"Upon the ordering of any such foreclosure suits the tax collector shall be credited upon the assessment-roll then in his hands with the amount charged against him on account of such assessments or reassessments ordered to suit and be relieved of further duty in regard thereto."* (Italics added.) The order for foreclosure was made. As the tax collector was thereupon "relieved of further duty in regard thereto," he is under no legal duty to sell the land for tax delinquencies.

[2] Foreclosure under section 11 of the 1915 bond act is a cumulative remedy. In other words, an additional remedy. The town of Lakeport has the choice whether it shall proceed by tax sale or whether it shall proceed by foreclosure sale. In the case of Chicago & N. W. Ry. Co. v. City of Chicago, 148 Ill. 141, 35 N.E. 881, the court said: "A cumulative remedy is a remedy created by statute in addition to one which still remains in force; and when a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided is cumulative, and, the party may elect between the two." See Bowles v. Neely, 28 Okl. 556, 115 P. 344.

1 Bouvier's Law Dictionary, Rawle's Third Rev., p. 737, defines "cumulative remedy" as follows: "Cumulative Remedy. A remedy created by statute in addition to one which still remains in force."

Whether stated to be cumulative or alternative remedies, it must be that they are alternate in character. The lien can only be foreclosed once for each delinquency. Thus, if the lien has been foreclosed under section 11(c), there is nothing to sell at tax sale under section 12. Or, if the lien has been foreclosed by a valid sale under section 12, nothing remains to foreclose under section 11(c). Furthermore, under the bond act, the city council *may*, and in the event of a demand by the tax collector therefor, as provided in section 12 thereof, *must* levy the tax. Obviously then, if the tax collector is relieved of further duty regarding the assessments ordered to foreclosure, and is credited upon his books with the amount thereof, he is not only under no legal duty, but has no power or authority to make demand upon the city for a *tax levy*.

Plaintiff further contends, however, that notwithstanding the plain language of the bond act, which we hold bars the remedy sought, it should prevail by reason of adjudications in two actions between the same parties, covering certain questions arising out of said bond issue. The judgment rolls in said actions are not before us. The trial court, however, found in respect to said judgments as follows: "That on the 20th day of July, 1935, there was commenced in the Superior Court of the State of California, in and for the County of Lake, an action numbered 4179 of the files of said court, wherein Town of Lakeport, a municipal corporation, sometimes called City of Lakeport, and George H. Voss, as Treasurer of the Town of Lakeport, were plaintiffs, and Dorothy Haggitt, and Wulff-Hansen & Co., a corporation, et al., were defendants; that in and by said action number 4179 plaintiffs therein sought a judgment of said court of a declaration of their rights or duties with respect to said Main Street Improvement Bonds owned by the defendants in said action, a declaration of plaintiffs' rights or duties as to what Main Street Improvement Bonds should be paid first, a declaration of plaintiffs' rights or duties as to whether the whole Main Street Improvement Bond Fund should be kept intact and prorated when all bonds are mature, a declaration of plaintiffs' rights as to whether all delinquent Main Street Improvement Bonds should be prorated out of the funds available, a declaration of plaintiffs' rights as to whether the first Main Street Improvement Bonds presented that matured July 2nd, 1935, should be paid first or prorated with those of the same date of maturity, and for general relief; that said action number 4179 was prosecuted to judgment, and that the Amended Judgment in said action number 4179, has long since be-

come final, and that no appeal was ever taken from said Amended Judgment in said action number 4179, and that said Amended Judgment in said action number 4179 has never been changed or modified, and that the same is now in full force and effect; that said Amended Judgment commanded, among other things, the plaintiffs in said action to pay to the defendants in said action, 38 per cent of the face value of their Main Street Improvement Bonds upon presentation, and all interest thereon to date of maturity thereof out of said Main Street Improvement Bond Fund, and that all delinquent and unpaid Main Street Improvement Bonds, other than those owned by the defendants in said action number 4179, be treated, so far as payments are concerned, in the same manner; that said plaintiffs did thereafter make all of such payments so commanded by said Amended Judgment as hereinabove found; that said Amended Judgment also provided that the plaintiff, Town of Lakeport, a municipal corporation, 'comply with all of the provisions of the "Improvement Bond Act of 1915"' (Statutes 1915, page 1441), and as the same have been amended prior to the issuance of the aforesaid bonds, and that in and by said Amended Judgment it was further ordered that plaintiff, Town of Lakeport, make all necessary assessments and levy all necessary taxes as provided in said Act, and that said assessment and levy of taxes continue and the plaintiff, Town of Lakeport, was thereby directed to levy and collect the same until such time as all mature and unpaid Main Street Improvement Bonds of the plaintiff Town, and all interest thereon, as provided by law, have been fully paid, satisfied and discharged, or until funds are available for such purpose. * * * That on the 5th day of September, 1936, there was an action commenced in the Superior Court of the State of California, in and for the County of Lake, being number 4283 of the files of said court, wherein Wulff-Hansen & Co., a corporation, was plaintiff, and Town of Lakeport, a municipal corporation, sometimes called City of Lakeport, and George H. Voss, as treasurer of the Town of Lakeport, were defendants; that in and by said action number 4283 plaintiff sought a judgment of said court, among other things, commanding the defendant, town, to 'comply with all the provisions of the Improvement Bond Act of 1915 (Statutes 1915, page 1441), and as the same have been amended prior to the issuance of the aforesaid bonds'; that in said action number 4283 a stipulated judgment was entered therein, and thereafter a stipulated Amended Judgment was entered therein; that said Amended Judgment has long since become final; that no appeal was ever taken from said Amended Judgment nor was said Amended Judgment ever changed or modified, and that said Amended Judgment is now in full force and effect; that said Amended Judgment, among other things, commanded the Defendant Town to 'comply with all the provisions of the "Improvement bond act of 1915" (Statutes 1915, page 1441), and as the same have been amended prior to the issuance of the aforesaid bonds', and further provided 'that this Amended Judgment shall not exceed the terms and provisions of the Improvement Bond Act of 1915, Statutes 1915, page 1441, and the amendments thereto, and should any of the provisions in this Amended Judgment in any way exceed, or attempt to exceed the provisions of the Improvement Bond Act of 1915, (Statutes 1915, page 1441), then said provisions in this Amended Judgment shall give way and be governed by the provisions of the Improvement Bond Act of 1915, as already interpreted by the decisions of the Supreme Court of the State of California'; that in and by said judgment the defendant, Town of Lakeport, was directed to make all necessary assessments, and levy all necessary taxes, as provided for in said Act, said assessment, and levy of taxes, to continue until such time as all mature and unpaid Main Street Improvement Bonds of the Town of Lakeport, and all interest thereon, have been fully paid, satisfied and discharged, or until funds are available for such purpose."

[3, 4] We are of the opinion that neither of the said judgments is a bar to this action. The rule governing the situation is thus expressed in 34 C.J., page 902, sec. 1312: "A judgment rendered by a court having jurisdiction of the parties and subject matter, whether correct or not, is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit, and *actually adjudicated therein*, when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action." (Italics ours.)

Section 1911 of the Code of Civil Procedure provides as follows: "That only is deemed to have been adjudged in a

former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The question adjudicated here—the right of a bondholder to compel the municipality to sell property at a tax sale—was not adjudicated in either of said former judgments, and such judgments were therefore no defense to the action.

Appellant relies chiefly upon two cases, in respect to the question whether or not the commencement of the foreclosure proceedings precluded the granting of any relief to it. The first is the case of Hammond v. City of Burbank, 6 Cal.2d 646, 59 P.2d 495, 502, wherein it is said: "It may be that when foreclosure proceedings are instituted and proceed not only to final judgment, but also to sale, then the city may be relieved of liability (Federal Construction Co. v. Wold, 30 Cal.App. 360, 158 P. 340), a point we expressly refrain from deciding, but *the foreclosure provisions were never intended, in our opinion, to constitute an alternative method of procedure so that the city by the mere commencement thereof, or by proceeding to judgment therein, should be entirely relieved of its mandatory obligation to make the 10-cent levy under section 16(a).*" (Italics added.)

Respondents here do not contend that the commencement of such an action relieves the city of the obligation to *levy* the tax. The question of the right of a bondholder to compel the tax collector to proceed with a *tax sale* was not involved in the case.

In view of what we have said, we do not deem it necessary to discuss the question whether or not the purchasers at the foreclosure sale took title subject to the lien of delinquent assessments which were due *prior* to the commencement of that proceeding. We might add that such question was not decided by the trial court.

[5, 6] Finally, it is the rule that "proceedings on tax sales are *in invitum*, and to be valid must be *stricti juris*." (Italics added.) 24 Cal.Jur., sec. 296, page 324. There would seem to be no valid reason why the legislature should provide two methods of enforcement in case of delinquencies, one of which may be more beneficial than the other to the bondholders. The foreclosure method, adopted by respondent city here, as we have seen, insures the creditor little or nothing. The language of the statute is so plain and direct that there is no room for interpretation. We refer the whole matter to the legislature. We can go no further than to declare the law according to its plain and obvious import.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.



48 Cal.App.2d 800

OLIVER CONTINUOUS FILTER CO. v. McCOLGAN, Franchise Tax Commissioner.

Civ. 11910.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1942.

Hearing Denied March 2, 1942.

1. Taxation ⇐4

The federal statute permitting state taxation of national bank shares does not prohibit the state from imposing a franchise tax on holding companies on basis of net income from dividends on stock held. 12 U.S.C.A. § 548, subd. 1(c).

2. Taxation ⇐37

Under constitutional amendment providing for payment of corporate franchise taxes and empowering legislature to define "corporations" and "doing business", legislature could provide a different definition than that of federal decisions defining "doing business" although amendment referred to federal statute relating to state taxation of national bank shares, assuming that legislative specific definition covered activities within federal grant of power to tax, and that definition was relevant to subject which constitutional amendment authorized legislature to define and was not inconsistent with other constitutional provisions. Gen.Laws 1931, Act 8488, § 5; 12 U.S.C.A. § 548, subd. 1(c); Const. art. 13, § 16, subds. 2(a), 5, as adopted in 1928.

3. Taxation ⇐37

The 1931 amendments to Bank and Corporation Franchise Tax Act providing that

"doing business" shall "include the right to do business" are not unconstitutional as in violation of constitutional amendment providing for payment of corporate franchise taxes and authorizing legislature to define "corporations" and "doing business", since definition adopted by legislature is germane to subject, relevant to term "doing business" and is within the federal grant of power to the state. Gen.Laws 1931, Act 8488, § 5; 12 U.S.C.A. § 548, subd. 1(c); Const. art. 13, § 16, subd. 2(a), 5, as adopted in 1928.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

4. Taxation ⇐117

A corporation which on merger transferred its assets to a new corporation, receiving stock, part of which corporation distributed as dividends to stockholders, retaining a portion thereof, and which loaned funds to new corporation, to an individual, and to certain of its former employees, was properly required to pay corporate franchise tax based on its income for the preceding year as a corporation "doing business" within state under statutory provision that "doing business" shall "include the right to do business". Gen.Laws 1931, Act 8488, § 5; 12 U.S.C.A. § 548, subd. 1(c); Const. art. 13, § 16, subds. 2(a), 5, as adopted in 1928.

5. Taxation ⇐117

The corporate franchise tax referred to in constitutional amendment requiring all corporations doing business within state to pay franchise taxes and authorizing legislature to define "corporations" and "doing business" was not placed on "doing business" except to extent of fixing amount of such tax as equivalent to four per cent. of net income, which is incidental to main purpose of amendment that tax may be levied on privilege or right of exercising a corporate franchise in the state. Gen.Laws 1931, Act 8488, § 5; 12 U.S.C.A. § 548, subd. 1(c); Const. art. 13, § 16, subds. 2(a), 5, as adopted in 1928.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the Oliver Continuous Filter Company against Charles J. McColgan as franchise tax commissioner who was substituted for the state treasurer to recover a corporation franchise tax paid under protest in the year 1931. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hearing denied; TRAYNOR, J., not participating.

Jones & Dall, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and H. H. Linney, James J. Arditto, and Valentine Brookes, Deputy Attys. Gen., for respondent.

WARD, Justice.

Plaintiff prosecutes this appeal from a judgment for defendant State Treasurer for whom the Franchise Tax Commissioner of the State of California was substituted. Stats.1939, ch. 1050, § 18, page 2968; Deering's Gen.Laws, 1939 Supp., Act 8488, § 30. The action, submitted to the trial court upon an agreed statement of facts, is for the recovery of a corporation franchise tax paid under protest in the year 1931.

Plaintiff, organized under the laws of the State of California, was actively engaged in the business of manufacturing and selling filters and allied machinery and equipment, which is manufactured in a plant situated in the city of Oakland, until May, 1928. The United Filters, Incorporated, a Delaware corporation, conducted a like business in Pennsylvania. To effect a merger of the two companies, Oliver United Filters, Inc., was incorporated under the laws of the State of Nevada, and immediately qualified to do business in this state. To such company, plaintiff transferred all of its assets, except cash in the sum of $20,000, receiving therefor stock in the new (Nevada) corporation. The Delaware corporation, likewise assigned its assets to the Nevada corporation, and received stock therefor. Plaintiff immediately distributed to its stockholders as dividends part of the stock acquired, retaining, however, a portion thereof, on which it received dividends, disbursing them from time to time to its stockholders. This stock, together with the $20,000 cash retained, as above, constituted plaintiff's only asset, and, although it still retained all powers granted under its articles of incorporation, it did not actively engage further in the business it had previously conducted.

The income of plaintiff for the years 1929, 1930 and 1931 consisted of dividends from the stock of the Nevada corporation, and interest on loans made to that corporation by it, also on loans to its own princi-

pal stockholder, and to a number of its former employees made to enable them to retain stock of the Nevada corporation for which they had previously subscribed, and which stock the plaintiff held as security. After May, 1928, the plaintiff maintained no offices, and had no salaried employees, its only expense being that for bookkeeping services. Subsequent to the transfer of the assets of plaintiff corporation to the Nevada corporation, the former was kept alive so that stock it so owned could be voted as a unit at meetings of the Nevada corporation.

In the year 1931 plaintiff paid the minimum franchise tax of $25 specified by law. Some time thereafter, upon demand, it paid to the commissioner under protest an additional sum of $7,174.88, based upon dividends received from the Nevada corporation on business transacted by that company out of the state, and upon interest received from loans. The additional assessment was made upon the theory that plaintiff was a business corporation actively doing business in California.

The questions on appeal involve the constitutionality of amendments, enacted by the legislature in 1931 to the Bank and Corporation Franchise Tax Act, which provide that "doing business" shall "include the right to do business," and the applicability thereof to appellant corporation. Stats.1929, ch. 13, page 19; Stats.1931, ch. 1066, page 2225; Deering's Gen.Laws 1931, Act 8488.

"All financial, mercantile, manufacturing and business corporations doing business within the limits of this State * * * shall annually pay to the State for the privilege of exercising their corporate franchises within this State a tax according to or measured by their net income." Const. of California, art. XIII, § 16, subd. 2(a). This section, adopted in 1928, also empowered the legislature to define "corporations" and "doing business" subd. 5. In 1929 the legislature defined "corporation" as including every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision 1(c) of section 5219 of the Revised Statutes of the United States, 12 U.S.C.A. § 548, subd. 1(c). "Doing business" was defined to mean "any transaction or transactions in the course of its business" by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state. Stats. 1929, ch. 13, § 5, page 20. In 1931, section 5 was amended to include "the enjoyment of the right to do business through such incorporation or qualification." Stats. 1931, ch. 65, page 65. At a later date in the same year the statute was further amended by eliminating the words "the enjoyment of," so that the term "doing business" "shall include the right to do business through such incorporation or qualification." Stats.1931, ch. 1066, § 5, page 2225.

The California state constitutional amendment used the language found in section 5219, subdivision 1(c) of the United States Revised Statutes, 12 U.S.C.A. § 548, subd. 1(c), and the California act contained an express reference to such section. It has been held that in that situation the interpretation to be placed upon terms of state provisions shall be that given by federal courts to the same terms in the federal statute, and that in view of the fact that "doing business" as used in federal legislation fixing excise taxes has acquired a definite meaning through interpretation, which excludes application of the term to a holding company merely engaged in receiving dividends from stock of its subsidiary companies, the distribution of such dividends did not constitute doing business, and the state legislation did not apply to a holding company. Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499. In the Union Oil case, unlike the present, the corporation charter had been amended to limit its functions to those of a holding company. It was held at page 735 of 2 Cal.2d, at page 295 of 43 P.2d, 98 A.L.R. 1499 that "the state might have provided that holding companies should be subject to the tax along with other corporations. * * *"

[1] The power of the state to levy the tax so far as national banks are concerned is based upon section 5219, subject to the limitation therein that the rate shall not be higher than that fixed by the taxing state upon other corporations of like character doing business within its limits. Section 5219 of the United States Revised Statutes does not prohibit the state from taxing holding companies on the basis of net income from dividends on stock held.

[2] The question is not whether the 1931 amendments conflict with section 5219, but whether there is in fact a conflict with

our own constitutional provision pursuant to which the Bank and Corporation Franchise Tax Act was enacted. The state Constitution does not define the term, but grants to the legislature express authority to give a definition. Under such condition it would be within the power of the people to permit the legislature to provide a different definition than that of federal decisions defining "doing business," assuming that the legislative specific definition covers activities within the federal grant of power to tax, and that the definition is akin and relevant to the subject which the constitutional amendment authorized the legislature to define, and is not inconsistent with other constitutional provisions.

[3, 4] Attention has not been called to any other claimed constitutional violation. The definition adopted by the legislature is germane to the subject, rationally relevant to the term "doing business," and is within the federal grant of power to the state. In Union Oil Associates v. Johnson, supra, at page 735 of 2 Cal.2d, at page 295 of 43 P.2d, 98 A.L.R. 1499, the court said: "It is true that subdivision 1(c) of section 5219 is not a restriction upon the classes of corporations which the state may tax, and does not proscribe a tax upon holding companies measured by net income." Appellant corporation is not in fact organized as a holding company. It was transacting business. As above stated, it loaned funds to the corporation whose stock it held, to an individual, and to certain of its former employees. Some of the loans to these employees were uncollectible and were subsequently written off as bad debts. In the year 1930 plaintiff corporation paid out dividends in the sum of $200,000 upon receipts of $237,500 plus $1,829.26, dividends and interest respectively. In 1931 plaintiff received dividends in the sum of $12,500 and interest in the sum of $13,349.82, and paid dividends in the sum of $50,000.

Upon first examination, the phrase "right to do business" might give the impression that a new and irrelevant meaning had been created to designate the power over the subject given under the constitutional amendment. The same impression might possibly be gained if the legislature had used the following words: "the privilege of exercising their corporate franchises within this state." If such definition had been adopted, the propriety thereof could have been predicated upon the exact language found in art. XIII, § 16, subd. 2 (a) of the Constitution of the State of California. If the word "right" had been substituted for "privilege," it could have been held that the words for the purpose of interpretation were reasonably synonymous in that there would be in the interchange of the two words neither enlargement nor diminution of the scope of authority conferred by constitutional amendment upon the legislature.

[5] The phrase "right to do business" is not inconsistent with the constitutional amendment. The tax referred to therein was not placed on "doing business" except to the extent of fixing the amount of such tax as the equivalent to four per cent of net income, which is incidental to the main purpose of the constitutional amendment, namely, that a tax may be levied on the privilege or right of exercising a corporate franchise in this state.

Sections 4 and 5 of the act simply sanction a tax upon a business corporation. The sections provide that the tax shall be fixed upon the basis of net income, and that in any event each such corporation shall pay a minimum tax of twenty-five dollars. In this case plaintiff's articles of incorporation provided that it was organized for the purpose and with the privilege and right, among other things, to buy, sell, transfer, invest and deal in real estate, stocks, bonds and personal property of every kind and character; to lend and borrow money and to engage and carry on the business of manufacturing, constructing and assembling machinery.

As applied to appellant corporation, if no business should be transacted, or if the net income should be less than a tax thereon justifying twenty-five dollars, the specified minimum is payable, otherwise the tax for the privilege or right to do business is measured by net income for the next preceding fiscal or calendar year, computed at the rate of four per cent. § 4.

The legislature directed, pursuant to constitutional authorization, that corporations during 1931-1933 incorporated for the purpose of doing business should pay a tax for the right to do business. In the Union Oil case the corporation did not have the right to do business. Appellant herein was organized for the purpose of doing business, and actually engaged therein. Appellant cites cases which are not directly in point. Rose v. Nunnally Inv. Co., 5 Cir., 22 F.2d 102, however, is worthy

of mention. That case dealt with a reorganized corporation. Transactions similar to those in the present case were held not to be included in the term "doing business" upon the theory that a tax is based, not upon charter powers, but upon its activities. That rule may not be applied under the provisions of a statute wherein the test is the "right to do business." In the latter instance, necessarily the charter powers determine the scope of activity.

The words "right to do business" may have given rise to some doubt, and in 1933 reference to the "right" was eliminated, the definition then reading: "The term 'doing business,' as herein used, means actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Stats.1933, ch. 210, page 694. It is not necessary to discuss the change. The present case deals solely with the 1931 definition.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.



48 Cal.App.2d 666

PEOPLE v. CROW.

Cr. 3521.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

1. Criminal law ⇐878(4)

A verdict of acquittal of negligent homicide was not inconsistent with a verdict of conviction of manslaughter arising out of same automobile accident. Vehicle Code, § 500, St.1935, p. 173.

2. Homicide ⇐34

The statute defining "negligent homicide" defines a crime different from "involuntary manslaughter" or from any other crime defined in the Penal Code. Vehicle Code, § 500, St.1935, p. 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Manslaughter" and "Negligent Homicide".

3. Homicide ⇐255(2)

Evidence that motorist was under influence of intoxicating liquor when he struck pedestrians, who died as a result, sustained conviction of involuntary manslaughter on ground that pedestrians were killed while motorist was committing an unlawful act. Pen.Code, § 192, subd. 2.

4. Criminal law ⇐200(1), 878(3)

An acquittal of negligent homicide did not place defendant in "jeopardy" as to a charge of manslaughter growing out of the same facts, and did not amount to acquittal of involuntary manslaughter. Vehicle Code, § 500, St.1935, p. 173.

See Words and Phrases, Permanent Edition, for all other definitions of "Jeopardy".

5. Witnesses ⇐329

In prosecution of motorist for negligent homicide and manslaughter arising out of killing of pedestrians, wherein evidence showed that motorist's automobile contained 11 empty beer bottles, which motorist attempted to explain by stating that he had helped to consume the contents thereof, the prosecution could ask whether motorist had become intoxicated the night before, for purpose of testing credibility of his testimony.

6. Witnesses ⇐390

In prosecution of motorist for negligent homicide and manslaughter, whereir defense witness testified that motorist was sober before and at time of accident, evidence of prior contradictory statements by such witness concerning amount of beer motorist had consumed before the accident was admissible. Code Civ.Proc. § 2052.

7. Witnesses ⇐379(1)

A witness may be impeached by evidence that he has made at another time inconsistent and contradictory statements regarding a material issue, which are in conflict with his testimony at the trial. Code Civ.Proc. § 2052.

8. Witnesses ⇐327, 406

In prosecution of motorist for negligent homicide and manslaughter wherein defense witness testified that both she and motorist were sober at time of accident, evidence that such witness was intoxicated after accident was admissible for impeachment and to show

that such witness was not able to accurately perceive events before and at the time of the accident.

9. Homicide ⇐309(1)

In prosecution for negligent homicide and manslaughter arising out of killing of pedestrians, instructions that prosecution must prove that the act resulting in pedestrians' deaths involved some measure of wantonness, flagrant disregard for the safety of others or wilful indifference was properly refused. Vehicle Code, § 500, St.1935, p. 173; Pen.Code, §§ 20, 192, subd. 2.

10. Homicide ⇐34

For an act to be "without due caution and circumspection", as required by statute in order to result in "involuntary manslaughter", such act need not be wanton or reckless. Pen.Code, § 192, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Without Due Caution and Circumspection".

11. Criminal law ⇐1023(9, 10)

An order granting probation and suspending the pronouncement of judgment and sentence is not appealable, and purported appeal therefrom must be dismissed.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Donaldson Vickers Crow was convicted of manslaughter, and he appeals from orders denying new trial and suspending proceedings pending probation.

Orders denying new trial affirmed and appeal from other order dismissed.

Fred N. Howser, of Long Beach, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From orders denying defendant's motions for new trials after verdicts of guilty on two counts of manslaughter, defendant appeals.

The case was tried before a jury and defendant was placed upon probation, no judgments of conviction being entered, but an order suspending proceedings pending the term of probation was made by the trial judge. From this order defendant also attempts to appeal.

Viewing the evidence in the light most favorable to the People (respondent), the essential facts are:

About 7 p. m., September 22, 1940, defendant was driving in an easterly direction on Ocean Avenue in Long Beach. At the same time Mr. and Mrs. Vrzal were crossing Ocean Avenue in a marked crosswalk. Defendant struck them with his automobile and as a result of injuries which they received they died.

The information in five counts charged defendant as follows:

Count I: Violation of section 500 of the Vehicle Code, St.1935, p. 173 (negligent homicide), committed on September 22, 1940, proximately causing the death of John Vrzal.

Count II: Manslaughter, being a different statement of the same offense set forth in Count I.

Count III: Violation of section 500 of the Vehicle Code (negligent homicide), committed on September 22, 1940, proximately causing the death of Anna Vrzal.

Count IV: Manslaughter, being a different statement of the same offense set forth in Count III.

Count V: Violation of section 501 of the Vehicle Code (driving while under the influence of intoxicating liquor).

The jury found defendant (1) guilty as charged in Counts II and IV, (2) not guilty on Counts I and III, and (3) they disagreed as to Count V.

Defendant relies for reversal of the orders denying his motions for new trials on these propositions:

First: The verdicts are inconsistent, in that the same elements required to constitute a violation of section 500 of the Vehicle Code are also required to constitute involuntary manslaughter; and, since the jury found the elements did not exist to constitute a violation of section 500 of the Vehicle Code, it was inconsistent for them to find that the same elements existed to constitute involuntary manslaughter.

Second: The evidence is insufficient to sustain the implied finding of the jury that decedents were killed by defendant while he was committing an unlawful act.

Third: Defendant has been placed in double jeopardy, in that a finding of not guilty of violating section 500 of the Vehicle Code, which defendant alleges was an identical offense with manslaughter, consti-

tuted a finding that defendant was not guilty of manslaughter.

Fourth: The trial court committed prejudicial error in overruling objections to certain evidence offered by the People.

Fifth: The trial court committed prejudicial error in refusing to strike from the record testimony of the prosecution relative to the sobriety of one of defendant's witnesses.

Sixth: The trial court committed prejudicial error in refusing to give at defendant's request the following instructions:

(a) "The words 'neglect', 'negligence', 'negligent', and 'negligently' import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns. Though found in the Penal Code, this definition of 'negligence' is only of an act which fixes civil liability. It is the definition of the kind of an act which fixes responsibility upon, for instance, drivers of automobiles where no criminal arrangement whatever is involved, as applied to manslaughter, and must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others or willful indifference. If no one of these arrangements enters into the act, the person charged cannot be held guilty of criminal negligence."

(b) "You are instructed that evidence of lack of ordinary care which might support a judgment for negligence in a civil action for damages is not sufficient to sustain a conviction in a criminal trial for manslaughter which charges the defendant with failure to use due caution and circumspection as the gravamen of the offense charged. Failure to use due care accompanied by gross indifference or disregard for the safety of others is insufficient to sustain a conviction for manslaughter; and if you find from the evidence that the defendant at the time and place in question has not been proved beyond a reasonable doubt to have acted with gross negligence, it is your duty to acquit him of this charge."

(c) "In your deliberations as to Counts II and IV of the information, you are instructed that Section 20 of the Penal Code of the State of California provides as follows:

"'To constitute crime there must be unity of act and intent. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.'

"In order to constitute criminal negligence, there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others or willful indifference. If no one of these elements enters into the act, the person charged cannot be held guilty of criminal negligence, and it would be your duty to acquit the defendant as to said counts."

[1, 2] Defendant's first proposition is untenable. The law is established in California that section 500 of the Vehicle Code (negligent homicide) defines a crime different from involuntary manslaughter, or from any other crime defined in the Penal Code. (People v. Beckhard, 14 Cal. 2d 690, 692, 96 P.2d 794; People v. Pociask, 14 Cal.2d 679, 686, 96 P.2d 788.)

[3] Defendant's second proposition is without merit. Defendant testified that he was driving the car which struck decedents. He also admitted having had several drinks of an alcoholic beverage prior to the accident. A police surgeon who examined defendant within an hour after the accident testified that defendant's muscular and nervous system was affected by alcohol to an appreciable degree, and that he was intoxicated at the time of the examination. The foregoing evidence discloses that defendant was violating section 502 of the Vehicle Code (driving while under the influence of intoxicating liquor) at the time he struck decedents. Therefore it is clear that there was substantial evidence to sustain the convictions of manslaughter, since involuntary manslaughter, among other things, consists in the unlawful killing of a human being, without malice, in the commission by the defendant of an unlawful act. (Sec. 192, subsec. 2, Penal Code.)

[4] Defendant's third proposition is also untenable. It is the law in California that a finding that defendant is not guilty of negligent homicide (sec. 500, Vehicle Code) does not place him in jeopardy as to a charge of manslaughter growing out of the same facts; and, therefore, a verdict of not guilty of negligent homicide does not amount to an acquittal of the charge of involuntary manslaughter. (See People v. Amick,[1] —— Cal.App.2d ——, 118 P.2d 490.)

[1] Hearing in Supreme Court granted.

[5] Defendant's fourth proposition is without merit.

(a) The trial court permitted the People to ask defendant over objection, "Had you become intoxicated the night before when you were drinking beer?" Such question was proper. The evidence disclosed that defendant's car, immediately after the commission of the offenses with which he was charged, contained eleven empty beer bottles. Defendant attempted to explain the presence of these bottles, and during such explanation stated that he had helped to consume the contents thereof. It was therefore proper for the prosecution to inquire as to defendant's condition on the preceding evening for the purpose of testing the credibility of his testimony with reference to the disposition of the contents of the bottles.

[6, 7] (b) A defense witness, Mrs. Parker, who accompanied defendant at the time of the commission of the offenses charged against him, testified that defendant, prior to the time of the accident and at the time thereof, was "cold sober." On cross-examination, over objection, the prosecution was permitted to show that the witness had on previous occasions made contradictory statements relative to the amount of beer defendant had consumed prior to the accident. Such evidence was properly admitted. The law is established in California that a witness may be impeached by evidence that he has made at another time inconsistent and contradictory statements regarding a material issue, which statements are in conflict with his testimony at the trial (People v. Pollock, 31 Cal.App.2d 747, 757, 89 P.2d 128; sec. 2052, Code Civ. Proc.).

[8] Defendant's fifth proposition is likewise devoid of merit. Mrs. Parker testified that at the time of the accident she was "cold sober." Upon rebuttal the prosecution was permitted to show, over defendant's objection, that shortly after the accident she was given the "Romberg test" and was unable to walk a straight line without swaying, that her eyes did not react properly to light, that her speech was thick and that her breath was strong with the aroma of alcohol. Such evidence was properly admissible for the purpose of impeaching the testimony which she had given that at the time of the accident she was "cold sober"; and also for the purpose of showing that, being in an intoxicated condition, she was not able to accurately perceive the incidents which took place prior to and at the time of the accident.

[9, 10] Defendant's final proposition is also without merit. The instructions set forth in this proposition charged that in order for the jury to find defendant guilty of manslaughter it was necessary for the prosecution to prove that the act resulting in decedents' deaths constituted one involving some measure of wantonness, flagrant disregard for the safety of others or willful indifference. Such is not the law. For an act to be without due caution and circumspection, as required for involuntary manslaughter in section 192, subsection 2 of the Penal Code, it is not necessary that such act go to the extent of being wanton or reckless. (People v. Wilson, 193 Cal. 512, 518, 226 P. 5.) The statements in People v. Driggs, 111 Cal. App. 42, 47, 295 P. 51, and in People v. Hurley, 13 Cal.App.2d 208, 214, 56 P.2d 978, to the contrary have been overruled by our Supreme Court in People v. Pociask, supra, 14 Cal.2d at page 684, 96 P. 2d at page 791. In the same case the Supreme Court reaffirms the rule as set forth in People v. Wilson, supra.

For the foregoing reasons the orders denying the motions for new trials are affirmed.

[11] An order granting probation and suspending the pronouncement of judgment and sentence is not an appealable order. (People v. Smith, 36 Cal.App.2d 361, 363, 97 P.2d 867.) Therefore, the purported appeal from such order in the instant case is dismissed.

MOORE, P. J., and W. J. WOOD, J., concurred.

48 Cal.App.2d 848

LAUGENOUR v. FOGG et al.

Civ. 6609.

District Court of Appeal, Third District, California.

Jan. 5, 1942.

1. Bastards ⇐13

In determining what is necessary under the statute to establish illegitimate child's claim of legitimation, the chief concern is not the plight of the illegitimate child so much as that of the father and his family. Civ.Code, § 230.

2. Bastards ⇐13

To establish claim of legitimation, it is not enough merely to establish paternity, but, in accordance with requirements of statute, claimant must establish illegitimacy, paternity, public acknowledgment by the father, reception into family with wife's consent, given with knowledge of the illegitimacy, and treatment of claimant as legitimate. Civ.Code, § 230.

3. Bastards ⇐13

A single man may establish a home with his paramour, and the offspring of such union, reared therein, may become his legitimate child by adoption under the statute. Civ.Code, § 230.

4. Bastards ⇐13

The father of illegitimate child, who without being divorced from his wife lived apart from her with mother of illegitimate child, who lived with them and was acknowledged by father as his own, did not thereby effect legitimation of child, where the lawful wife had no knowledge of the illegitimate child, since such child was never received into the "family" of the father within meaning of statute providing for legitimation. Civ.Code, § 230.

See Words and Phrases, Permanent Edition, for all other definitions of "Family".

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Action by W. R. Laugenour, as trustee, etc., against Hazel Fogg and Joe J. Zopfi, as guardian, etc., involving the issue of legitimation under Civil Code, § 230. From a judgment for plaintiff, Joe J. Zopfi, as guardian, etc., appeals.

Judgment affirmed.

James F. Gaffney and Peter Mannino, both of Sacramento, for defendant and appellant.

Albert Michelson, of San Francisco, and A. G. Bailey, of Woodland, for defendant and respondent.

Mervin H. Reith, of Sacramento, for plaintiff and respondent.

PARKER, Justice pro tem.

The question presented here, while it may not be simple, is at least definite and clear-cut.

From the nature of the case, as it will disclose itself, a detailed statement of the facts would have as its sole result the embalming in buckram of a story that would serve only to arise as future embarrassment to innocent and blameless persons unhappily drawn into the controversy. Both parties agree that there is for determination but one point of law upon which the entire controversy hinges and the proceeding becomes in reality one following a practice adopted in some courts, namely, a certification of the question involved.

In the instant case the appellant presents the question as follows: Does section 230 of the Civil Code contemplate, in order to effect the legitimation of a child, that the father must take the child into his wife's home for reception there, with the wife's consent, under circumstances wherein the father had separated and lived apart from the wife, and had continuously lived, and maintained a settled and fixed home with his illegitimate child and her mother, always acknowledging the child as his own for a period of seventeen years?

The respondent presents the question, in slightly different form, as follows: Can a married man, the father of an illegitimate child, adopt such child under section 230 of the Civil Code by separating and living apart from his wife and living with the mother of said illegitimate child, and having said child live with them, and acknowledging the child as his own, without any consent having been given by the wife and without her even knowing of such illegitimacy?

To both of these questions may be added, concededly, the further statement that

in both it is assumed to be understood that there had been no divorce between the spouses.

The questions as respectively propounded could be narrowed down to the one simple query, as follows: Does section 230 of the Civil Code mean what it says or must it be construed as merely a moral precept intended for general guidance as inclination might determine?

Section 230 of the Civil Code reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, *with the consent of his wife,* if he is married, *into his family,* and otherwise treating it as if it were a legitimate child, thereby adopts it as such * * * ." (Italics added.)

This section was adopted in 1872 and, throughout the changing conditions of the ensuing years, has not been amended. The section has been before the courts on many occasions when fortunes have been at stake and prominent families involved. Through all this time there has never been placed upon the language used any construction other than the plain words import.

[1] The argument is stressed in the case before us that we should consider the plight of the illegitimate child as the foremost factor in the case. At the outset it may serve some purpose to dispose of this contention. In the case of Blythe v. Ayres, 96 Cal. 532, on page 574, 31 P. 915, 19 L. R.A. 40, we find the court's announcement of the principle that the concern is not a cause for anxiety for the interest of the illegitimate child so much as for that of the father and his family, e. g., the other children, his collateral relations. In the dissent of Justice McFarland in the same case, at page 594 of 96 Cal., at page 928 of 31 P., 19 L.R.A. 40, this revered justice uses language certainly strong enough to dispel the argument of the appellant here. He states that the law must be applied just the same to a case where half a dozen legitimate children had been left a small estate and a brood of asserted illegitimates were clamoring for half the patrimony. Quoting, he says further: "No doubt illicit sexual relations sometimes impose hardships on innocent persons, but such is the result of all violations of law. The legislature could abolish all distinctions between legitimate and illegitimate children; but if it should do so it would practically abolish marriage, and dethrone chastity as the queen of womanly virtues."

For further general comments along the same line reference is made to the Estate of De Laveaga, 142 Cal. 158, 75 P. 790.

Cases without number could be cited and the subject, without citation, offers a wide field for rhetorical moralizing. We may pass over the earlier cases and come down to some of the more recent holdings on the application of the section under discussion.

In the Estate of Baird, 193 Cal. 225, 223 P. 974, 1001, we find this statement: "This court declined, in Re Jessup, 81 Cal. [408, 434], 459, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594, [to adhere to the view expressed in the first opinion written by Works, J., and concurred in by three justices], that in cases of adoption under section 230 the only strictness required should be proof of paternity; and that the paternity being satisfactorily established by plenary proof courts should lean strongly in favor of a finding that the father had performed his duty and adopted the illegitimate child. It has been the rule ever since that the elements of paternity, public acknowledgment thereof, receipt of the child into the family of the father as his own, and otherwise treating him as legitimate, must each be established by a preponderance of the evidence, and that if the proof fails in respect to any one of them there is no adoption. 'There can be no compliance with section 230 in the absence of the conditions contemplated by that section, and absolutely necessary to give it effect.'" See, also, In re Estate of Gird, 157 Cal. 534, 108 P. 499, 137 Am.St. Rep. 131.

[2] In Re Estate of Flood, 217 Cal. 763, 766, 21 P.2d 579, 580, the court, after quoting the section, goes on to state:

"To establish her claim of legitimation under this section as construed by a number of decisions of this court, petitioner must sustain the burden of proof of the following elements:

"(1) *Illegitimacy* * * * (2) *Paternity* * * * (3) *Public acknowledgment* * * * (4) *Reception into family with wife's consent* * * * given with knowledge of the illegitimacy. (5) *Treatment as legitimate.*"

And in the same case, to accentuate the necessity of compliance with each require-

ment, the court definitely determined that at the outset petitioner was the illegitimate child and that she was received into the family of the father with the consent of the wife and was there treated as though she were legitimate. But the court also held that this showing was far from sufficient and required establishment of the other essentials, namely, paternity, public acknowledgment and knowledge on the part of the wife that the petitioner was illegitimate. The court made no short cuts nor did it make any attempt to qualify the section in any respect. It stood squarely upon the terms of the section and insisted on full compliance with every requirement thereof.

The argument of the appellant here seems to be one of expediency and the doing of justice, as a mere abstraction, without reference to the provisions of the statute. The argument is that when the father of the illegitimate child severed his relations with his lawful wife he then became a man without a home of any kind with the right to re-establish a home elsewhere, with whom he chose and under whatever conditions he chose. This, too, regardless of the laws governing divorce and a separation. It is a strange contention and if adopted would mean the end of what we have heretofore deemed the backbone of any civilized country, to-wit, the home and family.

[3] Section 230 has stood as it is now written for almost seventy years and has been the subject of litigation and construction from the very beginning. Not one word of the original section has been changed and no construction has ever even winked at such a result as is here sought. Millions in wealth have been at stake and almost every arguable theory has been advanced in an effort to cause the courts to relax in construction to the end that once paternity having been established the remaining requisites of the statute should be ignored. As the cited cases indicate, the attempt has failed. It is true that it has been held, and it may be conceded to be the present rule, that a single man may establish a home with his paramour and there rear the offspring without the sanctity or formality of a marriage. The reasoning of these cases is that every man can lawfully claim *a home;* if married the home is where the wife and family reside and if single he may still provide this home for whomsoever he chooses to establish the marital relation, even without the conventions. But always the word "home" is used in the singular. We deem it needless to go over all of the decisions and authorities on the subject. It seems a little impudent to require that every time the virile vagaries of some roaming Romeo run counterwise to a sane public policy we should again diagram the rules and revamp the same to meet the requirements of his particular need. If the rules are relaxed or misconstrued to the extent here sought we will unsocialize our system beyond description. The terms "home" and "family" will have no meaning other than designating sheltered centers for sex promiscuity. A man could start out in a marriage relation and when established therein even to the extent of a large family could begin to branch out as his capacity permitted. At each stop he could remain long enough to make public acknowledgment of an incidental paternity and then roam on to the next stop and in these days of easy transportation could cover much territory. If each one of these landings could assume the dignity of a home and each group become a family within the law then the chaotic conditions would require complete abandonment of all of the same notions we now entertain and encourage.

We can see no particular hardship resulting from an adherence to the rule which protects the entire social order. If a man or a woman have grounds justifying separation the law is certainly liberal enough to free them from the exacting bonds that have been voluntarily assumed. If it be deemed best to ignore the law and the general compact governing parental and family relations then, by the same token, the same law should not be sought as a refuge in cases where the misadventure might be turned into a benefit only for those ignoring it.

[4] Manifestly, in our opinion, the trial court was correct in holding that where the wife has no knowledge of the illegitimate child and the said child is never received into the family of the father, there can be no adoption.

The judgment is affirmed.

TUTTLE, J., and THOMPSON, Acting P. J., concurred.

THOMPSON v. B. F. GOODRICH CO.

Civ. 11616.

District Court of Appeal, First District, Division 1, California.

Dec. 29, 1941.

Rehearing Denied Jan. 28, 1942.

Hearing Denied Feb. 26, 1942.

1. Negligence ⇐32(1, 2)

Generally, one who during business hours lawfully enters a store to purchase goods does so at implied invitation of owner, upon whom the law imposes the duty of exercising ordinary care to keep aisles and passageways, in and through which by their location and arrangement a customer in making his purchases is induced to go, in a reasonably safe condition so as not to unnecessarily expose customer to danger or accident.

2. Negligence ⇐136(9)

Negligence is a "question of fact" for the jury, even when there is no conflict in evidence, if different conclusions upon the subject can be rationally drawn from the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Negligence ⇐136(9, 10)

In customer's action for injuries sustained by tripping over an unguarded platform on floor in defendant's salesroom, whether defendant was negligent was for jury, where evidence permitted different conclusions to be rationally drawn therefrom and presented definite conflicts on material issues.

4. Appeal and error ⇐1002

A jury's verdict on conflicting evidence was controlling on appeal, where verdict was supported by evidence.

5. Negligence ⇐136(26)

Whether a customer who tripped over an unguarded platform on floor after entering defendant's salesroom was guilty of contributory negligence was for jury.

6. Trial ⇐251(8)

In customer's action for injuries sustained by tripping over an unguarded platform on floor in defendant's salesroom, where complaint alleged that defendant negligently maintained a low platform near entrance to salesroom, instructions were not objectionable as broadening issues made by pleadings, or as abstract, where all but one of the instructions limited the issue of negligence to aisles, doorways and floor of premises through which customer in making purchases was invited to go.

7. Negligence ⇐125

In customer's action for injuries sustained by tripping over an unguarded platform on floor in defendant's salesroom, evidence offered by defendant to show that many persons had passed through entrance to salesroom and that no one had ever fallen over platform before was inadmissible, especially where defendant was not prepared to show that conditions in salesroom at other times were the same as those existing at time of accident.

8. Negligence ⇐125

Evidence of previous accidents similar in character may be admitted to charge one with the duty of anticipating a dangerous condition and of taking appropriate steps to avert the danger, but evidence of absence of previous accidents at the same place is not admissible.

9. Negligence ⇐125

The absence of previous accidents does not relieve a tort-feasor from liability for invasion of rights of others or damage resulting therefrom, but such evidence is admissible in meeting a prima facie case under doctrine of res ipsa loquitur, or a plaintiff's claim that an instrumentality had previously been used a reasonable number of times and found to be safe.

10. Negligence ⇐125

Before testimony regarding previous similar accidents at place of accident in question may be received, it must first be shown, or an offer made to show, that conditions were similar.

11. Appeal and error ⇐1004(1)

A court is not authorized to set aside the award of damages made by jury as excessive merely because the court's opinion is at variance with that of jurors, and it is only where the excess appears as a matter of law, or where recovery is so grossly disproportionate to any compensation reasonably warranted by facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice or corruption, rather than honest and sober judgment, that the court may exercise such power.

12. Damages ⇐130(2)

$5,478.10 for injuries sustained by 73 year old widow was not so excessive, where injuries consisted of the breaking of both bones in widow's left arm above wrist, contusions of leg, shin and knee, and widow had suffered from shock and was unable to close her hand at time of trial.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Marie L. Thompson against the B. F. Goodrich Company for personal injuries. From a judgment for plaintiff, defendant appeals.

Affirmed.

Myrick & Deering & Scott and James Walter Scott, all of San Francisco, for appellant.

M. Mitchell Bourquin and Clinton L. Markley, both of San Francisco, for respondent.

KNIGHT, Justice.

The defendant, the B. F. Goodrich Company, operates a place of business on the corner of Eleventh and Howard Streets in San Francisco, consisting of an open space into which automobiles may be driven for service, and an adjoining salesroom and office wherein said company displays its products and transacts its office affairs. Between ten and eleven o'clock on the morning of November 22, 1939, the plaintiff, Marie L. Thompson, drove her car into the open service area to purchase and have installed two new tires. She left the car in charge of a company attendant and walked over to and entered the salesroom and office to pay for the tires. Upon opening the door she took a step or two forward and then turned to the left to approach a group of salesmen standing near the office counter. In doing so she tripped and fell headlong over a low, unguarded wooden platform, fracturing both bones of her left arm at the wrist, and sustaining other personal injuries less severe. Before plaintiff tripped and fell she was unaware of the presence of the platform. It was 11½ inches above the surface of the floor, the same color as the floor, and according to plaintiff's evidence, there was nothing on the platform to call attention to it. She sued for damages, and was awarded a verdict of $5,478.10, and from the judgment entered thereon the defendant company appeals.

The trial court denied defendant's motions for a nonsuit and a directed verdict, and the rulings are assigned as error. Summarized, the grounds urged in support of the motions were insufficiency of the evidence to support an affirmative finding as to the unsafe condition of the aisle or passageway; and that if there was any danger presented by the presence of the platform it was an obvious one, and that therefore plaintiff was guilty of contributory negligence as a matter of law. It is our conclusion that the cause was properly submitted to the determination of the jury, and that its verdict finds ample evidentiary support.

The doorway through which plaintiff entered the salesroom is in the easterly wall at the extreme northeasterly corner of the room. The door is 35 inches wide, and swings inward to the right against the northerly wall; and the platform is on the left side of the doorway. The end of the platform over which plaintiff tripped and fell starts from the easterly wall at a point 7 inches to the left of the doorway, and runs thence westerly parallel with the northerly wall and into the salesroom for a distance of 47 inches. There is a large window set in the easterly wall which extends down to the level of the platform; and in the door through which plaintiff entered there is a pane of glass which extends down to within 15 inches of the floor. Along the northerly wall there is a large, long tire rack 10 feet high, the easterly end of which stands opposite and about 7 feet from the doorway through which plaintiff entered; and evidence was introduced by plaintiff showing that at the easterly end of the tire rack nearest the door and about the same width as the tire rack there stood an easel-like advertising display rack 53 inches high, leaving an open floor space of 35 inches between the bottom of the advertising rack and the corner of the platform. Plaintiff is a widow, and was 73 years old at the time of the accident. When she entered the salesroom she was wearing bifocals, and was carrying her purse under her arm, and a pen and check book in her hand. She testified that upon passing through the door she was confronted with the advertising rack, which was immediately in front of her, about 2½ feet away; and that in order to avoid said rack and reach the office counter where the company's employees

were standing, she turned to the left, took but one step, and fell over the platform. Defendant's employees testified that the advertising rack was not there at the time of the accident, and some of them testified that they had never seen any such rack. However, plaintiff positively testified as to the presence of the rack at the time of the accident, and produced a witness who testified that two days after the accident (the intervening day being a holiday, Thanksgiving) the rack was still there. Defendant also introduced photographs and testimony from which it appears that there were several tires displayed on the platform near the door through which plaintiff entered; but plaintiff emphatically testified that no such tires were there at the time of the accident.

[1-4] The general rule is that one who during business hours lawfully enters a store to purchase goods does so at the implied invitation of the owner, upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways, in and through which by their location and arrangement a customer in making his purchases is induced to go, in a reasonably safe condition so as to not unnecessarily expose him to danger or accident. Brinkworth v. Sam Seelig Co., 51 Cal.App. 668, 197 P. 427; Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80; Oles v. Kahn Bros., 81 Cal.App. 76, 253 P. 158. And as frequently declared by the courts, negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. Brinkworth v. Sam Seelig Co., supra, citing Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 663, 62 P. 308, 64 P. 993. Here the evidence is such that not only may different conclusions be rationally drawn therefrom, but as will be noted it presents definite conflicts on two material issues. Therefore, under the rule declared in the following cases, the cause was properly submitted to the determination of the jury; and since the evidence supports its conclusion its verdict is controlling on appeal. Walsh v. Maurice Mercantile Co., 20 Cal.App.2d 45, 66 P.2d 181; Williamson v. Hardy, 47 Cal.App. 377, 190 P. 646; Brinkworth v. Sam Seelig Co., supra; Oles v. Kahn Bros., supra; Moffitt v. Ford Motor Co., 135 Cal.App. 7, 26 P.2d 661; Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 44 P.2d 405; Hodge v. Weinstock, Lubin & Co., supra. The case last cited, like this one, involved a fall over an unseen platform, and the court held that upon the evidence presented the question of the negligence of the defendant was properly submitted to the jury.

[5] The basis of defendant's contention that plaintiff was guilty of negligence as a matter of law is that if she had looked she would have seen the platform. The same argument was advanced in a number of other cases, but it was held that the question of contributory negligence was one for the jury. For example, in Walsh v. Maurice Mercantile Co., supra [20 Cal.App.2d 45, 66 P.2d 183], the court said in part: "Conceding that if plaintiff had looked she might have seen the scale, nevertheless, in the circumstances, she was reasonably justified in assuming that the aisle was unobstructed, and her failure to see it was not necessarily negligence. Different inferences might be drawn from the evidence. As held in the following cases, the question was one for the jury: Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396; Madigan v. [O. A.] Hale & Co., 90 Cal.App. 151, 265 P. 574; Hodge v. Weinstock, Lubin & Co., 109 Cal.App. 393, 293 P. 80." Again in Roach v. Wells Fargo Bank & Union Trust Co., 102 Cal. App. 380, 282 P. 967, 968, the court said: "The defendant claims that the plaintiff Clara J. Roach was guilty of contributory negligence. This attack rests upon the contention that Mrs. Roach was looking directly ahead and did not look down at the floor, and, if she had looked down, she would have been able to see that there was a variation in levels between the outside room and the inside room. All of these matters in the instant case presented questions of fact which were properly left to the jury. Long v. John Breuner Co., supra [36 Cal.App. 630, 172 P. 1132]; Siegman v. Fetters, 59 Cal.App. 114, 210 P. 49." And in Tuttle v. Crawford, 8 Cal. 2d 126, 63 P.2d 1128, 1130, the court used this language: "Whether Mrs. Tuttle was negligent in presuming that the floor of appellants' store was in a safe and fit condition to be traversed by customers is a question about which there might well be a division of opinion among average persons, but it certainly cannot be said that the weight of opinion would so strongly preponderate on the side of negligence on the part of respondent as to take the ques-

tion out of the realm of fact and transport it into a question of law."

[6] The complaint alleged that defendant carelessly and negligently maintained a low platform in close proximity to the entrance; and defendant contends that certain instructions given by the court "broadened the issues made by the pleadings and were misleading" and tendered an issue "far beyond the charge made in the complaint," in that they dealt with the general proposition that it was defendant's duty to use ordinary care to keep the "premises," including the floor, doorway, and aisles, in a reasonably safe condition. However, it appears from the record that the court gave an instruction proposed by defendant wherein the word "aisle" was employed three times; and all but one of the instructions defendant complains of used language which limited the issue of negligence to aisles, doorways and floor of the premises in, through, and over which by their location and arrangement a customer in making purchases is induced or invited to go. It is apparent, therefore, that defendant's point is not well taken. Nor is there any merit in the objections made to various other instructions. Defendant's criticism of instruction XXXV is answered by the decision in Roach v. Wells Fargo Bank & Union Trust Co., supra; and instruction VII finds support in People v. Crandall, 125 Cal. 129, 57 P. 785. The remaining ones criticized are mostly commonplaces of the charge invariably given in negligence cases.

[7-9] Further contention is made that the trial court erred in excluding proffered evidence to the effect that many persons had passed through the entrance, and nobody had ever fallen over the platform before. Even though it be held in some jurisdictions that such evidence is admissible, the rule has not been so adopted in California. City of Oakland v. Pacific Gas & Elec. Co., 47 Cal.App.2d 444, 118 P.2d 328. Here it has been held that evidence of *previous accidents* similar in character may be admitted to charge one with the duty of anticipating a dangerous condition and of taking appropriate steps to avert the danger. McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.2d 145, 81 A.L.R. 678; Continental Ins. Co. v. Pacific Greyhound Lines, 43 Cal.App.2d Supp. 877, 111 P.2d 37; Gerberich v. Southern Cal. Edison Co., 26 Cal.App.2d 471, 79 P.2d 783; Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406; City of Oakland v. Pacific Gas & Elec. Co., supra. But it has been definitely held that evidence of the *absence* of previous accidents at the same place is not admissible. Carty v. Boeseke-Dawe Co., 2 Cal.App. 646, 84 P. 267; Sheehan v. Hammond, 2 Cal.App. 371, 84 P. 340. As said in the recent case of City of Oakland v. Pacific Gas & Elec. Co., supra [47 Cal.App.2d 448, 118 P.2d 330]: "The absence of previous accidents should not and does not have a reasonable tendency to relieve a tort feasor from liability for the invasion of the rights of others or damage resulting therefrom, but such evidence is admissible in meeting a prima facie case under the doctrine of res ipsa loquitur, or a *plaintiff's* claim that an instrumentality had previously been used a reasonable number of times and found to be safe. Union Oil Co. v. Rideout, 38 Cal.App. 629, 177 P. 196; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164." (Italics ours.)

[10] Furthermore, under the rule followed in this state, before testimony of this character may be received it must first be shown, or an offer made to show, that the conditions were similar. 10 Cal. Jur. 828; Sellars v. Southern Pac. Co., 33 Cal.App. 701, 166 P. 599; Lim Ben v. Pacific Gas & Elec. Co., 101 Cal.App. 174, 281 P. 634. In the present case defendant's counsel in response to a direct question propounded by the court conceded that he was not prepared to show that the easel-like advertising display was at any time in the place described by plaintiff, which she testified caused her to turn and she immediately fell over the platform which she had not observed. It would appear, therefore, that under the case last above cited, the evidence in any event was properly excluded.

[11, 12] Finally, appellant urges that the verdict was excessive. In this regard the record shows that as a result of the fall both bones of plaintiff's left arm were broken just above the wrist, the fracture being described by the doctor a "severe type" of "Colles fracture"; that she had many contusions of the leg, shin and knee, and suffered from shock. She was hospitalized four days, in bed three weeks at home and remained in bed three weeks more. She had a plaster cast on her hand and arm for eight weeks, and a splint for two weeks more. At the time of trial, she still had pain in the arm, and was un-

able to close her hand; she had no gripping strength, and there was a limitation of motion on pronation and supination (rotation) of the wrist; she could not hold a knife or use the hand in dressing; and her doctor testified that he was doubtful if this condition would improve. She was able to drive her car again shortly prior to the trial, but could not set the emergency brake. Even though the award could be deemed generous, it is the well settled law that courts are not authorized to set aside the award of damages made by the jury as excessive merely because the opinion of the court is at variance with that of the jurors. It is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that the court may exercise this power. 8 Cal.Jur. 834, and cases cited. There is nothing in the present case to justify such conclusion.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.



48 Cal.App.2d 824

SWART v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 12703.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1942.

Rehearing Denied Jan. 27, 1942.

Hearing Denied March 2, 1942.

Powers ⇐36(1)

In action by husband to set aside the exercise by deceased wife about five months before her death of reserved power of appointment, by which wife amended a trust created by her so as to terminate husband's interest therein, conflicting evidence sustained finding that wife was at the time mentally incompetent to exercise such power and warranted judgment setting aside the exercise thereof.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Perry Z. Benton Swart against the Security-First National Bank of Los Angeles (a national banking corporation) and others, to set aside the exercise by a decedent of a power of appointment by which trust was amended so as to terminate plaintiff's interest therein. The action was tried with administrator's action to set aside decedent's conveyance of realty in trust. From a judgment for plaintiff and an order denying a new trial, defendants appeal.

Judgment affirmed and appeal from order dismissed.

Prentiss Moore, of Los Angeles, for appellant Robert E. Johnson.

M. C. Schrager and C. V. Caldwell, both of Los Angeles, for appellant Security-First Nat. Bank.

Hill, Morgan & Bledsoe, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

On June 30, 1928, in the "Little Church Around the Corner" in the city of New York, Perry Z. Benton Swart and Pearl Tinsley Johnson were married. It was the third marriage for Mrs. Swart, her two former husbands having died. From her first husband's estate she received a large amount of money and property, the income of which was sufficient to enable her to live in affluent circumstances. This income was used by Mr. and Mrs. Swart in maintaining a fine home in Los Angeles, and in extensive domestic and foreign travel.

For the purpose of taking care of a portion of her property, investing and re-investing it, Mrs. Swart from time to time deposited certain assets with corporate trustees, reserving a power of appointment and disposal over the income and corpus of the trust estates.

On June 17, 1929, Mrs. Swart caused one of these trusts which she had with the Security-First National Bank to be amended so that if Mr. Swart survived her, he was to be paid the trust income for life, with remainder to certain named beneficiaries. On February 21, 1935, Mrs. Swart again caused this trust to be amended, providing that upon her death, her husband was to receive all of the corpus of the trust estate, except a $2,500 gift out of it to be paid to Bernard Claggett, her chauffeur.

Mr. and Mrs. Swart lived happily together until the latter part of 1936, when a serious situation developed for them both. She changed. Instead of conducting herself as an intelligent, well-groomed woman, she became uncleanly and careless of her personal appearance; she drank more than was good for her; she became more and more irrational, until she died October 24, 1937, in a private sanitarium, hopelessly insane.

For the sake of brevity we will hereafter refer to Mr. Swart as the plaintiff, and to Mrs Swart as the decedent.

As the malady of this unfortunate lady progressed, her love and affection for her husband changed to suspicion and hatred, until on May 4, 1937, without any previous intimation to him, she filed suit for divorce in the Superior Court of Los Angeles County, and caused due service of complaint and summons to be made.

On May 29, 1937, the decedent made a last will in which she did not mention her husband. On May 29, 1937, decedent caused the trust to be amended, substituting a brother of her first husband as beneficiary in place of the plaintiff. By these instruments, dated May 29, 1937, and the conveyance of an apartment house, to be discussed in the opinion following, the decedent attempted to terminate any and all rights which the plaintiff might have had in or to any of her property.

After the death of decedent, plaintiff filed an action in the superior court against the defendants, to set aside the exercise of the power of appointment by the decedent terminating his interest in the trust.

This action, and Swart v. Johnson, Cal. App., 120 P.2d 699, this day decided, were tried together, it having been stipulated that the testimony taken at the trial might go to both actions, but each action was to be considered and decided separately.

Many court days were consumed in taking testimony, and in argument. The trial judge in an oral opinion from the bench, stated that he was convinced that during the last few months of her life the decedent became obsessed with the insane delusion that the plaintiff was endeavoring to get some or all of her property away from her, and that there was no substantial evidence of any effort on the plaintiff's part to do this, and directed that findings and judgment be prepared setting aside the purported exercise of the power of appointment by which the trust was amended to terminate plaintiff's interest.

In addition to findings contrary to affirmative defenses and covering facts relative to the trust, its institution and its terms, the trial court found that the amendment of May 29, 1937, was in the nature of a testamentary disposition by the decedent of the corpus of the trust, and that the decedent "was not in full possession of her mental faculties," and had an insane delusion that her husband was trying to secure her property. Inasmuch as laches must be discussed in our opinion with reference to the apartment house, we may say here that in the pending case the trial court found specifically that the plaintiff and his attorneys had filed and prosecuted the action to judgment with reasonable diligence and that the defendant had suffered no delay, and that plaintiff was not guilty of any laches.

In accordance with the findings, judgment followed that the purported amendment to the trust be set aside and cancelled and that the balance of the assets held by the trustee be paid to the plaintiff.

From this judgment and order denying a new trial, the defendants in the trust case have appealed. This appeal is based upon the contention that the evidence was insufficient to support the court's finding of incompetency, and that there was undisputed proof that there were sufficient facts upon which the decedent might have formed the belief that her husband was trying to get her property away from her.

A careful review which we have made of all of the testimony has brought us to the very definite opinion that there is in the lengthy transcript of evidence brought before this court ample evidence to sustain the finding of incompetence of the decedent, as made by the trial court.

The plaintiff husband of the decedent testified that in his opinion she became insane in 1936. His reasons were that in talking she could not enunciate her words clearly; she became careless of her dress and person; she began to drink to excess; she did not understand business deals; she began to use sleeping tablets to excess; she did not seem to know what she was doing or what she was saying; she had hallucinations and delusions; she thought everybody was trying to rob her and persecute her. And the plaintiff further testified that this condition continued and grew

worse, although he tried to protect the decedent. After the separation the decedent wrote plaintiff letters accusing him of stealing her things, which accusations were not true at all, and called him on the telephone to berate him.

Two intimate acquaintances testified that in their opinion decedent was not right mentally, giving their reasons.

Dr. Victor Parkin, a medical doctor and an admitted expert psychiatrist, testified that when the decedent died she was insane; and in reply to a hypothetical question setting out the condition of the decedent as contended by the plaintiff, that, in his opinion, she was insane at the time the amendment to the trust was made.

Bernard Claggett, the decedent's chauffeur, testified that during the period in question, the decedent's mouth would quiver and she would ramble; she foamed at the mouth in the morning; after the divorce proceedings were instituted, she asked the witness to carry a gun to protect her from her husband; on May 27, 1937, two days before the trust was amended, decedent was in a terrible condition, she had all the water in the laundry turned on and was putting colored blankets into the washing machine, and a whole pillow, and the sheets were coming out all colored and the decedent was wringing wet, and the witness put her to bed and cleaned up the mess; that on another occasion the decedent pulled up the growing flowers in the yard, and it took the witness hours to clean it up. This witness testified that the plaintiff had always treated the decedent in a kindly manner.

Also on rebuttal, ladies in a beauty parlor, who qualified as intimate acquaintances, testified to mental difficulties of the decedent.

It is, of course, true that there were witnesses who appeared for the defendants and expressed their opinion that she was sane, giving their reasons therefor. We are not reciting this testimony, because we think that the brief résumé of the testimony above given demonstrates that there is substantial evidence to support the finding of incompetency upon which the judgment in this case is based.

In passing, it may be said that most of the defendants' witnesses were persons with whom the decedent transacted business—business out of which these witnesses, or their principals, were making a profit—and that at the trial the defendants failed to call the decedent's brother or any of her relatives-in-law, who were in attendance upon her after she filed her action for divorce against her husband. Also, the evidence discloses that after her break with her husband, and while one of her brothers was living with her, she quarreled with her brother, too.

Appeal from the order denying a new trial is dismissed. The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 829

SWART v. JOHNSON et al.

Civ. 13260.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1942.

As Modified on Denial of Rehearing Jan. 27, 1942.

Hearing Denied March 2, 1942.

1. Deeds ⇐211(1)

In administrator's action to set aside a deed, whereby decedent approximately two months before death conveyed apartment house to trustee, conflicting evidence sustained a finding that decedent was suffering from an insane delusion that husband, from whom she sought a divorce, was attempting to get her property and that deed was solely the result of such delusion, but that decedent was not wholly without understanding, and such finding required a judgment setting the deed aside.

2. Husband and wife ⇐278(1)

Where a settlement of property matters between a husband and wife is being negotiated, both parties should at all times be represented by counsel.

3. Cancellation of instruments ⇐53

In administrator's action to set aside a deed, whereby decedent approximately two months before death conveyed an apartment house in trust, on the ground that decedent was mentally incompetent at the time, a finding that administrator from the time of his appointment had full knowledge with respect

to the conveyance in trust and the beneficiary thereof, and failed to take any action to set aside conveyance until more than 11 months after appointment, was at best uncertain as to existence of laches barring recovery.

4. Equity ⇐67

"Laches" is such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity, and in determining what will constitute unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other parties have been prejudiced by such delay.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

5. Cancellation of Instruments ⇐34(1)

In administrator's action to set aside a conveyance of property by decedent on ground of mental incompetency, administrator was not chargeable with "laches" barring recovery on account of failure to commence action until more than 11 months after his appointment, where grantees had knowledge he contemplated taking some action respecting conveyance and had been definitely advised several days before complaint was filed that an action would be brought, and it did not appear that any one was prejudiced by the delay.

6. Equity ⇐67

The doctrine of "laches" is not technical and arbitrary and is not designed to punish a plaintiff, but can only be invoked where a refusal would be to permit an unwarranted injustice.

7. Equity ⇐84

Whether the doctrine of "laches" applies depends upon the circumstances of each case.

8. Appeal and error ⇐1122(2)

Where trial court's finding as to laches was uncertain and in any event the proof was directly contrary to any finding of the existence of laches, the District Court of Appeal, under statute permitting reviewing court to make findings of fact contrary to, or in addition to, those made by trial court, adopted trial court's finding as to laches and in addition found that plaintiff was not guilty of laches. Code Civ.Proc. § 956a.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Perry Z. Benton Swart, as administrator of the estate of his deceased wife, against May Emma Johnson and others, to set aside a conveyance of apartment house by the deceased to a trustee and a conveyance by trustee to the named defendant, which action was tried with an action to set aside an exercise of a power of appointment under a trust created by the deceased. From an adverse judgment and an order denying a new trial, plaintiff appeals.

Judgment reversed and cause remanded, with directions.

Hearing denied; GIBSON, C. J., and SHENK, J., dissenting.

Hill, Morgan & Bledsoe, of Los Angeles, for appellant.

Prentiss Moore, of Los Angeles, for respondents May Emma Johnson and Robert E. Johnson.

Swanwick, Donnelly & Proudfit and C. V. Caldwell, all of Los Angeles, for respondent California Trust Co.

DRAPEAU, Justice pro tem.

This action, and Swart v. Security-First National Bank of Los Angeles, Cal.App., 120 P.2d 697, this day decided, were tried together, it having been stipulated that the testimony taken at the trial might go to both actions, but each action was to be considered and decided separately.

Inasmuch as we have recited in the opinion in that case the facts relative to the marriage of the plaintiff and his wife; their living together; her mental illness, and the detailed testimony of witnesses who established that she was incompetent at the time of the transactions in question in the two cases, we will not repeat them here.

This appeal has to do with title to an apartment house, called the Durant apartment. In 1936 Mr. and Mrs. Swart exchanged three parcels of real estate for this apartment house. In addition to the real property thus exchanged, $4,000 in cash was paid by Mr. and Mrs. Swart as further consideration. This $4,000 was checked out of a joint bank account of Mr. and Mrs. Swart. One of the three parcels of real property exchanged was in Mrs. Swart's name alone, and Mr. Swart did not sign the deed for that. The other two parcels were in both their names as joint tenants. In one of these parcels Mr. Swart had put work and labor and funds of his own. When the deeds passed, title to the apartment house

was taken in Mr. and Mrs. Swart as joint tenants.

On May 5, 1937, the plaintiff made a quitclaim deed of the apartment house property to the decedent, and on August 25, 1937, the decedent conveyed this property to the California Trust Company to be held in a trust in which plaintiff was not mentioned. Thereafter, and on August 18, 1938, California Trust Company by deed, under direction of the trust, conveyed it to the defendant, May Emma Johnson.

By this instrument, dated August 25, 1937, and those referred to in the foregoing opinion, the decedent attempted to terminate any and all rights which the plaintiff might have had in or to any of her property.

After the death of decedent, plaintiff filed an action in the superior court, in his representative capacity as administrator of the decedent's estate, and against May Emma Johnson, Robert E. Johnson and California Trust Company, seeking to set aside conveyances of the apartment house which vested title thereto in May Emma Johnson.

The trial judge stated that "The defendants * * * having pleaded as an affirmative defense the facts showing the conveyance, so that it is within the issues, my judgment is that that affirmative defense has been sustained by a preponderance of the evidence, and my conclusion is that, * * * judgment will have to be for the defendants."

As has been stated, there are two cases here upon appeal. Both cases were tried together, and it was stipulated that the testimony might be considered as applicable to either or both cases. Appeals from the judgments rendered in the two cases are before this court, and are being reviewed together, in accordance with the stipulation of the parties; but the stipulation reserves the right to have each case decided separately, and we are filing a separate opinion in each case.

The findings as to incompetency are somewhat different in form from those in the Swart v. Security-First National Bank of Los Angeles case, supra.

Finding V is that the decedent was suffering from an insane delusion and became obsessed with the idea that the plaintiff was attempting to get her property and "that the transfer and conveyance" of the apartment house property on August 25, 1937, "was solely the result of such insane delusion"; but that on said date the decedent was not "wholly without understanding."

Finding VIII is that plaintiff was appointed administrator December 22, 1937; that he had full knowledge of the trust with the California Trust Company, and that the defendant, May Emma Johnson, was the beneficiary; and that he failed to take any action to claim said real property or to set aside the conveyance from California Trust Company to May Emma Johnson until the filing of this action, December 10, 1938.

Based upon these findings, judgment was rendered against the plaintiff, as administrator, and from this judgment and an order denying a new trial, the plaintiff appeals.

This appeal is based upon the contention that the findings do not support the judgment as rendered. Respondents argue that the findings do support the judgment, in that there is a finding of laches which bars the plaintiff's right to set aside the deed, and in that the finding of incompetency of the decedent is not supported by the evidence.

[1] The latter proposition has already been discussed at length. We have demonstrated that we think there is ample evidence in the record to support the finding of the trial court thereon. The finding in the trust case was relative to her incompetency on May 29, 1937, when she attempted to amend the trust. The deed here in question is dated August 25, 1937. We are convinced that the evidence shows the decedent was suffering from a form of insanity which became progressively worse, and that the proof of her incompetency on the latter date is stronger, if anything, than it is as to her incompetency on the former date.

We think the trial judge in rendering his opinion from the bench must have overlooked the primary point upon which a decision of both cases had to be reached, namely: That of the competency or incompetency of the decedent on the date of the amendment to the trust, and on the date of the deed attempting to convey the apartment house property to the defendant, California Trust Company. And we think that the finding of incompetency of the decedent on the date the deed was made requires a judgment setting it aside.

While it is not necessary to a decision in this case, nevertheless we have concluded that something should be said about the circumstances when the plaintiff's quitclaim

deed of the apartment house was made to the decedent. The deed was prepared in the office of attorneys for the decedent after the divorce complaint had been filed and served; it was there presented to the plaintiff, when he also signed an agreement denominated a "Mutual Release," and was paid by counsel for decedent $400.

The plaintiff testified that he signed these instruments and later filed an answer but made no contest to the divorce case, because he felt that if he crossed the decedent it would aggravate her mental condition, and that he thought if he did not oppose her it might help her to get over her trouble. It is evident the trial court believed this testimony and that the plaintiff had an entirely proper and laudable reason for what he did in these respects.

[2] The plaintiff was not represented or accompanied by counsel when the quitclaim deed and the release were presented to him for signature, in the office of his wife's lawyers. This situation illustrates a fact which should be evident to all members of the bar of this state—that in fairness to both parties concerned, when negotiations for settlement of property matters between husband and wife are on hand, both parties should at all times be represented by counsel.

In this case we find that unquestioned property rights which the plaintiff had in the apartment house were attempted to be taken away from him, that a long period of harmonious relationship as husband and wife were brushed aside, and that purported statements made by the plaintiff were used later on in the trial to embarrass and discredit him. Members of the bar should never forget that they are ministers of justice, and that when agreements between husbands and wives are negotiated, and one of the negotiating parties is without benefit of counsel, justice in the settlement of their property affairs can seldom be had.

[3] This then brings us to a consideration of laches, if any, involved. In the trust case, upon the same evidence, the trial court found there were no laches. In the apartment house case, it may be argued that finding VIII is a finding that there were laches. We think the most that can be said of this finding is that as to laches, it is uncertain.

Assuming it to be a finding of laches, we think the proof is directly contrary to any finding of laches.

[4] "'Laches' is defined as 'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.' * * * 'In determining what will constitute such unreasonable delay, regard will be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant, or of other persons, have been prejudiced by such delay.'" Cahill v. Superior Court, 145 Cal. 42, 46, 78 P. 467, 469.

[5] The record discloses that the plaintiff was appointed administrator December 22, 1937; that the defendants knew his counsel were engaged in making a study of the case, and were considering taking some action toward setting aside the deed; and that on October 27, 1938, they were definitely advised that some action would be brought; and that the complaint was filed November 10, 1938. Under these circumstances, we do not think there is any showing which would support a finding of an omission to assert a right, or a delay in the assertion of that right sufficient to charge the plaintiff with laches. And in this case we think that no one, under any circumstances, has been prejudiced because the complaint was not filed sooner.

[6, 7] "The doctrine of laches is not technical and arbitrary and is not designed to punish a plaintiff. It can only be invoked where a refusal would be to permit an unwarranted injustice. Whether or not the doctrine applies depends upon the circumstances of each case." Hiett v. Inland Finance Corp., 210 Cal. 293, 300, 291 P. 414, 417.

[8] In view of the situation which thus presents itself to the court, the provisions of section 956a of our Code of Civil Procedure are applicable here. This section permits the reviewing court to make findings of fact contrary to, or in addition to, those made by the trial court.

Therefore, we adopt the findings of the trial court as to laches in the trust case, and find that the plaintiff in the apartment house case was not guilty of laches. This finding, together with the finding of the trial court of the incompetency of the decedent, requires us to reverse the judgment of the

superior court and to send this case back to that court, with directions to enter judgment setting aside the deed dated August 25, 1937, designating Pearl T. Swart as grantor to California Trust Company, a corporation, as trustee; setting aside the deed dated July 19, 1938, from California Trust Company, a corporation, as trustee, grantor, to May Emma Johnson; requiring May Emma Johnson to account to plaintiff as administrator of decedent's estate for the rents, issues and profits of the apartment house received by her, less taxes and other proper charges attributable thereto; and declaring that no defendant has any claim to, or interest in, the apartment house property; and declaring that the plaintiff as administrator is the owner of said real property; and for his costs of suit. It is so ordered. Appellant shall not recover his costs on appeal against respondent California Trust Company.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 791

PEOPLE v. BUMBAUGH.

Cr. 3514.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1941.

1. Criminal law ⇐1144(13)

On appeal from conviction, the reviewing court was required to state the facts in the light most favorable to the prosecution.

2. Assault and battery ⇐92

Evidence sustained conviction of assault by means of force likely to produce great bodily injury. Pen.Code, § 245.

3. Assault and battery ⇐55

To constitute the crime of "assault" within statute relating to an assault by means of force likely to produce great bodily injury, it is not required that an intent to injure the victim severely by use of force be proved, nor is it required that the injuries inflicted be of serious nature. Pen. Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault".

4. Assault and battery ⇐55

One may be guilty of assault by means of force likely to produce great bodily injury although the attack is made by the use of hands or fists. Pen.Code, § 245.

5. Assault and battery ⇐95

What force is likely to produce great bodily injury so as to authorize conviction for assault by means of force likely to produce great bodily injury is a question of fact for the jury. Pen.Code, § 245.

6. Criminal law ⇐1159(4)

Even though testimony may disclose unusual circumstances, the reviewing court cannot disturb action of jury in believing testimony unless the court can say that it would not seem possible that what was testified to have been done could have been done under the circumstances disclosed, and the reviewing court is authorized to reject the positive testimony of a witness only if the testimony is inherently improbable.

7. Rape ⇐51(5)
Sodomy ⇐6

In prosecution for forcible rape and an act of sex perversion, wherein record showed that prosecutrix complained to her mother and stepfather immediately after the accused left prosecutrix and later that morning advised physician that prosecutrix had been the victim of an attack and that within a few days thereafter prosecutrix presented her complaint to the office of district attorney, contention that prosecutrix waited an unusual length of time before making complaint was without merit. Pen.Code, § 288a.

8. Rape ⇐40(2)

In rape prosecution, testimony that alleged victim has previously been guilty of unchaste acts is admissible for impeachment as to manner in which the act was committed as well as for impeachment as to whether the crime of rape was committed at all.

9. Criminal law ⇐696(3)

In prosecution for forcible rape and an act of sex perversion, testimony of character witness that "if you call a drinking person bad" the witness would say that the prosecutrix' reputation was bad, was properly stricken, since reputation of prosecutrix for sobriety was not in issue. Pen.Code, § 288a.

10. Rape ⇐40(3)
Sodomy ⇐6

In prosecution for rape and an act of sex perversion, exclusion of evidence concerning whether character witness recalled any specific instance where prosecutrix might have been involved in trouble prior to the case with a man other than the defendant was proper, since answer to the question would not tend to prove or disprove the previous chastity of the prosecutrix. Pen.Code, § 288a.

11. Criminal law ⇐829(12)

In prosecution for rape and an act of sex perversion, wherein the story of the prosecuting witness was corroborated by other testimony, error could not be predicated on refusal to give instruction on weighing of evidence, especially in view of general instructions as to specific duty of each juror to decide the case conscientiously and only after full and fair consideration of all testimony without any bias or prejudice by reason of nature of charges for which the defendant was on trial. Pen.Code, § 288a.

12. Criminal law ⇐822(1)

Instructions must be considered as a whole.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Arnold Bumbaugh was convicted of assault by means of force likely to produce great bodily injury, forcible rape and an act of sex perversion, and he appeals.

Affirmed.

Gerald A. Coxe, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The defendant was charged in count 1 of the information herein with the crime of assault by means of force likely to produce great bodily injury; in count 2 with the offense of forcible rape; while count 3 alleged a violation of section 288a of the Penal Code. Upon the trial thereof the jury found him guilty as charged in each of said counts. From the judgments of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

[1] Stating the facts in the light most favorable to the prosecution, as we must do following a verdict of guilty, such facts, as to count 1, may be thus summarized: On or about February 26, 1941, the prosecutrix owned and operated a cafe on Garvey Road between Monterey Park and Pomona in Los Angeles County. Defendant had previously been in the cafe. On the aforesaid evening he spent several hours therein drinking beer and dancing. In response to defendant's invitation, the prosecutrix danced with him during the evening. About 1:30 o'clock on the following morning the prosecutrix left the cafe and got into the automobile of one of her employees who had brought her to work and with whom she intended to go home when the cafe closed. This automobile was parked near the side door of the cafe. The prosecutrix lay down on the back seat of the car and went to sleep. The car was a two-door sedan. The light over the side door of the cafe was about fifteen feet distant. The testimony indicates that the defendant was seen to leave the cafe by the side door about ten minutes before two o'clock. Shortly thereafter the prosecutrix was awakened by defendant's choking her and pulling her out of the car. She screamed, but the defendant put his hand over her mouth, choked her with the other hand, and dragged her about thirty feet through the mud of the parking lot toward the darkness away from the cafe. Defendant threw the prosecutrix down on her back in the mud, where he lay upon and continued to choke her as she struggled to free herself from his grasp. According to her testimony, she was unable to scream because defendant continued to hold one hand over her mouth. During the struggle her coat and stockings were torn and her clothing, face and hair were covered with mud. Defendant loosened his hold momentarily and the prosecutrix screamed again, at which time defendant got up and ran around the corner of the building. The prosecutrix made her way to the kitchen door of the cafe, in a dazed and hysterical condition. According to her employee, who was near the door about to close the cafe for the night, the prosecutrix had welts and other scratches on her neck, bruises on her legs, and her forehead was skinned. She related what had happened, and with her employee went to a private police patrol agency, from which place they called the Temple City

sheriff's substation. The evidence further indicates that within a week or so after this occurrence defendant went to Palm Springs, where he obtained work under the assumed name of George Arnold, Jr.

The factual background of counts 2 and 3 may be epitomized as follows: The alleged victim named in these counts was a widowed mother of two children aged 12 and 10 years. She was employed as a cook and waitress in a cafe operated by her mother on Garvey Road. She resided with her children over some garages in the rear of a lot near the cafe. She was acquainted with the defendant, whom she knew as one of the residents of the neighborhood, and he had been in the restaurant two or three times prior to the alleged assault. On the night of September 18, 1939, defendant entered the restaurant between ten and eleven o'clock and remained there until about twelve, when the complainant closed the cafe for the night. With the defendant she left the cafe, the defendant stating that he would walk with her, as it was dark. As they approached the home of the complaining witness, defendant walked back along the driveway with her to the steps leading up to her apartment. The testimony indicates that it was very dark because trees overshadowed the entire driveway. The complaining witness testified that after she had bade the defendant good night and had taken two or three steps up the stairs, he tripped her, pulled her backward, and she fell to the ground on her back. Defendant immediately got on top of her and when she tried to scream put his hand over her nose and mouth and admonished her not to make an outcry. She testified that he pinned her down, overcame her resistance, and raped her. During the struggle, she received several scratches and bruises, and, the prosecutrix testified, during the course of the assault the defendant outraged her in violation of section 288a of the Penal Code. After the defendant finally released her she went upstairs to her apartment, locked the door and watched until she saw the defendant pass the street light on the corner. She then went to her mother's home and made complaint concerning appellant's conduct. She waited there until the sheriff's deputies arrived. During the morning she was attended by a physician and was confined to her bed for two days from shock and soreness of her body. The physician found skin burns about the neck and back, over the shoulder blades. There were also well-defined imprints in the shape of a bite of both upper and lower teeth at the base of the neck. There were scratches and bruises over the sacrum, buttocks and both sides of the hips. The outer sides of both legs of the prosecutrix were also scratched and bruised from the hips to the knees. The mouth of the vagina had teeth marks on both sides of it.

As to count 1, the defendant testified that he was in the cafe on the evening in question; that he was drinking with the prosecutrix and that she had agreed to meet him outside in an automobile, promising to "show him a good time." He further testified that she was to give him a "high sign" when she left the cafe, which promise he testified she fulfilled, whereupon, shortly thereafter, he went outside and found the prosecutrix asleep in the rear seat of the automobile. He testified that he then proceeded to awaken her and attempted to induce her to come out of the car, and in his attempt to assist her she either slipped or stumbled and fell on her hands and knees on the ground outside the car. He testified that the prosecutrix thereupon directed toward him a violent stream of profane language, whereupon a struggle ensued in which, according to defendant, he was attempting to get the complainant on her feet, but she resisted and rejected his proffered assistance, and remained on the ground on her hands and knees. According to his testimony, he thereupon came to the conclusion that the prosecutrix had no intention of fulfilling her promise to him, whereupon he abandoned her entirely and went on his way. He testified that he remained in the neighborhood, residing at the home of his parents, for about a week after the alleged assault, after which for a period of several weeks he worked on a chicken ranch near Yucaipa, in Riverside County.

With reference to counts 2 and 3, the defendant admitted being in the cafe on the night charged in the information, and testified that during his sojourn there he was drinking beer and talking to the complainant until about midnight, when she took the day's receipts out of the cash register, placed them in her purse, and requested him to escort her home. According to his testimony, he and the complainant engaged in an act of sexual intercourse on the grass at the foot of the stairs leading up to her apartment. He testified that the act was accomplished with her consent and without any resistance whatsoever upon her part;

that after the act was accomplished he assisted her to her feet; that she went upstairs and he retired to his home in the neighborhood. He emphatically denied the claimed violation of section 288a of the Penal Code.

[2] As to count 1, appellant contends that the verdict of guilty thereunder is contrary to and unsupported by the evidence, as well as contrary to law. In support of this claim it is argued that while the evidence clearly establishes the fact that an altercation took place between prosecutrix and the appellant, the circumstances thereof as revealed by the testimony do not warrant a conviction of any offense other than simple assault. The genesis of this argument is predicated upon the claim that the evidence shows that the complainant and defendant were on friendly terms throughout the time they were in the cafe, and that no weapon of any kind was used; that the assault consisted merely of a scuffle between the participants therein, during the course of which appellant used only his hands or fists. The case of People v. Mullen, 45 Cal.App.2d 297, 114 P.2d 11, 12, relied upon by appellant, is easily distinguishable from the case at bar. In the first place, the charge against the defendant in the cited case was assault with intent to commit rape, and the court simply held that the evidence was insufficient to disclose or establish the intent required to substantiate the charge there in question. The statement contained in the decision that under the circumstances therein presented the defendant was "guilty of nothing more than simple battery," was merely dicta and not necessary to the decision.

[3] To constitute the crime of assault within the meaning of section 245 of the Penal Code, under which appellant in the instant case was charged, it is not required that an intent to severely injure the victim by the use of force be proved. People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026. Nor is it required that the injuries inflicted be of a serious nature. The word "violent" as used in section 240 of the Penal Code defining an assault, has been held not to be synonymous with "bodily harm," but to include any wrongful act committed by means of physical force against the person of another. People v. Bradbury, 151 Cal. 675, 676, 91 P. 497. In the case just mentioned it is said: "The term 'violence' as used here is synonymous with 'physical force,' and in relation to assaults the two terms are used interchangeably. State v. Wells, 31 Conn. [210], 212; State v. Daly, 16 Or. [240], 241, 18 P. 357; Am. & Eng. Ency. of Law, 'Violence.' Mr. Bishop says (2 Crim. Law, § 32–34): 'The kind of physical force is immaterial * * * it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.' "

[4, 5] Repeatedly the courts of this state have held that one may be guilty of assault by means of force likely to produce great bodily injury although the attack is made by the use of the hands or fists. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Kimmerle, 90 Cal.App. 186, 265 P. 525; People v. Blake, 129 Cal. App. 196, 18 P.2d 399; People v. Nudo, 38 Cal.App.2d 381, 385, 101 P.2d 162. What force is likely to produce great bodily injury is a question of fact to be determined by the jury. People v. Nudo, supra. In view of the injuries sustained by the complainant, as well as the manner of the assault made upon her, the jury was authorized to conclude that the manner of as well as the means used to perpetrate the attack constituted a felonious assault within the meaning of section 245 of the Penal Code. We therefore find that in the conviction of appellant under count 1 of the information no miscarriage of justice occurred. Const., art. VI, sec. 4½.

[6, 7] In relation to counts 2 and 3 appellant urges that the testimony of the prosecutrix should be disregarded in view of the evidence of appellant coupled with the claim that more than a year and a half elapsed between the date of the commission of the alleged offenses and the lodging of a complaint by the victim. The jury was not required to believe the testimony of appellant and reject that of the prosecutrix if, as indicated by its verdict, it believed the latter and disbelieved the former. So far as an appellate court is concerned, we are authorized to reject the positive testimony of a witness only when that testimony is "inherently improbable." Even though the testimony may disclose circumstances which are unusual still we cannot disturb the action of the jury in believing it unless we can say that it would not seem possible that what was testified to have been done could have been done under the circumstances disclosed. Furthermore, in the instant case the tes-

timony of the complainant finds corroboration in the evidence of her mother and her physician as to her physical condition, all of which serves to negative appellant's testimony that the act of sexual intercourse was committed with the consent of the prosecutrix. A reading of the entire record herein, instead of establishing an inherent improbability that the offenses charged in counts 2 and 3 were committed, tends strongly to establish reasonable inferences of appellant's guilt. The claim of appellant that the victim waited an unusual length of time before making a complaint is not borne out by the record, which shows that she complained to her mother and stepfather immediately after appellant left her, and later that morning advised the doctor that she had been the victim of an attack. A few days thereafter she presented her complaint to the office of the District Attorney of Los Angeles County.

[8-10] Appellant next assigns as error certain rulings of the trial court with reference to testimony offered to prove that the general reputation of the prosecutrix for chastity was bad. We are aware of the line of decisions in this state holding that in prosecutions for forcible rape testimony that the alleged victim had theretofore been guilty of unchaste acts is admissible for impeachment as to the manner in which the act was committed as well as for impeachment as to whether the crime of rape was committed at all. People v. Pantages, 212 Cal. 237, 259, 297 P. 890, and cases therein cited. However, we find no rulings of the trial court in the case at bar that contravene the foregoing rule. The record herein indicates that when the reputation witness was called and testified that she knew "the general reputation in the community" of the prosecutrix "for chastity, truth, honesty and integrity," she was asked, "Is that reputation good or bad?", to which she replied, "Well, I would rather not say." During further examination the court asked the witness, "Do you know enough about her reputation to be able to answer that it is good or that it is bad?" To this interrogatory the witness answered, "Well, if you call a drinking person bad I would say that it was bad." On motion of the district attorney this last answer was stricken. The ruling was proper. Clearly the reputation of the complainant for sobriety was not in issue and was utterly foreign to her reputation for chastity. Finally, however, defendant's counsel inquired of the witness, "* * * can you say from your personal acquaintance with * * * (the prosecutrix) * * * whether her reputation for chastity is good or bad?" To this the witness answered, "Well, I would not say that it was good." Defendant's counsel then asked, "You wouldn't say that it was good?" to which the witness answered, "No." Thereupon counsel inquired of the witness, "Now, I will ask you the previous question: Do you recall any specific instance where the prosecutrix may have been involved in trouble previously to this case with a man other than this defendant?" Objection to this question was properly sustained. The fact that the prosecutrix "may have been involved in trouble * * * with a man other than this defendant" would not tend to prove or disprove her previous chastity.

Finally, appellant urges a reversal on the ground that prejudicial error was committed by the court in the giving and refusal of certain instructions. In that regard, appellant offered an instruction which was refused and which read as follows: "You are instructed that the evidence in a case of this kind is to be weighed by the utmost care, without bias or prejudice; since in this class of cases the accused is almost defenseless and ample opportunity is afforded for the free play of malice and private vengeance."

[11] It has frequently been held that error cannot be predicated upon refusal to give such a cautionary instruction, particularly where, as in the case before us, the story of the prosecuting witness is corroborated by other testimony. People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Agullana, 4 Cal.App.2d 34, 38, 40 P.2d 848. Furthermore, in the instant case the court gave general instructions to the jury as to the specific duty of each juror to decide the case for himself or herself conscientiously and only after a full and fair consideration of all the testimony without any bias or prejudice by reason of the nature of the charges for which defendant was on trial.

[12] While conceding that certain other instructions for the giving of which complaint is made, when taken and considered separately, constitute correct statements of the law, appellant urges that by reason of the failure of the court to give the previously mentioned cautionary in-

struction, the other instructions, concededly correct expositions of the law, were nevertheless prejudicial to the defendant. In this contention we cannot agree with appellant. Instructions must be considered as a whole, and after reading the instructions given we are satisfied that they fully and fairly advised the jury in connection with each issue presented by the information and the defendant's plea thereto, as well as those issues which were raised by the evidence. Taken as a whole, or read separately, the instructions cannot be held to be either confusing to the jury or erroneous.

The judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



48 Cal.App.2d 642

PEOPLE v. DUNCAN.

Cr. 3527.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1941.

1. Criminal law ⇐1131(4)

Where accused was granted probation after conviction of crime of grand theft, appeal from judgment was dismissed.

2. Criminal law ⇐1081

Where defendant failed to file written notice of appeal as such within five days after application for probation was granted as required by statute, but filed request to trial court for preparation of record on appeal which request advised court that defendant appealed from order denying his motion for new trial and specified that grounds of appeal were that court erred in denying motion for new trial for specified reason, request for preparation of record was sufficient as "notice of appeal". Pen.Code, §§ 1237, 1239.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice of Appeal".

3. Criminal law ⇐1110(1)

Where accused moved to dismiss prosecution on ground that he was not properly committed before committing magistrate and accused could not properly present to reviewing court questions involved in appeal without having transcript of preliminary hearing brought up as part of the record, and inclusion of such transcript would assist reviewing court in determining accused's appeal from order denying motion for new trial, motion for diminution of the record so that transcript of preliminary proceedings could be certified and made part of the record on appeal was granted. Pen.Code, § 995.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Frank Duncan was convicted of grand theft, and from the judgment of conviction and an order denying a new trial, he appeals. On motion for diminution of the record, and counter-motion by the Attorney General to dismiss the appeal from the judgment and to dismiss the appeal from the order.

Motion to dismiss appeal from judgment granted; motion to dismiss appeal from order denied; and motion for diminution of record granted.

Bertram H. Ross, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Upon notice duly given, appellant on November 24, 1941, moved this court for an order for diminution of the record to the end that a transcript of the proceedings of his preliminary hearing be certified and made a part of the record on appeal. It appears from the record herein that appellant made his motion to the trial court for a dismissal of the cause under section 995 of the Penal Code, upon the ground that he was not properly committed before the committing magistrate, which question is now being presented on appeal to this court. Prior to the denial by the trial court of appellant's motion for such dismissal, appellant offered a transcript of the preliminary hearing but the record is silent as to whether the trial court permitted the filing thereof. However, the order for preparation of the record on appeal signed by the trial

court on September 8, 1941, provides for the inclusion in the record on appeal of a "Transcript of Preliminary Hearing."

[1] On the same day that appellant made the foregoing motion, to-wit: November 24, 1941, the Attorney General made a counter motion to dismiss the appeal upon the ground of the lack of jurisdiction of this court to entertain the same for the reason that no valid notice of appeal was given by appellant. It is urged that, while appellant on September 3, 1941, gave oral notice of appeal from the judgment and from the order denying his motion for a new trial, no judgment was ever rendered, but that the proceedings were suspended following appellant's conviction of the crime of grand theft and appellant was granted probation.

Since the record discloses that appellant was placed on probation, the motion to dismiss the appeal from the judgment must necessarily be granted.

[2] It is further urged by the Attorney General in support of his motion to dismiss the appeal that the record does not show that appellant gave oral notice of appeal from the order of July 21, 1941, denying his motion for a new trial, or that he gave written notice of appeal within five days or at all from the date of said order.

Section 1237 of the Penal Code provides that an appeal may be taken by the defendant in a criminal prosecution from "an order denying a motion for a new trial."

Section 1239 of the Penal Code, as amended in 1939, in defining the manner of taking an appeal, provides:

"(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, by:

"(1) Announcing in open court at the time the judgment is rendered or the order made that an appeal is taken from the same; or

"(2) Filing with the clerk of the court a written notice of appeal within five days after the rendition of the judgment or the making of the order, or *within five days after the granting of probation where the defendant appeals from an order denying a new trial.*" (Italics added.)

The record discloses that appellant did not orally appeal from the order denying his motion for new trial at the time it was made, to-wit, on July 21, 1941, and it was therefore incumbent upon him to file his written notice of appeal from such order within five days after his application for probation was granted. Such application was granted on September 3, 1941, at which time appellant gave oral notice of appeal from "order denying his motion for a new trial." However, the record does not disclose that appellant filed written notice of appeal from such order unless the request to the trial court for preparation of the record on appeal, in accordance with section 7, Rule II of Rules for the Supreme Court and District Courts of Appeal, filed on September 8, 1941, may be considered equivalent to such notice. The request addressed to the court follows: "You and each of you will please take notice that the defendant above named did, on the 3rd day of September, 1941, appeal from the judgment entered against him in the above entitled cause, and from the Order denying his motion for new trial in said cause, and that said defendant does herewith file his request for the preparation of the record on appeal.

"Appellant's grounds of appeal are that the Court erred in denying his motion for new trial for the reason that the evidence presented against him was insufficient to justify the verdict of the jury finding him guilty; that the verdict was against law in that jurisdiction never attached to the Superior Court to try him for the reason that he was committed and bound over to the Superior Court without reasonable or probable cause; that the Court erred in denying his motion to set aside the Information under Section 995 of the Penal Code, and that the Court erred in denying his motion to exclude evidence at the beginning of the trial upon the grounds that jurisdiction had not attached to the Superior Court."

In People v. Shepherd, 12 Cal.App.2d 644, 55 P.2d 923, 925, this court held that appellants' application for appeal, filed within two days after denial of their motions for new trial, pursuant to section 7, Rule II, supra, was susceptible of the construction that they thereby appealed from the orders denying their motions for new trial, especially where said notice included among the various grounds relied upon, "That the Court erred in overruling defendants' motion for new trial"; and further that said notice was sufficient to perfect an appeal from such orders under the terms of section 1239 of the Penal Code, as it read at that time.

In view of this, it will be necessary to deny the Attorney General's motion to dismiss the appeal from the order denying appellant's motion for a new trial.

[3] Turning our attention to appellant's motion for diminution of the record, heretofore discussed, it would appear that it might have been through an inadvertence that the transcript of the preliminary hearing was not filed in the trial court at the time the motion for dismissal was made. At any rate, appellant's counsel states in his supporting affidavit that he cannot properly present to this court the questions involved in the appeal without having the transcript of the preliminary hearing brought up as a part of the record. This being so, it would appear that its inclusion in the record may be of assistance to this court in determining appellant's appeal from the order denying his motion for a new trial.

For the reasons stated, respondent's motion to dismiss the appeal from the judgment is granted and respondent's motion to dismiss the appeal from the order denying motion for new trial is denied. Appellant's motion for diminution of the record is granted.

DORAN and WHITE, JJ., concurred.



48 Cal.App.2d 756

COLLESTER v. OFTEDAHL et al.

Civ. 6623.

District Court of Appeal, Third District, California.

Dec. 29, 1941.

1. Equity ⇐66

In suit to enjoin defendants from soliciting sales of gasoline pump globe signs and countersigns manufactured by defendants under contract for plaintiff, evidence *held* sufficient to support trial court's findings and judgment enjoining defendants from soliciting sales to plaintiff's customers on condition that plaintiff do equity by paying cost incurred by defendants in manufacturing signs ahead of actual orders according to agreement.

2. Equity ⇐66

One who seeks equity may be required to do equity with respect to subject matter involved before relief may be awarded.

3. Equity ⇐66

A court will not confer equitable relief on party seeking it, unless he has acknowledged and conceded, or will admit and provide for, all equitable rights, claims, and demands justly belonging to adversary party and growing out of or necessarily involved in subject matter of controversy.

4. Equity ⇐66

A court will give plaintiff equitable relief to which he is entitled only on condition that he has given or consents to give defendant corresponding rights to which he also may be entitled in respect to subject matter of suit.

5. Injunction ⇐199

In suit to enjoin defendants from soliciting sales of gasoline pump globe signs and countersigns manufactured by defendants under contract for plaintiff, court had authority to grant relief sought in part on condition that plaintiff pay costs incurred by defendants in manufacturing signs remaining on hand after plaintiff's termination of contract.

6. Account ⇐20(3)

A suit for accounting is equitable in nature, so that plaintiff in suit for accounting of proceeds of defendants' sales to plaintiff's customers of gasoline pump globe signs and countersigns, manufactured by defendants under contract for plaintiff, must do equity by paying costs incurred by defendants in manufacturing, pursuant to contract in anticipation of future orders, signs left on hand when plaintiff terminated contract.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by T. M. Collester against Edith H. Oftedahl and others for an injunction against soliciting sales of and marketing gasoline pump globe signs and countersigns, manufactured by defendants under contract for plaintiff, and for an accounting, in which defendants filed a cross-complaint asking damages for breach of con-

tract. From a judgment enjoining defendants from soliciting sales to plaintiff's customers and awarding them the balance due for signs on hand after plaintiff terminated contract, plaintiff appeals.

Affirmed.

Lillick, Olson, Levy & Geary, Ira S. Lillick, Allan E. Charles, and Edward D. Ransom, all of San Francisco, for appellant.

John D. Harloe and Walter C. Frame, both of San Francisco, for respondents.

THOMPSON, Acting Presiding Justice.

The plaintiff has appealed from a judgment rendered against him in a suit to enjoin the defendants from soliciting sales and marketing certain gasoline pump "globe signs," and "counter-signs," manufactured by the defendants under contract for the plaintiff. The complaint also demanded an accounting. The cross-complaint charged plaintiff with a breach of contract, and affirmatively asked for $3,500 damages for completed signs remaining on hand after plaintiff terminated the contract. After hearing the application for injunction and holding an accounting, the court adopted findings favorable to the defendants on their cross-complaint, but enjoined defendants from soliciting sales of signs from the customers of plaintiff by writing letters to oil companies. The court then awarded judgment to the defendants for the net balance due for 3,400 completed signs remaining on hand, in the sum of $1,990. From that judgment the plaintiff has appealed.

This is an equitable action. The plaintiff was engaged in selling to oil and gas companies advertising glass globe signs. These signs consist of circular metal backs and rims with reflectors and glass lenses upon which the desired printed matter appeared. The signs contained electric lamps and attachments. Originally these signs were attached to gas pumps at the oil stations. Later a similar device was manufactured and sold by the plaintiff to oil companies as "counter-signs." The plaintiff conducted his enterprise under the name of "Western Trading Company," with his principal place of business at San Francisco. Prior to 1929, he purchased his "globe signs" in the east. To expedite deliveries and save cost he orally arranged with the defendants, who were engaged in a metal manufacturing business in San Francisco under the name of Western Machine & Stamping Works, to make these devices for plaintiff at an agreed cost of eighty-nine and one-half cents apiece. The plaintiff furnished the lenses and electric attachments which he purchased in quantity from the east. To produce the metal frames for these lamps the defendants manufactured the necessary rolls and dies, which were paid for by plaintiff. Under that oral agreement thousands of globe signs were manufactured and sold to plaintiff over a period of about seven years. Similar lamps for counter-signs were also manufactured by the defendants and sold to plaintiff at a cost of about one dollar apiece. The agreement required the defendants to make prompt delivery of the signs to the customers of plaintiff upon receipt of the orders therefor. For that reason the defendants manufactured sign-frames and kept a large number on hand to enable them to make speedy deliveries when they were ordered. Edith Oftedahl testified in that regard:

"We did not calculate to have anything on hand, without discussing it with Mr. Collester; that was agreed upon before we could enter into an agreement—We would talk that over before we bought the steel. * * * We decided how many frames and countersigns it was deemed advisable to have on hand."

About 1933 or 1934 the cost of steel advanced so rapidly that the parties decided to purchase materials in carload lots to save cost and to guard against a prohibitive selling price for the signs. By agreement the defendants then purchased carload lots of metal consisting of about 18,000 pounds of steel, from which 7,000 or 8,000 lamps were constructed. A carload of metal cost $1,500. The plaintiff advanced to defendants the whole or a part of that initial cost of metal, which was credited to his account and against which the costs of signs were charged as he ordered them for the market until the fund was exhausted, after which he paid for the signs as the bills were presented. In 1934 the plaintiff sold 7,784 counter signs. In 1935 he sold 4575 signs. The following year he sold 3,059 signs. In 1937 he sold only 498 signs.

On account of the increased cost of labor and materials, the defendants were unable to furnish the signs for the former orally agreed prices. Some dissension arose between the parties. On February

13, 1937, a written agreement between them was executed. It provided, in part, that: "Manufacturer agrees to furnish countersigns aluminum painted and equipped with the necessary electrical materials and spring wire as previously furnished and assembled with fired-in glass furnished by purchaser. All countersigns to be packed ready for shipment by manufacturer. The price in lots of 99 or less $1.10 for each countersign. In lots of 100 or more $1.00 for each countersign."

The contract does not specify how many counter-signs will be ordered. It further provides for a guaranty to order "approximately" 1,000 globe frames to be 95 cents each. The contract specified the manner of payment as follows: "In thirty days from date of this agreement the purchaser agrees to pay $200.00 to be applied to purchase of this steel for 1000 globe frames. The purchaser agrees to advance on the purchase of 500 countersigns $250.00 as an advance payment of 50 cents each on the total cost of the countersigns. Purchaser agrees to pay within five days $200.00 as an advance on globe frame orders given. * * * All cartons and glue for countersigns and globe frames to be furnished by purchaser."

At the time of executing this agreement the defendants had on hand about 400 completed globe frames and 4,000 countersigns ready for delivery, as the plaintiff well knew. Pursuant to that written agreement the defendants manufactured and delivered to plaintiff's customers the 1,000 globe signs contracted for and 4,000 additional frames previously ordered. They also delivered 500 counter-frames. These orders were filled before July of that year.

Subsequently the plaintiff orally ordered from the defendants 215 additional frames. The defendants then demanded another written contract agreeing to purchase at least 1000 frames at the prices and according to the terms of the contract of February 13, 1937, which the plaintiff refused to execute. The plaintiff then terminated their agreement and refused to purchase signs from the defendants. He demanded the dies which he had paid for and they were thereupon delivered to him. With reference to the 3,400 completed counter-signs which the defendants had on hand, the plaintiff then said, "I am sorry * * * Miss Oftedahl, that you have these frames on your hands." He refused to pay for them.

In order to dispose of the manufactured frames left on their hands when plaintiff terminated their contract, the defendants wrote letters to five or six oil companies soliciting sales of the signs, and thereby managed to dispose of about 500 frames. This left 3,400 counter-signs undisposed of.

This suit was then commenced by plaintiff to enjoin the sales and soliciting of customers for the purchase of signs and to require an accounting for those which had been sold. The defendants answered the complaint and filed a cross-complaint demanding damages for the 3,400 frames left on their hands. After the trial the court adopted findings granting an injunction against defendants prohibiting them from soliciting sales by the writing of letters to oil companies, and awarding them judgment on the accounting, as a condition for the enforcement of the injunction, of sixty cents apiece for the counter-signs which were left on their hands at the time of the termination of business relations. This allowance was based on the costs of manufacturing the frames exclusive of the cost of glass lenses and wiring apparatus which the plaintiff was to furnish under previous arrangement. Judgment was rendered accordingly. From that judgment the plaintiff has appealed.

[1] It is contended the findings and judgment are not supported by the evidence.

We are of the opinion the findings and judgment are adequately supported by the evidence. The court was authorized to grant the injunctive relief conditioned upon plaintiff's doing equity to the extent of paying the costs incurred by the defendants in manufacturing frames and signs ahead of actual orders, according to the previous agreement, so that they might be prepared to make prompt deliveries. The market for these signs was confined exclusively to sales to the oil companies. They had no other means of disposing of the frames on hand except to solicit sales thereof to such companies. They were induced to manufacture frames in large quantities ahead of the actual orders by the agreement and conduct of the plaintiff. The court found and the evidence supports the determination that there were no trade secrets involved in the enterprise.

[2-4] It is a fundamental principle of law applicable to equitable proceedings, that one who seeks equity may be required to do equity, with respect to the subject matter involved, before relief may be awarded. O'Brien v. O'Brien, 197 Cal. 577, 584, 241 P. 861; Ohanian v. Kazarian, 123 Cal.App. 196, 11 P.2d 42; Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801; Cox v. Hughes, 10 Cal.App. 553, 102 P. 956; 19 Am.Jur. 319, sec. 463, et seq.; 28 Am.Jur. 229, sec. 34; 2 Pomeroy's Equity Jur., 5th Ed. 51 Secs. 385, 386. In the text last cited, the principle referred to is expressed as follows: "Whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject matter of the controversy. * * * The court will give the plaintiff the relief to which he is entitled, only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject matter of the suit."

[5, 6] Certainly it would be inequitable for the plaintiff to enjoin defendants from soliciting sales of merchandise in any manner from oil companies without remunerating them for the signs left on their hands with no other available market. It is true that the injunctive relief sought by the plaintiff was granted only in part. Nevertheless the court had authority to grant the relief in part, conditioned upon payment of the cost incurred by the defendants in manufacturing the signs which remained on hand. Moreover the suit was also one for an accounting which is equitable in its nature. Smith v. Smith, 88 Cal. 572, 26 P. 356; Stesel v. Santa Ana River Water Co., 35 Cal.App.2d 117, 124, 94 P.2d 1052; 1 Cal.Jur. 167, sec. 27. In that proceeding the same principle, requiring the plaintiff to do equity, applies. On that accounting, which was demanded by plaintiff, he was given a credit of $50 for the signs which were sold by the defendants, and they were awarded judgment for $1,990. This judgment represents the costs incurred in manufacturing the signs by the defendants, pursuant to agreement in anticipation of future orders, which were left on their hands when the plaintiff terminated the business relation.

The judgment is affirmed.

TUTTLE, J., concurred.



48 Cal.App.2d 744

BINGHAM v. BINGHAM.

Civ. 13305.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1941.

1. Trial ⇐397(1)

In suit by husband for divorce, wherein wife filed a cross-complaint for separate maintenance, findings were not necessary with respect to allegations of wife's cross-complaint that she had no means of support other than that provided for in agreement whereby husband was to pay her $125 per month, and that husband had income sufficient to make the agreed payments, where the allegations were not denied by the husband's answer.

2. Appeal and error ⇐1056(1)

In husband's suit for divorce, wherein wife filed a cross-complaint for separate maintenance, exclusion of testimony as to arrest of wife for intoxication and her plea of guilty thereto, because there were no allegations with respect thereto in husband's complaint, was not reversible error, where case was replete with mutual accusations of intemperate use of alcoholic beverages, and there was no showing that excluded testimony would have materially affected the outcome of the case.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Suit by R. A. Bingham against Hjordis Bingham for divorce, wherein the defend-

ant filed a cross-complaint for separate maintenance. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Robert E. McGurl, of Los Angeles, for plaintiff.

William Ellis Lady, of Los Angeles, for defendant.

R. H. SCOTT, Justice pro tem.

Plaintiff brought suit for divorce against his wife. She filed a cross-complaint for separate maintenance. The divorce was denied and defendant was awarded $125 per month separate maintenance.

Plaintiff appeals on two grounds: (1) That the trial court did not make a finding that plaintiff has the ability to pay the amount ordered; (2) that it was error to exclude testimony concerning an arrest of defendant on a charge of intoxication and her subsequent plea of guilty thereto.

It appears that the parties were married in August, 1936, in Reno, Nevada, and separated about December 3, 1938. During that time defendant was injured in an automobile accident caused by plaintiff's reckless driving while intoxicated, and her full recovery appeared to be uncertain when the case was tried. A few days before the separation plaintiff secured an attorney and had an agreement prepared obligating himself to pay defendant $125 per month during her lifetime, and she agreed to pay all of her expenses out of that amount.

[1] In her amended cross-complaint the wife alleged, among other matters, that she had no means of support other than that provided for in the agreement, and that plaintiff, a dentist, had income sufficient to make the payments as agreed. These allegations were not denied in the husband's answer to this pleading. Findings on these elements of the defendant's case are therefore unnecessary. Evidence presented by plaintiff as basis for his opposition to paying the amount awarded indicates not that it would be impossible but that at the most it might be inconvenient for him to pay the amount to which he had voluntarily agreed.

[2] The testimony as to an arrest of defendant for intoxication and her plea of guilty thereto was excluded by the trial court because it had not been alleged in plaintiff's complaint. The incident is said to have occurred after the separation but before the complaint was filed. There is nothing in the record to which our attention has been directed which indicates that, in a case replete with mutual accusations of the intemperate use of alcoholic beverages, testimony concerning one such instance would have materially affected its outcome.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.



48 Cal.App.2d 762

FALK v. FALK.

Civ. 6645.

District Court of Appeal, Third District, California.

Dec. 29, 1941.

Hearing Denied Feb. 26, 1942.

1. Husband and wife ⇐262(1)

All property acquired by husband or wife after marriage is presumed to be "community property". Civ.Code, § 164.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

2. Husband and wife ⇐262(1)

A person, disputing application of principle that all property acquired by husband or wife after marriage is presumed to be community property, must affirmatively prove that such property is in fact separate property. Civ.Code, § 164.

3. Husband and wife ⇐249

Where separate and community properties are so commingled that it is impossible to identify them or trace the funds from which they were purchased, the whole must be deemed to be "community property".

4. Husband and wife ⇐249

Securities, purchased after marriage from funds derived from both community property and husband's separate property which were commingled in such a manner as to render it impossible to trace the sources thereof, would all be considered as "community property" and not as husband's separate property.

5. Husband and wife ⇐262(1)

The presumption that property acquired by either of spouses during marriage is community property can be rebutted only by satisfactory proof to the contrary. Civ.Code, § 164.

6. Husband and wife ⇐262(1)

Where marriage relationship has existed for a long period of time, presumption that property acquired by either of spouses during marriage is community property is entitled to greater weight. Civ.Code, § 164.

7. Husband and wife ⇐262(1)

A person controverting presumption that property acquired by either of spouses during marriage is community property must prove his claim regarding character of property acquired during marriage, and, unless such contention is supported by satisfactory proof, trial court is bound to decide the controversy in accordance with the presumption. Civ.Code, § 164.

8. Husband and wife ⇐249

The commingling of separate property, or proceeds therefrom, with community property or funds in such a manner as to make it impossible to identify separate property or to trace source of separate funds, renders entire fund or property community in its nature, unless community funds are inconsiderable in amount.

9. Husband and wife ⇐262(1)

Where source of commingled community and separate funds cannot be traced, the presumption that all property acquired during marriage is community property will be controlling. Civ.Code, § 164.

10. Husband and wife ⇐265

A husband having control of community funds, and investing portion thereof in his own separate property without wife's consent, must account to the community funds for such misappropriation.

11. Divorce ⇐253

In determining division of property between divorced husband and wife, finding that securities were purchased from commingled funds of separate and community property so that it was impossible to trace source from which purchase price was derived, and finding that certain of such securities purchased with community funds were husband's separate property inasmuch as husband had owned similar amount of property before marriage, were conflicting and irreconcilable and did not support judgment awarding last mentioned securities to husband as his "separate property".

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

12. Divorce ⇐253

A finding of ultimate fact that securities were purchased during marriage from commingled community funds was not controlled by subsequent finding that certain of such securities were husband's separate property, where subsequent finding was a mere legal conclusion which was contrary to law and conflicted with the finding of ultimate fact upon which the subsequent finding was founded.

13. Appeal and error ⇐1008(1)

An erroneous conclusion of court which is drawn from and based upon facts previously found to be true cannot stand if specific facts upon which conclusion is based do not support the conclusion.

14. Divorce ⇐252

The trial court's exercise of statutory discretion to determine amount of community property to be awarded to respective parties when divorce is granted for adultery or extreme cruelty must accord with justice in the light of facts of particular case and condition or circumstances of the parties. Civ Code, § 146.

15. Divorce ⇐286

The appellate court's statutory discretion in dividing community property when divorce is granted for adultery or extreme cruelty is paramount and superior to trial court's discretion to divide property under such circumstances. Civ.Code, §§ 146, 148.

16. Divorce ⇐252

Ordinarily, award of greater share than one-half of community property to innocent party to divorce which is granted on grounds of extreme cruelty and adultery is just. Civ. Code, §§ 146, 148.

17. Divorce ⇐252, 286

Trial court has sound discretion to determine under all facts and circumstances, including status of respective parties and their needs, how much in excess of one-half of community property should be awarded to innocent party to divorce granted for extreme cruelty or adultery, and appellate court will not be disposed to interfere with such discretion. Civ.Code, §§ 146, 148.

18. Divorce ⇐252

The award to wife, granted divorce for extreme cruelty and adultery, of household furniture and goods in addition to securities and other community property which was equally divided between husband and wife, was in compliance with asserted rule that wife was entitled to more than one-half of community property under such circumstances. Civ.Code, § 146.

Appeal from Superior Court, Humboldt County; Albert F. Ross, Judge Assigned.

Divorce action by Nina Falk against Charles C. Falk. From part of the judgment, the plaintiff appeals.

Reversed with direction to modify, and affirmed as so modified.

See also, Cal.App., 120 P.2d 720; Cal. App., 120 P.2d 724.

Hearing denied; CARTER, J., dissenting.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for appellant.

Hill & Hill, of Eureka, H. L. Preston, of Ukiah, and Harry W. Falk, Jr., of Eureka, for respondent.

PER CURIAM.

The plaintiff was awarded an interlocutory decree of divorce on the grounds of extreme cruelty and adultery. It was adjudged that the community property of the spouses should be divided equally between them. From that portion of the decree which determined that certain-described stocks and securities belong to the defendant as his separate property, and from that portion which limited the award to plaintiff of only one-half of the community property, this separate appeal was perfected.

The defendant is a physician and surgeon. He was previously married. At the time of his marriage to the plaintiff he was possessed of real and personal property of a value in excess of one hundred and fifty thousand dollars. The plaintiff and defendant were married at Pomona, California, September 16, 1915, and lived together as husband and wife for twenty-one years. During that period of time he successfully practiced his profession and operated a hospital at Eureka, from which sources he derived a large income. It was his custom to maintain a bank account in which he deposited and commingled the community proceeds derived from his business and profession with funds secured from the sales of stocks, bonds, mortgages, securities and lands. After his second marriage he sold numerous certificates of stocks, bonds and other securities, together with parcels of real property and deposited the proceeds therefrom in the bank account with the community funds. The court found that it was impossible to trace the source of any of the moneys deposited in that fund. From that community fund the defendant, from time to time, purchased several parcels of real property and numerous blocks of stock and also financed other investments. At the time of the divorce there was considerable cash on hand, unpaid debts due for professional services, amounts due on contracts, stocks, bonds, mortgages, securities, real properties, household goods and office furniture. Some of the properties were clearly identified as defendant's separate property. Some of them were determined to be community property. On account of the commingling of funds it was impossible to trace the source of proceeds from which many of the stocks and securities were purchased subsequent to the marriage.

The court found that seven parcels of specifically-described real property were purchased after the marriage from community funds, and that they are therefore community property; that the balance of the real estate was defendant's separate property; that thirty-one items of particularly-described stocks, bonds and securities, aggregating the sum of $131,000, were purchased since the marriage from community funds in which the proceeds of sales of defendant's separate property were commingled in such a manner as to render it impossible to trace the source from which the purchase moneys were derived; that other specified shares of stock, bonds and securities are the separate property of the defendant; that the moneys on hand, the accounts due, together with seventeen other identified certificates of shares of stock, bonds and securities, are the community property of the spouses, and that all community property shall be divided equally between them.

Regarding the disposition of thirty-one items of stocks, bonds and securities previously mentioned, aggregating the par value of $131,000, the court determined in finding number IX that, since those securities were purchased after the marriage from funds derived from both community and separate properties which were commingled in such a manner as to render it impossible

to trace the sources thereof, sixteen of them should be deemed to be defendant's separate property because he owned a similar amount of such properties before the marriage. Finding number IX reads as follows:

"That at all times since the marriage of plaintiff and defendant on the 16th day of September, 1915, defendant has exercised complete control over all of the community funds and property of plaintiff and defendant and he has, during all said times deposited in the same bank accounts and safe deposit boxes indiscriminately and without earmarking, segregation, or any means of identification, the funds derived from his earnings as a physician and surgeon, together with the funds derived from all other sources, and has during all of said time so intermixed and commingled all of said community earnings and funds with the funds derived by him from all other sources, including his separate property, that it is now impossible to trace or identify any of said funds as the separate property of defendant. That during said period of time defendant has been in receipt of a gross income from the practice of his profession as a physician and surgeon amounting to the sum of Two Hundred Sixty-three Thousand Four Hundred Twenty-five and 21/100 Dollars, all of which was the community property of the parties hereto."

Finding number XII regarding the same subject reads as follows: "That all of said securities hereinabove described have been purchased since said marriage out of and from funds commingled and intermixed as hereinabove, in paragraph IX set out, and it is now impossible to trace the source of the purchase price of any thereof to the separate funds or property of defendant; but because of the fact that defendant, at the time of the marriage of plaintiff and defendant owned as his separate property, bonds of a par value of Twenty-four Thousand Dollars, and a promissory note of Northern California Hospital Association in the amount of Eighteen Thousand Eight Hundred Sixty-seven and 70/100 Dollars and the proceeds of said bonds and promissory note were used to purchase other securities, which can not at this time be identified or determined, the court finds that of the securities on hand at the date of the trial of this action, Forty-two Thousand Eight Hundred Sixty-seven and 70/100 Dollars in value thereof is derived from the proceeds of said bonds and promissory note and for that reason the court finds that the following of the above described securities are the separate property of defendant, to-wit:" (Here follows description of the property.)

[1-4] We are of the opinion the trial court erroneously determined that any portion of said thirty-one items constitutes separate property belonging to the defendant. The rule is well established in California that the presumption exists that all property acquired by the husband or wife after their marriage is community property; that the burden is on one who disputes the application of that principle to affirmatively prove that such property is, in fact, separate property, and that when separate and community properties are so commingled that is is impossible to identify them or trace the funds from which they were purchased, the whole must be deemed to be community property. It follows that, since the court has found in the present case that it is impossible to trace the source from which said thirty-one items of stocks, bonds and securities were purchased, they must all be considered to be community property, and that the court erred in determining that any of such property constitutes defendant's separate property.

[5-7] Pursuant to section 164 of the Civil Code, the presumption exists that property acquired by either of the spouses during the marriage is community property, and that this presumption may be rebutted only by satisfactory proof to the contrary. Estate of Jolly, 196 Cal. 547, 238 P. 353; Estate of Caswell, 105 Cal.App. 475, 288 P. 102; 5 Cal.Jur. 311, sec. 22; 3 Cal.Jur., Ten Year Supp. 553, sec. 61; 1 Witkin's Summary of Calif.Law, p. 686. The nature or quantum of evidence which is necessary to rebut this presumption is not involved on this appeal for the reason that the evidence is not before us. Regarding the amount of evidence which will be deemed to rebut the presumption, see 3 California Jurisprudence, Ten Year Supplement, p. 573, secs. 75–79. It has been held that where the marriage relationship has existed for a long period of time the presumption is entitled to greater weight. Estate of Jolly, supra; 3 Cal.Jur., Ten Year Supp., page 554. The burden is upon the one who controverts the presumption to prove his claim regarding the character of property acquired during the marriage. Unless that contention is supported by satisfactory proof, the trial court is bound to decide the contro-

versy in accordance with the presumption. Estate of Caswell, supra, 105 Cal.App. at page 483, 288 P. 102; Lightner Mining Co. v. Lane, 161 Cal. 689, 708, 120 P. 771, Ann. Cas. 1913C, 1093; Estate of Fellows, 106 Cal.App. 681, 289 P. 887; 3 Cal.Jur.Ten Year Supp., p. 525, sec. 40, and p. 557, sec. 63.

[8, 9] The commingling of separate property, or the proceeds therefrom, with community property or funds in such a manner as to make it impossible to identify the separate property or to trace the source of the separate funds renders the entire fund or property community in its nature, unless the community funds are inconsiderable in amount. When it is impossible to trace the source of commingled funds, the presumption that all property which is acquired during the marriage is community, will be controlling. Fountain v. Maxim, 210 Cal. 48, 51, 290 P. 576; Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, 485, 111 P. 360; Estate of Cudworth, 133 Cal. 462, 467, 65 P. 1041; Maskuns v. Maskuns, 93 Cal.App. 27, 268 P. 1093; Truelsen v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996; 3 Cal.Jur.Ten Year Supp. 524, sec. 40; McKay's Community Prop., p. 215; 11 Am. Jur. 198, sec. 38; 1 Witkin's Summary of Calif.Law, p. 686, sec. 5B.

[10] Where the husband, who has control of the community funds, without the consent of his wife invests a portion thereof in his own separate property, he is bound to account to the community funds for such misappropriation. In the Estate of Chandler, 112 Cal.App. 601, 297 P. 636, a judgment of the trial court was reversed for error in holding that a definite amount of community funds which was expended for improvements on the husband's separate property became an inseparable part thereof and that it was therefore lost to the community fund.

In the present case the court has definitely held that the thirty-one items of stocks, bonds and securities heretofore mentioned were purchased during the marriage from community funds. It follows that the awarding to the defendant of any portion of the property so purchased, as his separate property, is in conflict with the well-established rule to the contrary.

[11] The findings of the court heretofore quoted are conflicting and irreconcilable. The findings are contrary to law. The portions of the judgment from which this appeal was perfected is therefore not supported by the findings. The court has specifically found that the thirty-one items of stocks, bonds and securities previously mentioned were purchased from commingled funds of both separate and community property so that it is impossible to trace the source from which the purchase price was derived. The court then erroneously found that because the defendant possessed bonds of the value of $24,000 and a note for $18,867.70 before the marriage, which were his separate property, therefore sixteen-described items of said stocks and securities, of the aggregate value of $42,867.70, purchased from community funds, should be deemed to be defendant's separate property, and should therefore be awarded to him as his separate property.

[12] The respondent contends that the last-mentioned finding, to the effect that the sixteen named items are defendant's separate property, is the finding of an ultimate fact and is therefore controlling over the previous findings which amount only to the determination of probative facts. In support of this assertion he relies on the following authorities, to-wit: Rankin v. Newman, 107 Cal. 602, 608, 40 P. 1024, 41 P. 304; Smith v. Acker, 52 Cal. 217; Commercial Bank v. Redfield, 122 Cal. 405, 55 P. 160, 772, and Estate of Hill, 167 Cal. 59, 138 P. 690. We are of the opinion the preceding authorities are not determinative of that issue in the present case. They are clearly distinguishable from the facts of this case. In this case the court finds that the stocks and securities in question were purchased during the marriage from commingled community funds. That is the finding of an ultimate fact, from which the court was bound to conclude, under the well-established rule of law, that all of those items constitute community property. The subsequent erroneous finding that sixteen of those items were defendant's separate property was a wrong conclusion in absolute conflict with the previous findings upon which it purports to have been based. The last finding is a mere legal conclusion which is contrary to law and conflicts with the previous finding upon which it is founded and it is therefore not controlling.

[13] It has been repeatedly held that an erroneous conclusion of the court which is drawn from and based upon facts previously found to be true cannot stand if the specific facts upon which the conclusion is based do not support it. McKay v. Ges-

ford, 163 Cal. 243, 246, 124 P. 1016, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253; Corea v. Higuera, 153 Cal. 451, 455, 95 P. 882, 17 L.R.A.,N.S., 1018; Estate of Hill, supra, 167 Cal. at page 63, 138 P. 690; Lee v. Hibernia Sav. & Loan Soc. 177 Cal. 656, 659, 171 P. 677; Steele v. Scott, 192 Cal. 521, 525, 221 P. 342. The preceding principle of law which is uniformly declared in the foregoing cases and in many others, is concisely stated in McKay v. Gesford, supra [163 Cal. 243, 124 P. 1017, 41 L.R.A., N.S., 303, Ann.Cas.1913E, 1253], as follows: "It is, of course, well settled that a general and ultimate finding * * * which is drawn as a conclusion from facts previously found *cannot stand if the specific facts upon which it is based do not support it.*" (Italics added.)

Finally, the appellant contends that the court erred in awarding to the plaintiff only one-half of the community property. She claims she is entitled to a larger proportion. In support of that claim she cites the following authorities, to-wit: Tipton v. Tipton, 209 Cal. 443, 288 P. 65; Quagelli v. Quagelli, 99 Cal.App. 172, 176, 277 P. 1089; Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221; Shapiro v. Shapiro, 127 Cal. App. 20, 27, 14 P.2d 1058, 1061, and several other cases. In the case last cited, it is said in that regard: "The plaintiff having made out her case of extreme cruelty was entitled to *more* than one-half of the community property." (Italics added.)

[14, 15] Precisely the same declaration was made in the Quagelli case, supra. That statement has been reiterated so frequently in the California cases that it seems to have been accepted as the fixed rule. It is not necessarily in conflict with the provisions of the code with respect to the distribution of community property in the event of divorce. Section 146 of the Civil Code provides that when a divorce is granted on the ground of adultery or extreme cruelty the community property shall be assigned to the respective parties "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." The same section declares that when a divorce is granted on any other ground "the community property shall be equally divided between the parties." It is argued that since the court must award the innocent party to whom a divorce is granted for any cause other than that of adultery or extreme cruelty, one-half of the community property, the legislature evidently intended that the innocent party to whom a divorce is granted for the more serious grounds of adultery or extreme cruelty should be entitled to more than one-half of the community property. That construction of the statute seems to be in accordance with justice, even though it may not conform to a literal interpretation of the language employed. The section confers upon the court a discretion in determining the amount of community property to be awarded to the respective parties when a divorce is granted on the ground of either adultery or extreme cruelty. That discretion must accord with justice in the light of the facts of the particular case and the condition or circumstances of the parties as provided by that section of the code. From the language of the second paragraph of that section, standing alone, it would seem that a division of the community property, under the circumstances contemplated therein, should not be disturbed on appeal except for an abuse of discretion. Section 148 of the Civil Code, however, confers authority on a court of review to revise the award of distribution of community property, regardless of the discretion vested in the trial court, so as to render justice pursuant to the provisions of section 146, as it appears to exist according to the judgment of the members of the reviewing court. In other words, the appellate courts have a discretion in dividing the community property pursuant to the mandate of section 146 which is paramount and superior to the discretion vested in the trial court under such circumstances.

[16-18] We are convinced of the justice of awarding to the innocent party to a divorce which is granted on the grounds of extreme cruelty and adultery, under ordinary circumstances, a greater share than one-half of the community property. Those grounds for divorce are recognized as more grievous than others which are designated by the code. The courts seem to assume that the more serious the offense which is committed against the marital status, the greater should be the punishment of the guilty party and consequently that in justice it should be followed by a proportionately larger award of the community property to the innocent party. At least there are many decisions which have held that in the event of a divorce on the ground of either extreme cruelty or adultery, the innocent party is entitled to more than one-half of the community property. Assum-

ing, without so deciding, that that is the established rule in California, there is still a sound discretion imposed upon the trial court to determine under all the facts and circumstances of the case, including the status of the respective parties and their needs, how much in excess of one-half of the community property shall be awarded to the innocent party. We have no disposition to interfere with that discretion of the court, even if we have the authority to do so. In the present case it appears that the court has awarded to the plaintiff more than one-half of the community property. Specific items of personal property in the form of stocks, bonds and securities have been equally divided between the spouses, except as above stated. In addition thereto the household furniture was given to the plaintiff. Finding number XIII awards the household goods to the plaintiff. It is stated therein that this is done with the consent of the defendant. This award may be deemed to be a compliance with the asserted rule that plaintiff is entitled to more than one-half of the community property.

The portion of the interlocutory decree from which this appeal was perfected, which purports to award to the defendant as his separate property the personal property in the nature of stocks, bonds and securities, which are described in the notice of appeal and which list appears on pages 54 and 55 of the transcript, of the determined aggregate value of $42,867.70, is reversed. The court is directed to modify the decree and divide the foregoing property between the spouses as required by law. As so modified, the judgment is affirmed.



48 Cal.App.2d 772

FALK v. FALK.

Civ. 6646.

District Court of Appeal, Third District, California.

Dec. 29, 1941.

Hearing Denied Feb. 26, 1942.

1. Husband and wife ⇐262(1)

All property purchased after marriage is presumed to be community property. Civ. Code, § 164.

2. Divorce ⇐253

Evidence was sufficient to show that securities, purchased after marriage with funds which were derived from commingled separate and community properties and which could not be traced, were subject to distribution between husband and wife, who was granted divorce for extreme cruelty and adultery, as community property. Civ.Code, § 164.

3. Appeal and error ⇐717

Where there was conflict between statements of trial judge in his former memorandum opinions and in his subsequent adopted findings, District Court of Appeal would disregard opinions, which were no part of record on appeal, and would be governed by the findings which were adopted.

4. Husband and wife ⇐264

Evidence warranted finding that one-half interest in land which son received from deceased mother and which son conveyed to surviving father after father's second marriage, in consideration of father's payment of cost of son's education from commingled community funds of father and second wife, was "community property" of father and second wife. Civ.Code, § 163.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

5. Husband and wife ⇐262(1)

Where home was purchased in 1919 after marriage in 1915 with proceeds of Liberty Bonds which were first issued nearly two years after marriage, bonds would be presumed to have been purchased with community funds, and such fact was sufficient to support finding that home was "community property."

Appeal from Superior Court, Humboldt County; Albert F. Ross, Judge Assigned.

Divorce action by Nina Falk against Charles C. Falk. From a part of the judgment, the defendant appeals.

Affirmed subject to modification.

Hearing denied; CARTER, J., dissenting.

Hill & Hill, of Eureka, H. L. Preston, of Ukiah, and Harry W. Falk, Jr., of Eureka, for appellant.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for respondent.

PER CURIAM.

The defendant has appealed from that portion of a decree of divorce which

awards one-half of the community property to the plaintiff. She was granted a divorce on the grounds of extreme cruelty and adultery. That portion of the decree is not challenged.

The appellant contends there is no community property subject to distribution for the reason that the overhead expenses of conducting defendant's profession and business, together with the cost of living, consumed all the funds from which the determined community stocks, bonds and securities were deemed to have been purchased. It is therefore asserted the findings and judgment to the effect that certain properties are community in nature, one-half of which were distributed to the plaintiff, are not supported by the evidence.

[1] This is one of three separate appeals growing out of the same divorce action. They were presented to this court at the same hearing, although they were not consolidated. One appeal was taken by the defendant from an order awarding plaintiff costs and alimony pendente lite. The plaintiff perfected the second appeal from that portion of the interlocutory decree which, after specifically finding that thirty-one items of described stocks, bonds and securities were purchased after the marriage with commingled funds received from the defendant's practice of his profession of medicine and from the proceeds and income from sales of his separate property, rendering it impossible to trace the source from which the securities were purchased, the court, nevertheless, erroneously distributed a large number of such securities to the defendant as his separate property. In an opinion this day filed in that appeal, 3 Civil Number 6645 (120 P.2d 714), to which reference is made for a more detailed statement of the facts of this case, that portion of the judgment was reversed. In that appeal it was held the court erred in awarding any of said thirty-one items of stocks and securities to the defendant as his separate property. The principle of law upon which that conclusion was reached, based on the presumption that all property purchased after the marriage is community property, is applicable on this appeal.

[2] We are of the opinion the findings and judgment with respect to the character of said thirty-one items of stocks, bonds and securities as community property, are adequately supported by the evidence. The record clearly indicates that the defendant maintained bank accounts, after his marriage with the plaintiff, into which he deposited and commingled indiscriminately the proceeds derived from his business and profession as a physician with funds acquired from sales of and income from stocks, bonds and securities owned by him before his marriage, so that it was impossible to trace the sources of funds from which such properties were purchased. The defendant testified in that regard:

"Q. Are you able to tell today in which banks or what portion of the deposits in each bank was from your professional income? A. No.

"Q. Is there any record you have which would show that? A. All I have is my deposit book.

"Q. But does that show what portion of each deposit was your professional income and what portion was profit from stocks and bonds? A. No.

"Q. Now in these two bank accounts you deposited all your profits from sale of securities, did you not? A. I deposited all the money that I received.

"Q. From any source? A. From every source. * * *

"Q. Now in depositing money in your bank account, or bank accounts, did you ever segregate any of those moneys? A. No.

"Q. So that profits from your stocks and bonds, and the income from your professional services, the profits or proceeds from your split products or timber ventures, and from whatever other ventures you received any money from was deposited in one or the other of the bank accounts without discrimination? A. Yes. * * *

"Q. Can you tell us what property you have today was bought from money drawn from that bank account in the Bank of Eureka? A. What property was bought?

"Q. Yes, of any kind, personal or real. A. No, I can't tell what was bought."

Mr. E. Ray Horton testified in behalf of the defendant. He is a public accountant who prepared from the defendant's records a statement of his properties and income, a memorandum of which appears in the appendix to appellant's opening brief. He said in regard to the commingled funds, in response to interrogatories:

"Q. These records are not such that any person can determine what portion of the money taken from the bank to buy securities or what portion of the money taken

from the safe deposit box or any other sources to buy securities was community earnings or what portion was separate earnings of Dr. Falk? A. That's true.

"Q. And that is absolutely impossible for anybody to determine that from the record Dr. Falk has? A. That's right. * * *

"Q. What was that total gross professional income for that period [from September 15, 1915, to October 31, 1937, the period during which marital relations existed]? A. $263,425.21.

"Q. What was the total professional expense for that period? A. $102,079.07."

The appellant argues that the report of the accountant, Mr. Horton, which was prepared from records, books of accounts, deeds, notes, cancelled checks and tax returns, establishes the fact that the thirty-one items of stocks, bonds and securities which were purchased after the marriage, were defendant's separate property. We think not. The most that may reasonably be said of that report is that it creates a conflict of evidence in some respects. It will be observed that Mr. Horton testified, in effect, that the funds which were deposited in the bank accounts and in the safe deposit box, were commingled so as to render it impossible to determine what portion thereof was derived from separate property or from community earnings. It also appears that, in estimating the aggregate income from the defendant's professional services as a physician during the period of the marital status, which he said amounted to $263,425.21, he did take into account his overhead expenses for that period amounting to $102,079.07. That would leave a net income from that source of $161,346.14, which would be deemed to be community funds. There is also evidence indicating the approximate cost of living expenses during that period.

It is true that the presumption that said thirty-one items of stocks, bonds and securities which were purchased after the marriage, under the provisions of section 164 of the Civil Code would be overcome and dispelled by evidence that specific property was actually purchased from defendant's separate funds. But, in the present case, the evidence fails to show that any specific item of said securities was purchased from identified separate funds. The court found that all of said securities were purchased from commingled funds which renders it impossible to determine which, if any, of them were purchased with separate funds. Therefore, under the well-established rule announced in an opinion in the plaintiff's separate appeal, 3 Civil Number 6645, supra, all of those securities must be deemed to be community property.

[3] But, in conflict with the specific findings which were adopted by the court upon that particular issue, it is pointed out that the language of the trial court which appears in two memorandum opinions which were filed prior to the adoption of the findings, indicates the trial judge was convinced that "a large part of defendant's present assets can be fairly attributed to or traced from his separate estate." He so stated in his first memorandum opinion which appears at page 1 of the appendix to his opening brief. He also states therein that he has satisfactorily traced to defendant's separate property funds invested in property acquired after the marriage of the aggregate value of $60,000. But, it will be observed, none of that so-called separate property is identified. The judge does not even say that it is personal property. No findings were adopted in accordance with that declaration. That memorandum opinion was subsequently recalled. The case was opened for further argument. In a later memorandum opinion the judge reiterates substantially the same statement, but he does say, "I was and am convinced that about $60,000.00 or $70,000.00 of the assets listed in this action are the product of the community earnings and income, while the balance is the result of the separate estate which defendant had at the time of the marriage." This would seem to refute appellant's contention that there is no community property subject to distribution. Moreover, the conviction of the trial judge, as expressed in the memorandum opinions to the effect that he believed the funds with which certain properties were purchased after the marriage could be satisfactorily traced to the proceeds from sales of his separate property was certainly changed and abandoned, for he subsequently adopted specific findings to the contrary. We assume that the judge changed his mind in that regard.

There is a conflict between the statements of the trial judge in his former memorandum opinions, and in his subsequent adopted findings, with respect to the subject of community property. We must therefore disregard the opinions, which are no part of the record on appeal, and be

governed by the findings which were adopted. The findings are controlling in that regard. Cavagnaro v. Delmas, 29 Cal. App.2d 352, 84 P.2d 274; Wittman v. Wittman, 32 Cal.App.2d 184, 89 P.2d 419; 2 Cal.Jur. 488, sec. 235.

[4] The appellant claims that the court erred in finding that one-half interest in 160 acres of land, referred to as the "Willow Creek Timber Claim," which was conveyed to the defendant by his son after the marriage, is community property. The evidence shows that interest in the land was deeded to the son of the defendant by his mother, who was the defendant's former wife. The defendant testified in effect that his son conveyed his one-half interest in that land to him after his marriage to the plaintiff in consideration of his payment of the cost incurred for his education in school and in college between the years 1915 and 1930. The defendant said in that regard:

"Q. Now Doctor, you stated at the last hearing that certain property had been deeded to you by your son in repayment for money loaned to him to finance his college education. Where was that property situated? * * * A. Near the Willow Creek section.

"Q. Timber land? A. Timber land, yes.

"Q. And when did you finance your son going to college, during what year? A. Between 1915 and 1930.

"Q. It was advanced during the time he was going to school? A. Yes. * * *

"Q. Do you know how much the money was, the total? A. A great deal more than the timber claim was worth * * *. He just volunteered to do it if I would let him have the money when he got it. * * * He said this property was a liability to him and not an asset and he would deed it to me and in recognition of the large amount of money that I would have to give him to go to college."

The foregoing evidence is sufficient to warrant the court in determining that the one-half interest in the Willow Creek Timber Claim was not a gift from the son to defendant so as to constitute separate property under section 163 of the Civil Code, but on the contrary that the defendant secured title thereto in consideration of payment of all expenses for his son's education, which cost more than the value of the land. These payments were made after the marriage from commingled community funds. This supports the trial court's finding that this interest in the land became community property.

[5] The appellant contends that the court erred in finding that the home property in Eureka is community property. It is asserted this home was purchased "chiefly through the sale of Liberty Bonds, four years after the marriage of said parties." That furnishes no evidence in conflict with the finding of the court in that regard. The home is designated as Tract Number 22. That was purchased after the marriage on July 22, 1919. If the home was paid for with Liberty Bonds, we may assume they were purchased with community funds after the marriage. Liberty Bonds were first issued in June, 1917. That is nearly two years after the marriage. We must presume they were purchased with community funds. That fact is sufficient to support the court's finding in that regard.

The findings of the court with respect to the character of many other specific parcels of real property and designated items of personal property are likewise challenged. It would be an idle and arduous task to attempt to analyze the evidence regarding each of these numerous assignments or error. We have examined each of them. Frequently, evidence is summarized which is deemed to refute certain findings of the court, without directing us to pages of the transcript where such evidence may be found. In some instances there seems to be a conflict of evidence. We may say that we have found no satisfactory evidence that any of the challenged findings of the court are unsupported by substantial proof. As we read the lengthy and involved record in this case, we are impressed with the fact that the defendant received very fair treatment at the hands of the court and that he was awarded his full share of the property.

That portion of the judgment from which this appeal was taken is affirmed, subject to the modification directed to be made in the opinion which was this day filed in plaintiff's appeal in 120 P.2d 714.

48 Cal.App.2d 780

FALK v. FALK.

Civ. 6647.

District Court of Appeal, Third District, California.

Dec. 29, 1941.

Hearing Denied Feb. 26, 1942.

1. Divorce ⇐280

A minute order, granting wife's motion for alimony pendente lite and anticipated costs on three appeals from interlocutory divorce decree in wife's favor, was a mere tentative ruling of trial court on wife's motion and became "functus officio", and did not preclude husband's appeal from formal written order allowing wife alimony pendente lite and anticipated costs on such appeals, where minute order specifically authorized wife to prepare and present more detailed order for such payments and the wife did so, and such detailed order was signed by trial judge and entered as the formal judgment on wife's motion.

See Words and Phrases, Permanent Edition, for all other definitions of "Functus Officio".

2. Divorce ⇐182

An award of $576.50 for wife's anticipated costs and expenses of three appeals from interlocutory divorce decree in wife's favor was not excessive, where wife filed four printed briefs in the three appeals, and her brief filed on husband's chief appeal consisted of 100 pages, and transcript in such case consisted of 975 pages, and wife was entitled to copy of such transcript from which to prepare her defense on appeal, and transcript in case in which wife appealed consisted of 60 pages, which she was required to procure and pay for.

3. Divorce ⇐182

An order, allowing $576.50 for wife's anticipated costs and expenses on three appeals from interlocutory divorce decree in wife's favor, was not invalid under statute limiting amount which any one party can recover for printing briefs to $100 on one appeal, where order did not segregate items of expense. Code Civ.Proc. § 1034.

4. Costs ⇐230

Costs, under statute entitling prevailing party to costs actually incurred on appeal for purpose of reimbursement, depend on winning the appeal, and are due only after appeal has been determined. Code Civ.Proc. § 1034.

5. Costs ⇐258

The statute limiting amount which any one party can recover for printed briefs to $100 on one appeal does not prevent the same party appearing in three different appeals from recovering $100 if necessary for printing of his briefs in each appealed case. Code Civ.Proc. § 1034.

6. Divorce ⇐182

The statute entitling the prevailing party to statutory costs actually incurred on appeal for purpose of reimbursement, and limiting amount which any one party can recover for printed briefs to $100 on one appeal, is not applicable to necessary costs which may be awarded in divorce action in discretion of court under statute authorizing trial court in its discretion to award either husband or wife reasonable estimated necessary costs for prosecuting or defending at the trial or on appeal a pending suit for a divorce. Code Civ.Proc. § 1034; Civ.Code, § 137.

7. Divorce ⇐182

An order allowing wife $200 per month as alimony pendente lite was not void for failure to provide that such payments should be credited on any final judgment for alimony which might be subsequently made, where application in complaint for divorce for allowance of $500 per month as permanent alimony was not granted, and all the relief secured under the complaint was an award for one-half of the community property, the whole of which was retained by the husband pending the appeals.

8. Divorce ⇐182

An allowance to wife of $200 per month as alimony pendente lite was a proper emergency provision to enable wife to continue to live in substantially the same manner she had been accustomed to live, pending determination of appeals, where application in complaint for divorce for allowance of $500 per month as permanent alimony was not granted, and all the relief the wife secured under complaint was an award for one-half of community property, the whole of which was retained by husband pending the appeals. Civ.Code, § 137.

9. Divorce ⇐209

The statutory right to necessary alimony pendente lite is separate from an award

of permanent alimony or maintenance which may be awarded under proper circumstances. Civ.Code, § 137.

10. Divorce ⇐214(3)

Evidence warranted award to wife, who was granted interlocutory divorce decree, of $200 per month as alimony pendente lite, on ground that such amount was reasonably necessary for support of wife, and that husband was amply able to pay wife such amount. Civ.Code, § 137.

11. Divorce ⇐211, 286

The trial court had sound discretion in determining amount of alimony pendente lite, and such determination cannot be disturbed on appeal except for a clear abuse thereof. Civ.Code, § 137.

12. Divorce ⇐212

In deciding whether allowance of alimony pendente lite should be made, trial court is authorized to take into consideration the circumstances of the respective spouses, the property which they possess, and their earning ability and their needs. Civ.Code, § 137.

13. Divorce ⇐215

In determining amount of alimony pendente lite, wife is entitled to be maintained, during the time the litigation is in progress, in substantially the same manner and condition she was accustomed to live and in her station in life. Civ.Code, § 137.

14. Divorce ⇐214(3)

On motion for alimony pendente lite, trial court can consider affidavits and oral testimony adduced at hearing of motion, together with evidence taken in trial of divorce case, when the same judge hears both proceedings. Civ.Code, § 137.

15. Affidavits ⇐18

Averments of affidavit which are conclusions or hearsay are competent evidence where they are admitted without objection. Code Civ.Proc. § 2009.

16. Divorce ⇐215

In estimating necessary expenses in application for alimony pendente lite, wife is not expected to unduly curtail her usual expenses or to deprive herself of the necessities of life, but she is entitled to live in her customary manner according to her station in life. Civ.Code, § 137.

Appeal from Superior Court, Humboldt County; Albert F. Ross, Judge Assigned.

Divorce action by Nina Falk against Charles C. Falk. From an order allowing the plaintiff alimony pendente lite and anticipated costs on three appeals from an interlocutory decree of divorce, the defendant appeals.

Order affirmed.

Hearing denied; CARTER, J., dissenting.

Hill & Hill, of Eureka, H. L. Preston, of Ukiah, and Harry W. Falk, Jr., of Eureka, for appellant.

Edwin V. McKenzie and Frank J. Mahoney, both of San Francisco, for respondent.

PER CURIAM.

The defendant has appealed from an order allowing plaintiff alimony pendente lite and anticipated costs on three appeals from an interlocutory decree of divorce which was rendered in her favor on the grounds of adultery and extreme cruelty.

The appellant contends that the court abused its discretion in allowing plaintiff $200 per month as alimony pendente lite, and $576.50 as costs for the three appeals, since the evidence shows that she has adequate income from her own property, and that the allowances were therefore unnecessary. It is also claimed the order for costs on the appeals under the provisions of section 1034 of the Code of Civil Procedure awards an excessive amount; that it is void for failure to provide that the said payments shall be credited on any final awards which may be made, and that the notice of appeal is ineffectual because the original minute order for alimony pendente lite and costs is in full force and controlling over the subsequent written order purporting to determine the same subject of controversy.

The plaintiff and defendant lived together as husband and wife for twenty-one years. The plaintiff has been ill and under the care of a physician, other than her husband, for more than two years. She is still indebted to that physician for his services. The defendant is a prominent physician in active practice. He owns property of the value of more than $150,000. He possesses and successfully operates a hospital at Eureka. He derives an annual income from the practice of his profession and from the net receipts of his hospital amounting to several thousand dollars. He has profitably conducted several timber enterprises. He has bought and sold real estate at considerable profit. At the time of his marriage to

plaintiff he owned at least seven separate parcels of land, together with numerous standard stocks, bonds and securities of the aggregate value of more than $130,000, from which he regularly derives substantial dividends. He engaged in buying and selling on the market stocks, bonds and securities. From this source he derived profits amounting to several thousand dollars per year. He loaned money and maintained bank accounts from which he was paid considerable interest. He was accustomed to deposit in his bank account proceeds derived from his business and profession which he commingled with funds secured from sales of his separate real properties, stocks, bonds and securities, so that it was impossible to trace the sources from which any of the funds were derived. In the divorce suit the community property was directed to be equally divided between the spouses.

The suit for divorce and for division of the community property was instituted by the plaintiff. She was granted a divorce on the grounds of extreme cruelty and adultery. That portion of the decree is not challenged on appeal. The plaintiff was also awarded one-half of the community property. The trial of the case consumed several days. The transcript on defendant's main appeal consists of 975 pages. Three appeals from that judgment were perfected. Plaintiff filed four printed briefs in those appealed cases. She appealed on the ground that the court had erroneously awarded to the defendant a large amount of community property as his separate property. The defendant instituted this and another appeal. In the last-mentioned appeal he sought a reversal on the ground that the court erred in determining that certain specified stocks, bonds and securities were community property. Pending these appeals all of the community and defendant's separate property remain in his possession and under his exclusive control.

After the entry of the interlocutory decree, the plaintiff moved for an order under section 137 of the Civil Code to award her alimony pendente lite and necessary costs of prosecuting the three appeals. This motion was heard upon plaintiff's verified affidavit which was admitted in evidence without objection, and to which no counter-affidavit was filed. Two witnesses were examined, on the hearing of the motion, in behalf of the defendant. A copy of his Federal income tax return for 1938 was received in evidence. The judge who tried the divorce case also heard this motion. It was conceded the trial court was authorized to consider on this motion all of the evidence adduced at the trial of the divorce action. 1 Cal.Jur. 964, sec. 19. The motion was submitted and taken under advisement. July 27, 1939, the court directed the entry of a minute order granting the motion and specifying the amounts of alimony pendente lite and costs of suit to be awarded plaintiff, in which minute order it was specifically provided, "Counsel for plaintiff may prepare a more detailed order for the above payments." A detailed written order was accordingly prepared, signed by the judge and entered July 31, 1939, as the formal judgment on that motion. The written order awarded plaintiff $576.50 for "her costs and expenses on the appeals." She was also allowed $200 per month as alimony pendente lite, from July 21, 1939, "until the further order of this court." It was provided that said sums shall be paid by the defendant from the community earnings derived from the practice of his profession, and "if said earnings be not sufficient, the balance thereof may be paid from the community property of the parties hereto." From the last-mentioned order the defendant has appealed.

[1] We are of the opinion there is no merit in respondent's contention that this appeal is ineffectual because the original minute order purporting to determine the motion for alimony and costs remains in full force and constitutes the order from which no appeal has been taken. The minute order was a mere tentative ruling of the court on that motion. That is clearly indicated by the language of the minute order. The court specifically authorized the plaintiff to prepare and present "a more detailed order for the above payments." She did so. We are therefore satisfied the formal written order was the judgment from which the appeal was properly taken. The former minute order becomes functus officio.

[2] The award of $576.50 for plaintiff's "costs and expenses on the appeals" is not excessive. That sum includes not only all necessary costs of prosecuting plaintiff's appeal, but also the costs incurred in defending herself on two appeals instituted by the defendant. In those three appeals she filed four printed briefs. Her brief filed on the defendant's chief appeal, in

which he seeks a reversal on the alleged ground that the court erroneously awarded plaintiff certain stocks and bonds as community property consists of about 100 pages. The transcript in that case consists of 975 pages. We may assume she was entitled to a copy of that transcript from which to prepare her defense on appeal. The transcript in the case in which plaintiff appealed consists of sixty pages, which she was required to procure and pay for. Many other expenses would be necessarily incurred by her on the three appeals. The verified affidavit of the plaintiff which was received without objection on the hearing of the motion avers that she will necessarily incur that amount of expense incident to the three appeals. The defendant filed no counter-affidavit on that motion, and no satisfactory evidence was adduced to refute the asserted claims for that sum. We must therefore assume there is ample evidence to support that award of costs on the three appeals.

[3] That award is not in conflict with the provisions of section 1034 of the Code of Civil Procedure. It does not appear that the order allowed plaintiff more than $100 for printing her briefs on appeal in any one case, or even for printing all her briefs on the three appeals. The order merely allows her $576.50 "on account of her costs and expenses on the appeals." It does not segregate the items of expense.

Moreover, we are of the opinion section 1034 of the Code of Civil Procedure has no application to the allowance of necessary costs awarded under section 137 of the Civil Code in a pending divorce suit to enable the petitioner to prosecute or defend the action. Oakland v. Pacific Coast Lumber & Mill Co., 172 Cal. 332, 334, 156 P. 468, Ann.Cas.1917E, 259. The last-mentioned section was enacted for quite a different purpose from that which prompted the adoption of section 1034 of the Code of Civil Procedure. The Civil Code provision is confined to pending divorce proceedings. It authorized the trial court, in its discretion, to award either the husband or the wife reasonable estimated necessary costs for prosecuting or defending at the trial or on appeal a pending suit for divorce.

[4-6] On the contrary, section 1034 of the Code of Civil Procedure entitles "the prevailing party" only to statutory costs actually incurred on appeal for the purpose of reimbursement. These costs depend upon winning the appeal and they are due only after the appeal has been determined. To discourage extravagant expenditures for printing too lengthy briefs, the legislature has seen fit to limit the amount which "any one party" may recover for printing briefs to $100 on one appeal. We assume that when the same party appears in three different appeals there is nothing in the language of that section which will preclude him from recovering $100, if necessary, for the printing of his briefs in each appealed case. We are convinced this section 1034 of the Code of Civil Procedure does not apply to necessary costs which may be awarded in a divorce action in the discretion of the court, under section 137 of the Civil Code.

[7-9] The order for alimony pendente lite, under the circumstances of this case, is not void for failure to provide that such payments shall be credited on any final judgment for alimony which may be subsequently made. There is no possibility of duplicating payments for alimony. The application in the complaint for divorce for an allowance of $500 per month as permanent alimony was not granted. All the relief the plaintiff secured under the complaint was an award for one-half of the community property, the whole of which is retained by the defendant pending the appeals. In lieu of an allowance for permanent alimony, on motion therefor, under section 137 of the Civil Code, she was allowed $200 a month pending the determination of the appealed cases. That is a proper emergency provision to enable the plaintiff to continue to live in substantially the same manner she has been accustomed to live, pending the determination of the appealed cases. The statutory right to necessary alimony pendente lite is separate and distinct from an award of permanent alimony or maintenance which may be awarded under proper circumstances. The fact that the wife was awarded one-half of the community property furnishes no reason why she may not also be entitled to alimony pendente lite, particularly when the custody and control of the entire community property is retained by the husband.

The causes of Smith v. Smith, 147 Cal. 143, 81 P. 411, and Sheppard v. Sheppard, 161 Cal. 348, 119 P. 492, 493, upon which the appellant relies in support of his contention regarding the last-mentioned issue, are clearly distinguishable from the

present proceeding. In the Smith case the court rendered judgment awarding the wife $100 a month as permanent maintenance. An appeal was taken from that judgment. The court then made an order for alimony pendente lite in the like sum of $100 a month. The judgment for $100 a month as permanent maintenance was based on proof that that sum was all that was necessary for the wife's support. The addition of another $100 payment per month was held to be a duplication of the necessary amount, and that it would result in plaintiff being required to pay twice as much per month, pending the appeal, as was necessary for her support. The court therefore properly held that the order, under such circumstances, should have provided for crediting the amount paid for alimony pendente lite on the judgment for permanent maintenance if and when that judgment was affirmed. In the present case there is no duplication of allowances for maintenance or alimony. If the alimony had been disallowed in this case, the wife would have had insufficient means with which to support herself during the appeals.

In the Sheppard case, supra, the facts are exactly the same as those of the Smith case in regard to the issue which is here involved. Sheppard sued his wife for divorce. In a cross-complaint she asked for permanent maintenance. The court denied plaintiff a divorce, but awarded the wife $50 a month as permanent necessary maintenance. An appeal was taken. On motion, the wife was awarded $50 a month as alimony pendente lite. The court there said: "It cannot be disputed, in view of the authorities, that the trial court was authorized to provide for the support and maintenance of defendant by plaintiff pending the determination of the appeal from the judgment, and to this end to make an order directing plaintiff to pay defendant such sums as were reasonably necessary for that purpose. See Bohnert v. Bohnert, 91 Cal. 428, 27 P. 732; Gay v. Gay, 146 Cal. 237, 79 P. 885."

But the court did say, as was said in the Smith case, that a failure to provide for crediting the payments made under the order for alimony pendente lite to the judgment for permanent maintenance, in the event the judgment should be affirmed, might result in payments of double the amount found by the court to be necessary. These and other similar authorities relied upon by the appellant are entirely different from the facts of this case. No judgment for permanent maintenance was rendered in the present suit. There can be no duplication of payments to be made in this case.

[10-14] The final and more serious issue on this appeal is whether the evidence adduced at the hearing of the motion for alimony pendente lite upholds the finding that $200 a month was reasonably necessary for the support of the wife pending the determination of the appeals. We are of the opinion the allowance is adequately supported by the evidence. We are unable to say the court abused its discretion in making that award. The rule is well established that the trial court has a sound discretion in fixing the amount of alimony pendente lite, which determination may not be disturbed on appeal except for a clear abuse thereof. Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032; Ritter v. Ritter, 103 Cal.App. 583, 591, 284 P. 950; Rose v. Rose, 109 Cal. 544, 546, 42 P. 452; 1 Cal. Jur. 964, sec. 19, and at page 992, sec. 46. In deciding whether such an allowance should be made the court is authorized to take into consideration the facts and circumstances of the respective spouses; the property which they possess; their earning ability and their needs. The wife is entitled to be maintained, during the time the litigation is in progress, in substantially the same manner and condition she was accustomed to live and in her station of life. For this purpose the court may consider the affidavits and oral testimony adduced at the hearing of the motion, together with the evidence taken in the trial of the divorce case, when the same judge hears both proceedings. Newlands v. Superior Court, 171 Cal. 741, 154 P. 829; Wittman v. Superior Court, 19 Cal.App.2d 734, 736, 66 P.2d 180; 1 Cal.Jur. 964, sec. 19.

In the present case the evidence satisfactorily shows that the defendant is amply able to pay the plaintiff the amounts allowed to her on the motion for alimony. The defendant retains possession and control of all the community property pending the appeals, and that property is therefore not available for her use in the meantime. Moreover, the order directs that the alimony shall be paid out of the "community earnings" of the defendant, and if that is not adequate for that purpose, then the balance shall be paid from the community

property of the respective parties. This means that eventually part of the alimony pendente lite may be charged against the plaintiff's own share of her community property. The affidavit of the plaintiff, which was read in evidence on this motion, averred that the defendant retains possession and control of community property of the value of $200,000; that his annual gross income from his profession as a physician is $10,000; that the affiant has been ill and that she necessarily required the care of a physician for two years past, for which medical treatment she is still indebted; that she is unable to work; that, pending this litigation, she has been compelled to curtail her living expenses and to deprive herself of many necessities of life; that she owns some separate property from which she derived $1,592.50 during the past year, but that she has no other source of income; that she necessarily expended for her living in the year 1938 the sum of $2,916.74, and was compelled to sell some of her stocks and a parcel of land for the aggregate sum of $4,215 to meet her obligations, and that she was in need of the sum of $250 per month for her maintenance during the pendency of the appealed cases. This affidavit was received in evidence without objection.

The defendant filed no counter-affidavit disputing any of the averments of the foregoing affidavit. He did take the witness stand in his own behalf, and offered in evidence a copy of his Income Tax Return for 1938, which showed that his income from personal services was $4,787.64, and that he received interest from corporation bonds amounting to $4,113.07. Miss Thomas, his secretary, testified that his household expenses amounted to $1,538, and that his income from the practice of his profession was entirely consumed by overhead expenses.

[15] The appellant contends that plaintiff's affidavit is incompetent evidence for the reason that it contains averments which are hearsay and which amount to mere conclusions. Even conceding that many of the averments of the affidavit are conclusions or hearsay, they became competent evidence for the reason that they were admitted without objection. Sec. 2009, Code Civ.Proc.; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037; Soares v. Ghisletta, 1 Cal.App.2d 402, 36 P.2d 668.

[16] We conclude that the court did not abuse its discretion in allowing plaintiff $200 per month as alimony pendente lite, in view of all of the evidence adduced on the motion and at the trial of the case which was entitled to be considered. In determining the question of plaintiff's necessity to obtain $200 a month for her maintenance, it is true there is evidence that she received from her separate property for the year 1938 the sum of $1,592.50, and that her actual expenditures for that year were $2,916.74. On that basis alone, it would follow that she required for her maintenance the difference between those ascertained figures, which is the additional sum of $1,324.24. But that is not the entire showing of necessity which was made by the plaintiff. The evidence further shows that for two years past she has been ill and that she has incurred an indebtedness for medical services which has not been paid. The clear inference is that she will continue to incur further necessary expenses for such medical services. Moreover, plaintiff averred that in estimating the cost of her maintenance in 1938 at $2,916.74, she omitted many privileges she has been accustomed to enjoy; that she was compelled to and did curtail her usual and customary expenses and deprived herself of many necessities of life. In estimating necessary expenses in an application for alimony, the law does not expect a wife to unduly curtail her usual expenses or to deprive herself of the necessities of life. In the allowance of alimony and costs under section 137 of the Civil Code, the law recognizes the fact that a wife is entitled to live in her customary manner according to her station in life. It also appears, from the order for alimony and costs pendente lite, that a portion of the money directed to be paid may be contributed from plaintiff's share of her own community property.

We are of the opinion we may not say, in view of the entire record, that the court abused its discretion in allowing plaintiff alimony and costs of suit pending the disposition of the three appeals.

The order is therefore affirmed.

48 Cal.App.2d 746

MONAHAN et al. v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 13321.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1941.

Hearing Denied Feb. 26, 1942.

1. Action ⇐6

Under Declaratory Judgment Act, litigants are not vested with an absolute right to a determination of an actual controversy existing between them, with respect to their rights and duties growing out of it, and, if the determination is refused, they are not entitled to a review unless they show affirmatively that the trial court abused its discretion. Code Civ.Proc. §§ 1060, 1061.

2. Action ⇐6

In order to entitle one to a declaratory judgment, not only must the controversy be a "justiciable controversy" as distinguished from difference or dispute of a hypothetical or abstract character, but it must be definite and concrete, touching the legal relations of parties having adverse legal interests. Code Civ.Proc. §§ 1060, 1061.

See Words and Phrases, Permanent Edition, for all other definitions of "Justiciable Controversy".

3. Action ⇐6

In order to entitle one to a declaratory judgment, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts, and the judgment must decree, and not suggest, what the parties may or may not do. Code Civ.Proc. §§ 1060, 1061.

4. Action ⇐6

Although ordinances and statutes are inherently proper subjects of declaratory relief, a declaratory judgment may not be rendered in respect to them in disregard of the customary limitations on the granting of such relief. Code Civ.Proc. §§ 1060, 1061.

5. Action ⇐6

The Superior Court was without jurisdiction to grant a declaratory judgment, declaring that plaintiffs, who were employees of the Department of Water and Power of city and were classified under civil service rules as "journeymen linemen", must be ranked with and paid the wage received by other journeymen linemen, whom the department designated as "troublemen". Code Civ. Proc. §§ 1060, 1061.

6. Municipal corporations ⇐178

Under provision of Charter of City of Los Angeles imposing on Department of Public Works the duty to create necessary positions in the department and to fix salaries and duties of every employee thereof, the department might establish positions by rank, grade, or otherwise, even though such positions were all within one class as determined by the Civil Service Commission, which under the charter had duty to classify generally and not specifically, and had no authority to set the wage.

7. Municipal corporations ⇐178

Where the Civil Service Commission established as a class the position of "journeymen linemen" in the Department of Public Works of the city of Los Angeles, the department was authorized to designate certain journeymen linemen as troublemen with higher pay going with that designation.

8. Municipal corporations ⇐220(2)

Under provision of Charter of City of Los Angeles that Salary Standardization Committee shall from time to time grade and regrade salaries of those in classified civil service so that like salaries shall be paid for like duties, the only power of the committee upon reaching a conclusion is to recommend to the proper authorities the salary or wage for each class of positions in strict accord with the classification set up by the Civil Service Commissioners, and the committee has no power to enforce its conclusions.

9. Municipal corporations ⇐178

Where the Civil Service Commission established as a class of civil service positions that of journeymen linemen in the Department of Public Works, and the department set the pay for the class to range between $195 and $225 per month, and designated certain journeymen linemen as "troublemen" at salary of $225 per month, the department might at any time revoke designation of a troubleman and reduce his pay to $195.

10. Municipal corporations ⇐63(1)

Where Department of Public Works was entitled under Los Angeles City Charter to

rank or grade linemen in the department as journeymen linemen, or troublemen, and might vary the pay as to each even though the work was the same or substantially so, the court could not inquire into the motives affecting the department in its selection.

11. Officers ⇐103

The courts will not assume to control or guide exercise of authority of governmental executives in handling of administrative details.

12. Pleading ⇐8(2)

Allegations that Department of Water and Power of city unlawfully and without authority adopted false classification of certain employees who were classified under civil service as "journeymen linemen", and designated them "troublemen", that duties of troublemen were identical with duties performed by plaintiffs as journeymen linemen, and that troublemen were not chosen on basis of seniority or ability but on basis of whim, caprice, and favoritism, constituted allegations of "conclusions".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

13. Action ⇐1

Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by E. A. Monahan and others against the Department of Water and Power of the City of Los Angeles and others for a declaratory judgment wherein the plaintiffs sought declaration that plaintiffs, who were journeymen linemen employed by the Department of Water and Power of the City of Los Angeles, should receive the same pay as that received by employees of the department designated as "troublemen". From an adverse judgment, the plaintiffs appeal.

Affirmed.

Gallagher, Wirin & Johnson and Fred Okrand, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., Leon T. David and Gilmore Tillman, Asst. City Attys., and George W. Adams and A. H. Driscoll, Deputy City Attys., all of Los Angeles, for respondents.

HANSON, Justice pro tem.

In this action for declaratory relief the plaintiffs, who under civil service rules are classified as "journeymen linemen" and are employed by the Department of Water and Power of the City of Los Angeles, allege in their complaint that they are entitled to receive the same pay, i. e., $225 per month, as is paid to those journeymen linemen whom the department designates and details as "troublemen," because, so they allege, they perform duties that are similar to and identical with the duties performed by the latter. As a basis for their alleged cause of action they aver with resounding epithets that the reason they have not been designated as troublemen or favored with the pay of troublemen is due to the "whim, caprice and favoritism" of the defendants, in whom the appointing power is vested, and not on any basis of seniority or ability. The trial court sustained a general demurrer to the complaint without leave to amend. Hence this appeal.

The record does not disclose whether the trial court sustained the general demurrer on the ground (1) that the court was without jurisdiction to grant the relief prayed on the facts alleged, or (2) that the essential allegations were set forth by way of conclusions rather than by ultimate facts As we are of the opinion that its decision was correct on either ground we shall discuss both grounds, even though a discussion of one would suffice.

The complaint, so far as is here material, alleged that the Department of Water and Power of the City of Los Angeles, by resolution adopted by its commissioners, fixed the wage of "journeymen linemen" at from $195 to $225 per month; that such linemen are within the competitive classified civil service of the city; that the plaintiffs are all employed by the department as journeymen linemen, having after competitive examination been duly certified by the Civil Service Commission; that each plaintiff is now receiving $195 per month; that the commissioners of the department have wrongfully and without authority of law set up a false classification of journeymen linemen which is designated as "troublemen," each of whom is paid a wage of $225 per month; that the troublemen perform duties that are similar and identical to and

with the duties performed by the plaintiffs as journeymen linemen; that the troublemen are not selected by the commissioners of the department on any basis of seniority or ability to perform the duties of a journeyman lineman [troubleman?] but on the basis of whim, caprice and favoritism which evades the law and the intent and purpose of the civil service provisions of the charter of the city; that as a result the plaintiffs are forever doomed to receive the minimum beginner's salary of $195 per month. After setting forth certain provisions of the charter, plaintiffs allege that certain specific controversies exist between the plaintiffs and defendants, and they then proceed to set forth the contentions they make as well as those they allege the defendants make, with a prayer for a declaration, among other things, that it be determined they are entitled to receive $225 per month.

At the outset it may be noted that this is not an action seeking to have the wage scale of troublemen reduced to that of the journeymen linemen because the work of each is the same but to lift the wage of the journeyman to the level of the troublemen. This involves nothing that is new or even dastardly. It merely implies that the troublemen are entirely capable and the journeymen equally so, but that the nod which has made one a troubleman and kept the other a journeyman was, in the view of appellants, the result of "nepotism, politics, whim or caprice." This claim has a familiar ring, if not to all then at least to business executives who are entrusted with the power to promote persons to responsible positions over their fellows. But the claim as made is significant in another aspect, and that is its bearing upon the jurisdiction of the court to entertain the cause of action which the complaint attempts to state. The complaint invokes the jurisdiction of the court to declare by its judgment, not that troublemen shall receive no more pay than journeymen, but that journeymen must be ranked with troublemen and be paid the wage which the latter now receive.

The initial contention of the plaintiffs which requires consideration is the claim that their controversy with the defendants was not only one within the jurisdiction of the court but that it set forth a right in the plaintiffs, and a corresponding duty on the part of the defendants, which should have been entertained and adjudicated by the court. In taking this position we must necessarily assume that the plaintiffs are of the opinion that if a right and duty are shown the trial court has no discretion except to entertain the action. Such is not the law; and, what is more, our right of review is so limited that we may reverse only if it affirmatively appears that the court below abused its discretion. Appellants here argue, and cite cases which they contend sustain their claim, that the court below had jurisdiction to entertain and adjudicate upon the controversy; but they neither argue nor cite cases to the all-controlling point whether the court abused its discretion.

[1] Our statute (Code Civ.Proc., sec. 1060) authorizes a superior court to make a binding declaration, with the force of a final judgment, in cases of actual controversy relating to the legal rights and duties of the respective parties to the action. But the statute expressly provides that the court may refuse to exercise the power where it concludes its declaration or determination is not necessary or proper at the time and under all the circumstances. Code Civ.Proc., sec. 1061. Accordingly under the statute litigants are not vested with an absolute right to a determination of an actual controversy existing between them with respect to their rights and duties growing out of it. Moreover, if the determination is refused they are not entitled to a review unless they show affirmatively that the court abused its discretion. City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810.

[2-4] In the instant case no such showing is made. In that connection we may well observe that not only must the controversy be a justiciable controversy, as distinguished from "a difference or dispute of a hypothetical or abstract character; from one that is academic or moot", but it must be "definite and concrete, touching the legal relations of parties having adverse legal interests." Ætna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 464, 81 L.Ed. 617, 108 A.L.R. 1000. In short, the controversy must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, and not suggest, what the parties may or may not do. While ordinances and statutes are inherently proper subjects of declaratory relief, yet a declaratory

judgment may not be rendered in respect to them in disregard of the customary limitations upon the granting of such relief.

[5] Applying these principles here, it will be noted that the judgment sought is one essentially of specific performance. The court is asked to decree that hereafter the department must pay each of the plaintiffs $225 per month, and that it cease and desist from its alleged practice of designating troublemen except upon the basis of seniority and ability. There is no such power in the court—and wisely there is none. We lay further discussion of the subject to one side and pass to a consideration of the provisions of the Charter of the City of Los Angeles, which is here controlling as to the rights and duties of the parties and which to our mind additionally sustains the decision below.

[6, 7] The Charter of the City of Los Angeles provides that its Board of Civil Service Commissioners shall classify the various positions or jobs in the city service so those that are sufficiently similar in respect to the duties and responsibilities shall be in one class. The commission has established as one of the classes that of journeymen linemen. The complaint, to which the Civil Service Commission is a party defendant, does not charge that it should have set up ranks within the class of journeymen linemen such as journeymen and troublemen. Indeed, the charge could not well be made in view of appellants' claim that the duties and responsibilities of all linemen are for all purposes identical and similar. At the time plaintiffs took and passed a competitive examination for journeymen linemen the Department of Public Works, according to the complaint, had set the pay for the class to range between $195 and $225 per month. It is not, and indeed it could not be contended, in view of the terms of the charter, that the department did not possess the authority and power to fix wages or salaries of its employees. This for the reason that the charter imposes upon the department the duty to create the necessary positions in the department and to fix the salaries and duties of every employee thereof. Under that provision of the charter it is clear (except for applicable civil service rules, of which there are none) that the department might establish positions by rank, grade or otherwise, even though such positions were all within one class as determined by the Civil Service Commission. The latter's duty was to classify generally, and not specifically; and it had no authority to set the wage. No provision of the charter restricts the department in its appointive power, except that it must choose linemen from the list certified by the Civil Service Commission. As the charter, as plaintiffs concede, makes no provision requiring that ability or seniority should be taken into account, the department necessarily may designate from its personnel of journeymen linemen those it chooses as troublemen, without let or hindrance from anyone. So far as the charter is concerned, the department may designate a journeyman lineman as troubleman, with the higher pay which goes with that designation.

[8, 9] Section 123 of the charter is quoted by appellants, but for what purpose is not clear. All that the section provides is that the Salary Standardization Committee shall from time to time grade and regrade salaries of those in the classified civil service so that "like salaries shall be paid for like duties." The committee has no power of enforcing its conclusions. All it can do after it has come to a conclusion is to recommend to the proper authorities the salary or wage for each class of positions in strict accord with the classification set up by the Civil Service Commissioners. In the instant case the commissioners set up a single classification—that of *linemen*. It did not designate, because it could not, the salary or wage to be paid to linemen. It might have classified linemen into the two existing designations of journeymen and troublemen, but it did not. No claim is here made that it should have done so. The Salary Standardization Committee could have recommended to the defendant department that journeymen and troublemen should receive the same pay; that the pay be $225 or $195, or in between. But even so, it could not enforce its views, as the charter grants the authority and the discretion to the department. The complaint does not allege that the department has promulgated any rules in favor of its employee linemen except that their compensation shall be somewhere between $195 and $225 per month. Unless there are controlling rules it seems evident that the department at any time may revoke a person's designation as troubleman and reduce his pay to $195. They

are confirmed by civil service rules in their classification as linemen, and in no others. People ex rel. O'Connor v. Girvin, 227 N.Y. 392, 125 N.E. 587, per Cardozo, J.

[10, 11] Accordingly, then, as under the charter the department may rank or grade linemen as journeymen linemen or troublemen, and may vary the pay as to each even though the work is the same or substantially so, we may not inquire into the motives that affect the commissioners in their selection. Executive heads in the fields of government, as in the fields of commerce, must have a certain amount of discretion if they are to function. Cf. State ex rel. Reilley v. Civil Service Commission, 8 Wash.2d 498, 112 P.2d 987, 134 A.L.R. 1100. For the court to accord relief here would not only be to put governmental executives in a strait jacket, but would involve an altogether too complacent an attribute of superiority in the court in the handling of administrative details which have not been entrusted to them but to the executives on the job. Courts should not and will not assume to control or guide the exercise of their authority. If relief be needed it should not be sought in the courts but with the body that has the authority.

[12] Quite apart from the considerations we have expressed in support of the ruling below, we are of the opinion that the demurrer was rightly sustained for still another reason. The essential charging allegations of the complaint are stated by way of conclusion and not by way of ultimate fact. The charge is that the defendants "have wrongfully and without authority of law adopted, established and set up an artificial and false classification of journeymen linemen known, termed and designated by said defendants as 'troublemen.' That journeymen linemen so designated are paid a salary of $225 a month and perform duties that are similar and identical to and with the duties performed by plaintiffs as journeymen linemen; that said 'troublemen' are not chosen or selected * * * on the basis of seniority or ability * * * but on a basis of whim, caprice and favoritism." Except for the statement that troublemen are paid $225 a month, the entire quoted statement represents nothing but the pleader's conclusion as to the facts. Going v. Dinwiddie, 86 Cal. 633, 25 P. 129; Ohm v. City and County of San Francisco, 92 Cal. 437, 28 P. 580; Callahan v. Broderick, 124 Cal. 80, 56 P. 782; Aurrecoechea v. Sinclair, 60 Cal. 532; Filarski v. Covey, 75 Cal.App. 353, 242 P. 874; Bailes v. Keck, 200 Cal. 697, 254 P. 573, 51 A.L.R. 930; City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810; Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 39 S.Ct. 172, 63 L.Ed. 381, 382, Holmes, J.; Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426, 428, 429; cf. 119 A.L.R. 1000. It was necessary that the facts should have been pleaded so the court might see from the facts stated that there was discrimination as claimed. This was doubly important here, as plaintiffs not only conceded but alleged that the defendants contended that the duties of troublemen were not similar or identical to those of journeymen linemen, and that the higher pay of troublemen was occasioned by their additional responsibilities and their peculiar personal qualifications for the work.

[13] The allegation that troublemen were appointed because of "whim, caprice and favoritism" is nothing but an allegation of motive; and as the standards of the law are external, motives are not actionable. Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance. 1 C.J. p. 962; 1 C.J.S., Actions, § 14. As no claim is made by the plaintiffs that the troublemen are not equally as capable as any of the other journeymen linemen, the concession accordingly admits that the appointments were proper but were based upon wrong motives, and in that situation the correctness of the appointment cancels out the wrongfulness of the motive. We need cite but a case or two.

In Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 57 S.Ct. 407, 410, 81 L. Ed. 562, the complaint alleged that an order issued by the Secretary of Commerce requiring the plaintiff to file its rates for transportation of various commodities to various points in foreign countries was made at the instance of a member of the Shipping Board who was an active competitor of plaintiff, and for the purpose of forcing plaintiff to join a conference or shipping monopoly. In denying relief the court said: "Aside from the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer is-

suing it, the allegations of the complaint are mere conclusions unsupported by any facts pleaded and are, therefore, insufficient."

In Dakota Central, etc., v. State, etc., ex rel. Payne, 250 U.S. 163, 39 S.Ct. 507, 509, 63 L.Ed. 910, 4 A.L.R. 1623, the plaintiff sought to enjoin the Postmaster General from putting into effect certain telephone rates. The complaint assailed the motives of the Postmaster General which it was claimed induced the exercise of the power. To that contention Chief Justice White said: "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial [power] may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

The cases cited by both appellants and respondents, with one exception are not in point, and for that reason we have no occasion to discuss them. The one exception, which is here pertinent, is a decision of our supreme court in Banks v. Civil Service Commission, 10 Cal.2d 435, 74 P.2d 741, 744, from which we quote as follows: "Plaintiffs complain that there are some fifty-eight other jailers serving the city and county of San Francisco, all of whom receive a salary of $197 per month, and only the four plaintiffs are limited to a salary of $170 per month. Apparently this is an inequality of which the plaintiffs may well complain, but the power to fix salaries of persons holding positions like or similar to those held by plaintiffs has been lodged by the charter in the Board of Supervisors. Plaintiffs' remedy lies not with the courts but with the authority upon whom the charter has imposed the duty of fixing the salaries of its officers."

The demurrer was rightly sustained and the judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

RAVIZZA v. BUDD & QUINN, Inc.

Sac. 5488.

Supreme Court of California.

Jan. 13, 1942.

Rehearing Denied Feb. 11, 1942.

1. Sales ⇐477(4)

The terms of a specific conditional sales contract are of vital importance in determining applicability of doctrine that certain conduct of conditional seller will constitute an irrevocable election by him to pursue his remedy for purchase price to exclusion of his right to repossession, and that such election results in the passage of the retained title to the buyer.

2. Sales ⇐467

The rights and liabilities of parties to a conditional sales contract are controlled by the terms of the particular contract.

3. Sales ⇐477(4)

Where conditional sales contract gave seller certain options in case of buyer's default and provided that neither the institution of a suit against buyer nor the procurement of judgment should operate as a transfer of title to buyer, the latter provision precluded conditional seller, who had subsequently received the property from buyer as a trade-in on new equipment, from claiming that one to whom he had assigned the conditional sales contract could not bring action in conversion against conditional seller because assignee was lacking title or property right by reason of his having commenced an action for and obtained a judgment against buyer for purchase price.

4. Sales ⇐467

Effect must be given to all of the terms of a conditional sales contract.

5. Sales ⇐477(4)

The use of the disjunctive "or", in provision in a conditional sales contract stating the seller's remedies, did not necessarily imply that seller was limited to the exercise of only one of those remedies, especially in view of another specific provision in contract to effect that institution of a suit or the procurement of judgment should not operate to transfer the title to the buyer.

See Words and Phrases, Permanent Edition, for all other definitions of "Or".

6. Sales ⇐469, 477(4)

A seller under conditional sales contract is not entitled to a double recovery or more than that to which he is entitled under his contract, and if he is paid in full or obtains a judgment against buyer for purchase price which is satisfied, then the contract having been completely performed by the buyer, title passes to buyer.

7. Sales ⇐477(4)

Where assignee of conditional sales contract brought action against buyer for purchase price and recovered a judgment which was not satisfied, and subsequently brought an action against seller for conversion of subject of the sale, which buyer had traded in on new equipment, seller could not rely upon an "estoppel" or claim of "waiver" of contract provision that institution of a suit for purchase price should not operate to transfer title to buyer, where assignee was not aware of transfer of property to seller when action for purchase price was brought, and, on learning of the transfer, it was agreed that procuring of judgment was not an election.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

8. Sales ⇐477(4)

Fact that assignee of a conditional seller, prior to commencement of an action to recover purchase price, made repeated demands upon buyer for the purchase price but did not demand a return of the property, did not constitute a "waiver" of provision in contract that neither the institution of a suit against buyer nor the procurement of a judgment should operate as a transfer of title to buyer, nor did it "estop" assignee from relying on the contract provision as against conditional seller, to whom property had been transferred by buyer as a trade-in on new equipment.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Sales ⇐477(4)

An assignment of purchase-money notes for collection made by an assignee of a conditional sales contract was not a "waiver" of the reserved title, so as to preclude an action by assignee against original seller, to whom subject of sale had been transferred by buyer as a trade-in on new equipment, for conversion of the subject of sale, especially where contract specified that an assignment of the notes or contract should not transfer title to buyer.

In Bank.

Appeal from Superior Court, Madera County; James D. Garibaldi, Judge.

Action by Fred Ravizza against Budd & Quinn, Inc., for damages for conversion. From a judgment for defendant, the plaintiff appeals.

Reversed.

For prior opinion, see 111 P.2d 720.

Nathan G. Gray, of Berkeley, for appellant.

Adams & Griswold, Claude H. Adams, and Hugh H. Griswold, all of Merced, for respondent.

CARTER, Justice.

On January 10, 1935, defendant, as seller, and John Mogliotti, as buyer, entered into a conditional sale contract for the sale of a tractor and disc. The purchase price was payable in installments, which were evidenced by promissory notes; the buyer also promised to pay the installments specified in the contract, and it was agreed therein that the acceptance of the notes did not constitute payment of the purchase price. The defendant was to retain title until the payments were made in full. There was a provision against transfer of the contract or the property by the buyer. The defendant's rights, in event of the buyer's default, were set forth as follows:

"First: It (defendant) may without notice elect to treat the entire remaining balance of the purchase price and interest, evidenced by said promissory notes due and payable immediately and sue therefor; or,

"Second: It may without demand or performance or notice, retake possession of said property and may, at public or private sale, with or without notice, with or without having the property at the place of sale, and upon such terms and in such manner as it may determine, sell the said property (seller being permitted to bid at any public sale) and after deducting all expenses (including reasonable attorney's fees) incurred, therein credit the net proceeds of the sale to the unpaid balance due hereunder; any surplus shall be paid to buyer; and buyer agrees to pay to seller any deficiency remaining under this contract or under said promissory notes after such resale is completed and the proceeds applied as herein provided; or

"Third: It may take possession of said property wherever and whenever found, and with or without notice or demand, may elect to treat buyer in default, and in such event, all of the rights, titles and equities of buyer in said property shall immediately cease and determine, and seller shall be released from all obligations to transfer or deliver said property to the buyer, and all sums of money theretofore paid, and all sums then due and unpaid by the buyer to seller hereunder or under said promissory notes shall remain the property of seller and shall be considered compensation for the use, wear and tear and depreciation of said property, and buyer agrees forthwith to pay to seller all of said payments which are then due and unpaid; or

"Fourth: It may avail itself of any of the remedies for the enforcement of a seller's rights under an agreement such as this as provided by the laws of the State of California."

The last installment fell due on December 15, 1936. The amount unpaid on February 11, 1936, including interest was $1,240.87, at which time defendant for a consideration of $1,240.87, assigned to plaintiff the contract and notes and all its right, title and interest in and to the property, the subject of the contract. Plaintiff made several unsuccessful efforts to obtain payment from the buyer, but never demanded or attempted to repossess the property. On December 13, 1939, plaintiff commenced an action on the notes against the buyer through one Abel, an assignee for collection, to recover the purchase price. In that action he had a writ of attachment levied on a tractor which he thought was the subject of the contract, but which he ascertained from a third party claim filed by defendant, was not the tractor covered by the contract, but was a tractor which defendant had sold to the buyer subsequent to the execution and assignment of the conditional sale contract here involved. He then also discovered for the first time that in February of 1939, the buyer had transferred the property, the subject of the contract, to defendant who took it at a value of $575 as a trade-in on new equipment, and defendant then sold it to a third party. Plaintiff's assignee recovered judgment against the buyer in the above-mentioned action on June 18, 1940; a stipulation was filed in that action in which plaintiff agreed that the amount of any judgment obtained against defendant in

this action would be credited against any judgment obtained against the buyer. The instant action was commenced on March 4, 1940, to recover damages against defendant in the sum of $575 for the conversion of the property which was the subject of the contract. Although the foregoing facts are undisputed, the trial court rendered judgment for defendant, apparently on the theory as evinced by its finding that "plaintiff did, prior to the bringing of this action, exercise one of its (his) options which it (he) was entitled to exercise under the terms of said contract, and did * * * irrevocably elect to enforce payment of the purchase money * * * and did * * * irrevocably waive its (his) option to repossess itself (himself) of such personal property."

Respondent relies upon its contention that a seller, under a conditional sale contract, upon default of the buyer, may by his conduct with respect to the payment of the purchase price, elect to pursue one of two inconsistent remedies, that is, the recovery of the purchase price rather than the recovery of the possession of the property, which debars him from recovering the property or maintaining any action the basis of which is a special or general proprietary interest in the property; and that plaintiff's action for conversion is one in which recovery is dependent on a special or general proprietary interest in the property for the conversion of which damages are sought.

[1-5] It has been often stated by the courts of this state that in the ordinary conditional sale contract under which the seller has the right to repossess the property or to recover the purchase price therefor, upon the buyer's default certain conduct on the former's part will constitute an irrevocable election by him to pursue his remedy for the purchase price to the exclusion of his right to repossession, and that such election results in the passage of the seller's retained title to the buyer. Smith v. Miller, 5 Cal.App.2d 564, 43 P.2d 347; Martin Music Co. v. Robb, 115 Cal. App. 414, 1 P.2d 1000; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 P. 435; Silverstin v. Kohler & Chase, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177; Parke, etc., Co. v. White River Lumber Co., 101 Cal. 37, 35 P. 442; Elsom v. Moore, 11 Cal.App. 377, 105 P. 271; George J. Birkel Co. v. Nast, 20 Cal.App. 651, 129 P. 945; Muncy v. Brain, 158 Cal. 300, 110 P. 945. The basis for that doctrine is not clearly expressed in the above cited cases. It appears, however, by implication or direct statement therein that it is founded either on the doctrine of estoppel, or is an application of the principle of waiver, or is based on the theory that the two remedies are wholly inconsistent. Most frequently it is merely announced as a principle of law without any discussion of the reasoning upon which it rests, other than to peremptorily state that conduct, such as an action to recover the purchase price, is inconsistent with a reliance on the retained title, and that conduct in the pursuit of one right, bars the other as being an election of remedies. In most instances, if there is an election, it would be more accurately an election of substantive rights rather than an election of remedies. It may well be that the doctrine has been resorted to as a means of protection to purchasers under conditional sales contracts from instances of harsh and unjust results arising out of transactions for the purchase of property under such contracts. But whatever may be the basis of such doctrine, we are convinced that the terms of the specific conditional sale contract involved in a given case are of vital importance in determining whether the doctrine is properly invoked in such case. In other words, the rights and liabilities of the parties to a conditional sale contract are controlled by the terms of the particular contract involved. Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900. In the instant case, as appears from the above quoted excerpts from the conditional sale contract, it is agreed that title shall not pass from the seller to the buyer until the full purchase price is paid, and the seller in the interim reserves absolute title. The contract stipulates that at the seller's option, the buyer shall be deemed to be in default if he fails to perform any of the terms of the contract as therein specified, the property is levied upon or seized, the bankruptcy or insolvency of the buyer, or if the seller deems the property or its interest therein insecure. The seller may in event of default, at its option, treat the entire remaining balance of the purchase price payable immediately and sue therefor, or retake possession of the property and may sell the same, crediting the proceeds to the unpaid purchase price, and giving the balance, if any, to the buyer, and recover any deficiency from the buyer, or take possession of the

property and all rights of the buyer shall cease and the buyer shall pay all sums then unpaid or it may pursue any of the remedies available under the laws of this state. It would appear that under those provisions standing alone and the authorities heretofore cited, the so-called doctrine of election would operate to pass title to the buyer if the seller commenced an action to recover the purchase price. However, there is a provision in the instant contract by which such an election is expressly negatived. The clause reads: "Neither the loss of, injury to, or destruction of, said property, nor renewals or extensions of this contract, or of any of said promissory notes, *nor institution of suit or procurement of judgment thereon,* nor the hypothecation, assignment or discounting of this contract together with any of said promissory notes, *shall operate* as payment, or *as a transfer of title to buyer* or in any manner to release him from any obligation hereunder." (Emphasis added.) Under the circumstances of this case, that provision is controlling and defendant cannot successfully claim a lack of title or property right in plaintiff by reason of the doctrine of election which might ordinarily arise from the plaintiff having commenced action for and obtained judgment against the buyer for the purchase price. Effect must be given to all of the terms of the contract. See Bolinger v. National Cash Register Co., 52 Ohio App. 217, 3 N.E.2d 640; Murray v. McDonald, 203 Iowa 418, 212 N.W. 711, 56 A.L.R. 233. Defendant asserts that the last quoted provision is modified by another provision in the contract that the seller may pursue *any* of the remedies set forth, with the disjunctive "or" appearing between the statement of the various remedies available. That is manifestly untenable. That provision does not necessarily imply that the seller is limited to the exercise of only one of those remedies. Further, even if it might be said that those terms of the contract might possibly be susceptible of such an implied construction standing alone, the contract must be read in its entirety, and the express provision last above quoted to the contrary forestalls any such interpretation. To hold otherwise would have the effect of rendering said last quoted provision meaningless.

[6] It is not our intention to hold that there may not be circumstances under which the seller is estopped to rely upon a conditional sale contract clause similar to the one in the instant case or that under which he is deemed to have waived it. The estoppel would be equitable, or estoppel in fact, with the necessity of the presence of the essential elements thereof. The waiver would be of the nature common in the law and based on fact rather than a presumed basis for a certain result. Also it is obvious that a seller is not entitled to a double recovery or more than that to which he is entitled under his contract; if he is paid in full or obtains a judgment for the purchase price which is satisfied, then the contract having been completely performed by the buyer, title passes to the latter. There is no element of double recovery in this case as the plaintiff's judgment against the buyer is unsatisfied. Further he has agreed that any amount he may recover from defendant may be credited on his judgment against the buyer.

[7] Defendant cannot rely upon estoppel or claim a waiver of the last above quoted clause in the contract here involved for the reason that at the time plaintiff's assignee commenced the action against the buyer to recover the purchase price, plaintiff did not know that the latter had transferred the property to defendant. He supposed the buyer still had possession of the property. It is true that before obtaining judgment in that action he had such knowledge, but by the terms of the contract, it was agreed that procuring a judgment was not an election and did not pass title to the buyer. Assuming, but not deciding, that the attachment in such an action would ordinarily constitute a waiver, it was not such under the circumstances of this case, inasmuch as the property, the subject of contract here involved, was not attached in that action. Although plaintiff thought he was attaching that property, the fact remains that he did not do so. He did not do any act which was in fact contrary to his right to rely on his reserved title, or which was to the detriment or disadvantage of defendant.

[8] Defendant directs our attention to the circumstance that plaintiff, prior to the commencement of his action to recover the purchase price, made repeated demands upon the buyer for the purchase price, but did not demand a return of the property. That could not constitute an

estoppel or waiver as to defendant. Furthermore, there are no facts in this case upon which an estoppel may be predicated in favor of defendant. It must be remembered that defendant was the original seller in the conditional sale contract which it assigned to plaintiff. It therefore knew all of its terms and that the title to the property was retained first by it, and then by the plaintiff by virtue of the assignment, and that the commencement of the action and obtaining judgment would not pass title. Plaintiff did not make any representations to defendant, or assume or cause to exist any misleading appearances upon which defendant justifiably relied to its injury. There could be no waiver as to any rights as against defendant when plaintiff had no dealings with it after the assignment of the conditional sale contract and was ignorant of the transfer of the property by the buyer to defendant. In connection with the above proposition asserted by defendant, it cites the case of Smith v. Miller, supra, in support of its contention that a series of circumstances, such as delay in taking action after default, coupled with a continuous demand for the purchase price without mentioning the return of the property, would constitute an election. It is to be noted that in that case the buyer's offer to return the property had been rejected by the seller; that factor is not present in this case. In any event the court in the Smith case was not considering the effect of the special clause with respect to election which exists in this case. When the election is specifically negatived, even if suit is brought and judgment obtained, certainly mere delay in enforcing his rights together with demands for the purchase price, does not create a waiver of that specific provision.

[9] It cannot be said that the notes which were given as evidence of the installment payments under the conditional sale contract were given as payment, and therefore title passed to the buyer. As above mentioned, the contract specifically provided that the notes were not payment. Nor did the assignment of the notes by defendant to plaintiff constitute a waiver of the reservation of title. The assignment by its terms included not only the notes and contract, but also the reserved title. The assignment by plaintiff to Abel was merely for collection by suit thereon, it not being intended that he acquire any beneficial interest therein. Such a transfer certainly would not constitute a waiver of the reserved title under the circumstances in this case. Furthermore, it is to be noted that the heretofore quoted provision in the contract negativing a waiver or election, specifies that an assignment of the notes or contract shall not transfer title to the buyer.

The title being at all times retained by the plaintiff, it necessarily follows that defendant's conduct in selling the property constituted a conversion thereof for which it is liable.

The judgment is reversed.

GIBSON , C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.



19 Cal.2d 254

HATCH v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al. (two cases).

SCHMIDT v. SAME (two cases).

L. A. 17529–17532.

Supreme Court of California.

Jan. 12, 1942.

Petitions for Rehearing and Modification Denied Feb. 11, 1942.

1. Mortgages ⇐375, 561

Under statutes prescribing procedure for entry of personal judgment for deficiency after judicial foreclosure of trust deed or mortgage or exercise of power of sale in such instrument, a party lending money on security of specific parcel of realty must secure fair market value thereof at private or judicial sale, if he desires to realize on security in case of default, and, if he fails to do so, his recovery in personal action against borrower will be measured accordingly. Code Civ.Proc. §§ 580a, 725a, 726.

2. Mortgages ⇐337
Pledges ⇐56(1)

A creditor, making no attempt to secure personal judgment against debtor for unpaid balance of debt after resorting to principal security therefor by exercising power of sale in trust deed of realty, but merely seeking to realize on additional security held under pledge agreement and another trust deed, need not bring action under statute for per-

sonal deficiency judgment against debtor. Code Civ.Proc. § 580a.

3. Mortgages ⇐375

A creditor, seeking personal judgment for balance due on obligation after unsuccessful resort to security therefor, must bring action against debtor for deficiency judgment. Code Civ.Proc. § 580a.

4. Mortgages ⇐337
Pledges ⇐56(1)

The statute prescribing procedure for recovery of personal deficiency judgment against debtor after creditor's exercise of power of sale in trust deed or mortgage securing debt does not require creditor to obtain judicial determination of unpaid balance remaining after such sale before resorting to additional security held by him, but is concerned only with actions to recover deficiency judgments after exhaustion of security. Code Civ.Proc. § 580a.

5. Mortgages ⇐337
Pledges ⇐56(1)

A bank's sales of personalty and realty under pledge agreement and trust deed, given bank by individuals as additional security for estate's indebtedness principally secured by prior trust deed, were not invalid because of bank's failure to sue for deficiency judgment after resort to principal security. Code Civ.Proc. § 580a.

In Bank.

Appeals from Superior Court, Los Angeles County; Raymond McIntosh, Judge Assigned.

Actions by Stella Schmidt Hatch, by Ruben S. Schmidt, by Harriet Schmidt Sparks, after whose death Stella Schmidt Hatch, as administratrix of decedent's estate, was substituted as party plaintiff, and by Ruben S. Schmidt, as surviving executor of the estate of Hulda F. Schmidt, deceased, respectively, against the Security-First National Bank of Los Angeles and another, to quiet title to certain real and personal property. Judgments for plaintiffs, and named defendant appeals.

Reversed.

George E. Farrand, Edward E. Tuttle, and Edward W. Tuttle, all of Los Angeles, for appellant.

George R. Schmidt, of Los Angeles, for respondents.

PER CURIAM.

Plaintiffs brought these actions, which have been consolidated for the purposes of this appeal, in order to quiet title to certain real and personal property. The actions were begun by Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks, the children of Hulda Franciska Schmidt who died testate in the city of Los Angeles on December 14, 1930. At the time of her death, Hulda Franciska Schmidt was indebted to the Security-First National Bank of Los Angeles in the sum of $52,000. This debt was evidenced by her unsecured note and that of her son, Ruben S. Schmidt.

Upon the death of Hulda F. Schmidt, each of these children was entitled to an undivided one-fifth of the estate. Ruben S. Schmidt and Harriet Schmidt Sparks became co-executors under the will. Between January 22, 1931 and June 29, 1932, the defendant bank made additional loans to the three children individually, for the purpose of paying off the accumulated debts of the estate. These loans were represented by the individual, unsecured notes of Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks, and the unpaid balance thereon amounted to $203,511.15 on June 29, 1932. On that date, pursuant to an order of the probate court, Ruben S. Schmidt and Harriet Schmidt Sparks, in their capacities as executor and executrix of the estate, executed an unsecured note in the sum of $278,000 as evidence of the sums advanced, and at the same time Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks, individually, executed general continuing guaranties in the sum of $300,000 as further security for the indebtedness of the estate. As part of the same transaction the individual notes previously executed by the three children were stamped "Renewed" and were returned by the bank to the makers. By June 16, 1933, the loans to the estate had been increased to $342,000 and on that date the executors, as such, signed a note for this amount and gave a deed of trust covering the real property of the estate. On April 15, 1935, the note was renewed in the sum of $380,000, a new deed of trust was entered into by the executors, and the three children individually executed new general continuing guaranties in the sum of $450,000.

On February 11, 1937, the bank gave notice of default on the executors' note and

of an election to sell under the trust deed of April 15, 1935. Thereafter separate suits were commenced against Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks on their individual guaranties, and in the course of the actions certain real property belonging to each of them individually was attached. Negotiations were entered into for the purpose of inducing the bank to refrain from selling the property of the estate to satisfy its debt and, as a result, the agreements which form the basis of the present appeal were entered into on October 9, 1937. A written agreement was entered into with Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks individually, by the terms of which the bank released them from further personal liability upon their general guaranties and agreed to dismiss the attachment suits previously instituted. The children, however, agreed to execute a deed of trust covering parcels of real property, owned by them individually, as additional security for the existing indebtedness of the estate and for any further loans. On the same day, Ruben S. Schmidt and Harriet Schmidt Sparks, as executors of the estate of Hulda F. Schmidt and with the authorization of the probate court, entered into a written agreement with the bank by which they pledged certain personal property owned by the estate as additional security. As a result of these contracts, the bank agreed to defer sale proceedings under the executors' deed of trust until November 15, 1938.

On December 8, 1938, a trustee's sale was held at which the real property of the estate was sold at public auction for the sum of $385,790. This was applied to the amount then due, $514,004.22, leaving an unpaid balance of $128,214.22. On February 28, 1939, a pledge sale was held at which the personal property of the estate pledged by the executors was sold for $9,000, of which the sum of $7,005.56 was applied to the principal of the debt and the remainder to the interest. On March 28, 1939, a trustee's sale was held at which the real property covered by the individuals' deed of trust was sold for the sum of $91,760.81. The proceeds of this sale were used to satisfy the remaining debt, consisting of the principal sum of $121,208.66, plus interest, advances and charges of the trustee, which brought the amount of the debt claimed to $137,730.59. After application of the proceeds of the sale of March 28, 1939, to the debt, the sum of $45,969.78 remained unpaid, for which the bank claimed no further security or right of action.

On March 27, 1939, these quiet title actions were filed by Stella Schmidt Hatch, Ruben S. Schmidt and Harriet Schmidt Sparks against the Security-First National Bank of Los Angeles, the beneficiary under the individuals' deed of trust, and the Los Angeles Trust & Safe Deposit Company, the trustee. In these actions, filed the day before the trustee's sale covering the same property, plaintiffs sought to establish their title to the real property previously owned by them as individuals. Harriet Schmidt Sparks died on May 11, 1939, after the institution of the action in L.A. 17,531, and her sister, Stella Schmidt Hatch, has been substituted as her administratrix in that action. On May 23, 1939, Ruben S. Schmidt, as the surviving executor of the estate of Hulda F. Schmidt, filed the fourth quiet title action, L.A. 17,532, against the Security-First National Bank of Los Angeles, seeking to establish the interest of the estate in the personal property which had been previously sold at the pledge sale held on February 28, 1939. These four cases were tried together in the court below, and by stipulation there is but a single set of consolidated findings although the court entered separate judgments. In each case judgment was entered for the plaintiff, and the defendant bank appeals from the judgments thus rendered.

The trial court concluded that the pledge sale on February 28, 1939, and the sale under the individuals' deed of trust, held on March 28, 1939, were invalid. In each case it was determined that title to the property involved remained in the original owner thereof. This holding was based solely upon the finding that, after the trustee's sale of the real property belonging to the estate of Hulda F. Schmidt under the trust deed of April 15, 1935, neither of the defendants took any steps pursuant to Code of Civil Procedure, sections 580a, 725a and 726, for the purpose of determining the existence of an actual deficiency. Upon this appeal defendants urge that these sections of the Code of Civil Procedure have no application to a situation where, as in the present case, no attempt is made by the creditor to secure a personal judgment against a debtor for a deficiency remaining after sale under a deed of trust. Since

there is no other claim of invalidity, it is contended that the sale held in each case is valid and that the judgments for the plaintiffs should be reversed.

[1] Code of Civil Procedure, sections 725a and 726, provide a specific procedure for the entry of a personal judgment for the deficiency remaining after a creditor has brought an action for judicial foreclosure under a deed of trust or mortgage. Since there was no judicial foreclosure in the present cases, these provisions of the statute have no direct application. Section 580a of the Code of Civil Procedure, however, provides a similar procedure where a personal judgment is sought after the creditor has exercised the power of sale granted in a deed of trust or mortgage. It reads: "Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. * * * Before rendering any judgment the court shall find the fair market value of the real property, or interest therein sold, at the time of sale. The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale with interest thereon from the date of the sale; provided, however, that in no event shall the amount of said judgment * * * exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured by said deed of trust or mortgage. Any such action must be brought within three months of the time of sale under such deed of trust or mortgage. * * *" This section also provides for the appointment of appraisers by the court for the purpose of determining the fair market value of the real property sold under the deed of trust or mortgage. The purpose underlying this legislation was discussed in Kirkpatrick v. Stelling, 36 Cal. App.2d 658, at page 665, 98 P.2d 566, at page 570, in which the court said: "When a lending agency determines to lend money on the security of a specific parcel of real property, it is told by the statutes of California that in case of default, before it can secure a personal judgment against the borrower, it must first exhaust its security. Sec. 726, Code Civ.Proc. This it may do, in either of two ways—it may foreclose (and this is so whether the security transaction takes the form of a mortgage or deed of trust—sections 725a, 726, Code Civ. Proc.) or it may sell under the power of sale in the mortgage or deed of trust. * * * [These provisions (secs. 580a, 725a and 726)] tell the lending agency by statute at the time that it makes the loan, that its primary security is a specific parcel of land * * * and that if, in the case of default, it desires to realize on the security * * * it must secure at private or judicial sale the fair market value of the security, and if it does not its recovery in a personal action will be measured accordingly." The evil which led to the enactment of this legislation became pronounced during the recent period of economic depression when creditors were frequently able to bid in the debtor's real property at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt. See, 22 Cal.L.Rev. 170, 181.

[2, 3] Plaintiffs urge that where a creditor holds a mortgage or deed of trust as security for an obligation and resorts to that security either by judicial foreclosure or by power of sale, he may take no further steps to collect his debt unless he proceeds within three months, under sections 580a, 725a or 726, to establish the existence of an actual deficiency in the amount realized from the original security. Thus, in the present case it is said that the bank, which had resorted to the security furnished by the executors' deed of trust, should have proceeded under section 580a before attempting to realize upon the additional security held by it under the pledge agreement and the individuals' deed of trust. Unless the creditor proceeds under section 580a to establish the existence of an unpaid balance after resorting to his security, plaintiffs contend that it will be presumed that he has realized enough to satisfy the debt in full. Acting upon this theory, the trial court concluded that the indebtedness of the estate to the defendant bank was fully paid and discharged, that

the sales held subsequently were invalid, and that title to the property involved still remains in the plaintiffs. Defendant concedes that, after resort to the principal security held by it, it would be necessary to bring an action under section 580a within three months in order to obtain a personal deficiency judgment against the debtor for any unpaid balance. But it is argued, that statute imposes no such requirement where the creditor merely seeks to realize upon additional security held by him and makes no attempt to secure a personal judgment for the unpaid balance.

The interpretation placed upon the statute by the defendant is clearly the correct one. The limited scope of section 580a is indicated by the language of that section. Thus, it provides: *"Whenever a money judgment is sought for the balance due* upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property * * * was given as security, following the exercise of the power of sale * * * the *plaintiff shall set forth in his complaint.* * * * *Any such action* must be brought within three months * * *." (Italics added.) Cases which have discussed this legislation have referred to it solely as a limitation upon the creditor's right to obtain a personal judgment for a deficiency against his debtor. Bank of America, etc., Ass'n v. Hunter, 8 Cal.2d 592, 598, 67 P.2d 99; Miller v. Hart, 11 Cal.2d 739, 743, 81 P.2d 923; cf. Rust v. Hill, 17 Cal.2d 517, 110 P.2d 657; Bennett v. Superior Court, 5 Cal.App.2d 13, 42 P.2d 80; California Trust Co. v. Smead Inv. Co., 6 Cal.App.2d 432, 44 P.2d 624; Hillen v. Soule, 7 Cal.App.2d 45, 45 P.2d 349; Bank of America, etc., Ass'n v. Hirsch, 13 Cal.App.2d 681, 57 P.2d 521; Reynolds v. Jensen, 14 Cal.App.2d 558, 58 P.2d 687; Birkhofer v. Krumm, 27 Cal. App.2d 513, 533, 81 P.2d 609; Drapeau v. Smith, 34 Cal.App.2d 84, 93 P.2d 157; Bank of America, etc., Ass'n v. Gillett, 36 Cal. App.2d 453, 97 P.2d 875; Kirkpatrick v. Stelling, supra; Read v. Mills Bldg. Co., 39 Cal.App.2d 140, 102 P.2d 542; cf. Hibernia S. & L. Soc. v. Lauffer, 41 Cal.App.2d 725, 732, 107 P.2d 494. In Bank of America, etc., Ass'n v. Hunter, supra, 8 Cal.2d at page 598, 67 P.2d at page 102, the court said: "A reading of section 580a supra, as added in 1933, discloses that its provisions have to do solely with *actions for recovery of deficiency judgments on the principal obligation after sale under trust deed or mortgage,* as distinguished from a guarantor's obligation * * *." (Italics added.) Section 580a refers to an action to secure a "money judgment * * * for the balance due upon an obligation." The action thus characterized has long been described in this state as an action to obtain a deficiency judgment. Such an action is required where the creditor seeks a personal judgment for the unpaid balance due upon an obligation after unsuccessful resort to the security. Sacramento Bank v. Copsey, 133 Cal. 663, 66 P. 8, 205, 85 Am. St. Rep. 242; Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745; Blythe v. Lamberth, 39 Cal. App. 583, 179 P. 533; 25 Cal.Jur. 104. The provisions of section 580a clearly refer to this situation.

[4] Plaintiffs argue that section 580a should be interpreted so as to require the creditor to obtain a judicial determination of the unpaid balance remaining after sale under a deed of trust or mortgage before resorting to any additional security which he may hold. The language of section 580a does not indicate that the legislature had any intention of thus protecting property which is only secondarily liable as security for the principal obligation. By its express terms, the statute is concerned only with actions to recover deficiency judgments after the security is exhausted and plaintiffs have cited no convincing authority in support of their position. They rely upon In re Naegely's Estate, 31 Cal.App.2d 470, 88 P.2d 715. In that case the court held that failure to commence an action to secure a deficiency judgment within three months under section 580a operated to bar recovery upon the unpaid balance. The right to such a recovery was said to be dependent upon compliance with section 580a and the court said (31Cal.App.2d at page 475, 88 P.2d at page 717), "This is equally true of the rights of the holder of an obligation secured by a deed of trust *against the estate of a deceased maker* as it is of the rights of the holder of such an obligation *against a living maker thereof.*" (Italics added.) The case thus holds that the requirements of section 580a must be observed in attempting to recover a deficiency judgment, whether against the debtor himself or against his estate, but it does not support the proposition that steps must be taken under section 580a before the creditor is entitled to resort to additional security secondarily liable for the principal obligation.

Similarly, cases from other jurisdictions upon which plaintiffs rely were decided under statutes fundamentally different from Code of Civil Procedure, section 580a. The New York statute referred to provides specifically that, in the event of failure on the part of the mortgagee to move for a deficiency judgment thereunder, "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt * * *." Civil Practice Act, sec. 1083-a. Failure to request a deficiency judgment at the proper time, in other words, is tantamount to conceding that the mortgage debt has been paid in full by the proceeds from the foreclosure sale. See, Lang v. New York Joint Stock, etc., Bank, 155 Misc. 779, 280 N.Y.S. 766; Bedcro Realty Corp. v. Title G. & T. Co., 175 Misc. 1082, 27 N.Y.S.2d 169; Waitt Operating Co., Inc., v. New York Life Ins. Co., —— Misc. ——, 29 N.Y.S.2d 705, 708. Agreements for additional security, therefore, have been construed in the light of this statutory language, and it has been held that the parties intended to give the mortgagee no right to realize upon additional security in a situation where he has, in effect, conceded that the mortgage debt is paid in full. In re Williams' Will, 258 App.Div. 592, 17 N.Y.S.2d 335, 336; Bedcro Realty Corp. v. Title G. & T. Co., supra. The statute relied upon in the present cases, however, does not provide that failure to sue thereunder for a deficiency judgment is to be deemed a concession that the principal obligation has been fully satisfied. In the absence of such a provision, the cases relied upon are not persuasive authority in interpreting Code of Civil Procedure, section 580a.

[5] Under the facts of the present cases, since the defendant has at no time attempted to secure a deficiency judgment against anyone, it is clear that section 580a is not applicable. It imposes no requirement which would invalidate the pledge sale or the sale under the individuals' deed of trust. It has already been pointed out that section 725a and 726 have no application to the facts of this case (supra). Since the judgments in these cases are based solely upon the finding that defendant failed to proceed under these sections of the Code of Civil Procedure, it follows that each of the judgments appealed from is erroneous.

The judgments are, and each of them is, hereby reversed.

19 Cal.2d 263

SMITH v. KERN COUNTY MEDICAL ASS'N et al.

L. A. 17336.

Supreme Court of California.

Jan. 12, 1942.

1. Associations ⇐10

In any proper case involving expulsion of a member from a voluntary unincorporated association, the only function which courts may perform is to determine whether association has acted within its powers in good faith, in accordance with its laws and the law of the land.

2. Mandamus ⇐168(4)

In physician's mandamus proceedings to compel reinstatement of physician to membership in an unincorporated medical association, evidence supported findings that amendments to association's constitution and by-laws respecting vote of members on questions of expulsion were regularly adopted and that physician had consented to be governed thereby, and that expulsion proceedings against physician were regularly taken.

3. Physicians and surgeons ⇐9

A member of an unincorporated medical association could not complain that hearings on question of expulsion of member from association were conducted in member's absence where absence was voluntary and member had due notice of hearings and opportunity to attend them.

4. Mandamus ⇐168(4)

In physician's mandamus proceedings to compel reinstatement of physician to membership in an unincorporated medical association, record did not sustain physician's contention that required two-thirds majority of membership did not vote for expulsion of physician from association.

5. Physicians and surgeons ⇐9

In absence of a contrary showing by physician, the minutes of an unincorporated medical association respecting vote of members of association on question of expelling physician therefrom constituted sufficient proof of regularity in proceedings respecting expulsion.

6. Physicians and surgeons ⇐9

The termination by an unincorporated medical association, without disciplinary action, of proceedings against a member for

member's failure to resign from a hospital staff did not preclude association from subsequently charging member with violating principles of ethics adopted by association by failure to resign from staff, where practices which formed basis of charge were continuing.

7. Physicians and surgeons ⇐9

In physician's mandamus proceedings to compel reinstatement of physician to membership in an unincorporated medical association, courts could not declare that association could not expel a member who persisted in practices which, by rules of association and written agreement of members, were unethical, where showing was sufficient to support finding that charge upon which physician was expelled from association was one which constituted a violation of such rules.

8. Physicians and surgeons ⇐9

An unincorporated medical association was not deprived of its right, if any, to expel a physician from membership in association by fact that a remedy might exist by contempt proceedings against physician for violation of an injunctive order.

9. Physicians and surgeons ⇐9

The right of expulsion from membership in an unincorporated association may be based upon two grounds, the first being a violation of such of the established rules of association as have been subscribed or assented to by members, and as provide expulsion for such violation, and the second being for such conduct as clearly violates fundamental objects of association, and if persisted in and allowed would thwart those objects or bring association into disrepute.

10. Mandamus ⇐172

Any matter of policy involved in the adoption by an unincorporated medical association of by-laws, a code of ethics, and resolution in conformity therewith was a question for membership of association and was not open in mandamus proceedings to compel reinstatement of an expelled member, so long as it was not shown that such policy was in violation of law.

11. Mandamus ⇐125

Where physician, as a member of an unincorporated medical association, had agreed to be bound by laws adopted by membership of association, and membership had adopted a by-law providing that failure of any member to resign from the staff of a hospital should be construed as a violation of ethics, and physician failed to resign from such staff, and disciplinary proceedings were brought against him in good faith by association and resulted in expulsion of physician from membership in association, physician was not entitled to relief in mandamus proceedings against association to obtain his reinstatement therein.

12. Physicians and surgeons ⇐9

The contractual relationship between an unincorporated medical association and one of its members was that which existed by virtue of rules of association, and so long as association acted toward member in accordance with those rules there was no violation of contract by association.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Mandamus proceedings by Joe K. Smith, M. D., against the Kern County Medical Association (an Unincorporated Association), and others to obtain petitioner's reinstatement to membership in the Kern County Medical Society, from which petitioner had been expelled. From a judgment dismissing the proceedings, petitioner appeals.

Affirmed.

For prior opinion, see 112 P.2d 268.

Borton, Petrini, Conron & Borton, of Bakersfield, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield, and Hartley F. Peart and Howard Hassard, both of San Francisco, for respondents.

SHENK, Justice.

The petitioner, a physician, sought the writ of mandate for the purpose of obtaining his reinstatement to membership in the Kern County Medical Society, an unincorporated association, from which, on November 15, 1935, his expulsion was ordered by the society. The petition for the writ was denied by the superior court and the petitioner has appealed from the judgment dismissing the proceeding.

[1] In any proper case involving the expulsion of a member from a voluntary unincorporated association, the only function which the courts may perform is to determine whether the association has acted within its powers in good faith, in accordance with its laws and the law of the land. Levy v. Magnolia Lodge, I. O. O. F., 110

Cal. 297, 42 P. 887; Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 111 P.2d 948; 7 Corpus Juris Secundum, Associations, §§ 25, 26, pp. 64, 68.

The undisputed facts are as follows:

The Kern County Medical Society is an unincorporated association of physicians and surgeons formed to develop the science of medicine, promote the betterment of the medical profession, and preserve and protect the public health. Membership is confined to physicians and surgeons holding a degree and duly licensed to practice in the state and in the county of Kern. The association is governed by a constitution and by-laws, and membership of qualified applicants is acquired by signing the constitution and by-laws of the society. The society federates with the medical associations of other counties in the state to form the California Medical Association, which in turn is a member of the American Medical Association. Membership in the county organization entitles the member to the privileges of access to the medical data, information and literature of the respective federations. Members do not acquire any severable property interest, nor do any beneficial rights accrue except as stated.

The petitioner had been a member of the respondent society for a period of seventeen years prior to his expulsion. At the time of and prior to his expulsion he had been serving as a physician superintendent on the staff of the Kern General Hospital operated by the county of Kern through its board of supervisors.

About April, 1933, certain physicians, members of the Kern County Medical Society, as taxpayers of Kern County, instituted an action in the superior court in that county seeking to enjoin the county supervisors from accepting at the county hospital patients who could afford to pay in whole or in part for care and medical service. It is admitted that it had been the practice and policy of the board of supervisors in the conduct of the hospital to treat such patients at the expense of the county. It appears to be conceded that there were and are sufficient private hospitals in Kern County to care for all patients requiring hospital treatment who could afford to pay therefor. The decree of the court granting injunctive relief in that action, entered on December 3, 1933, was modified on appeal so that with certain exceptions indigent persons only could be admitted to the county hospital for treatment. Goodall v. Brite, 11 Cal.App.2d 540, 54 P.2d 510.

Commencing in the year 1931 and each year to and including the year 1938, the Kern County Medical Society adopted a resolution providing that failure on the part of any member to resign from the staff of the Kern General Hospital "within a reasonable time, while present unsatisfactory conditions exist in said hospital shall be construed as violation of ethics, and shall make such member" liable to disciplinary action in accordance with the constitution and by-laws.

A new constitution and set of by-laws were adopted by the society in 1934 and were signed by the petitioner and the other members of the society. It was therein provided, among other things, that a member who violated any provision of the constitution or by-laws, or the principles of professional conduct, was liable to censure, suspension or expulsion. Charges against a member were required to be in writing and signed, and a copy furnished to the accused. Opportunity was provided for the accuser and accused to be heard before the committee on grievances, which was required to submit its written report and recommendation to the board of directors. A hearing before the board was provided for and if the board duly voted for expulsion the matter was to be referred to the membership in meeting, where a two-thirds vote was necessary to sustain the board's action. Notice of the decision was required to be given to the accused and the action of the board was agreed to be final, subject only to appeal to the council of the California Medical Association, and then to the American Medical Association. Reapplication for membership in the society could be made after the expiration of one year, to be considered in the same manner as a new application.

On September 18, 1935, charges were brought against the petitioner, signed by Dr. N. N. Brown. The accusation charged the petitioner with violation of the principles of ethics adopted by the society and specifically section 2, article VI, chapter III, which read: "It is unprofessional for a physician to dispose of his services under conditions that make it impossible to render adequate service to his patient or which interfere with reasonable competition among the physicians of the community. To do this is detrimental to the

public and to the individual physician, and lowers the dignity of the profession." The accusation also charged that the petitioner had for several years participated in a political policy to monopolize the care, treatment and hospitalization of the sick by the county of Kern at public expense by the unlawful use of the county hospital irrespective of the lawful right of patients to be treated at public expense, with the object and purpose of interfering with reasonable competition among physicians in the community; that as a result of such political policy and practice the county hospital became overcrowded and understaffed so that it became impossible to render adequate service. It was also charged that the petitioner lent his cooperative endeavors in such a way as to create a political issue in the campaign interests of the members of the board of supervisors and contrary to the dignity and honor of the medical profession.

The petitioner filed a denial of the charges. Hearings were had before the committee on grievances and the board of directors, of which the petitioner had due notice, but which he voluntarily did not attend. The action of expulsion by the board was referred to a vote of the members at a meeting held November 15, 1935. The finding of the court was that the expulsion was sustained by a two-thirds vote of the members in attendance, and that all of the proceedings were in strict conformity with the rules of the society.

The petitioner appealed to the California Medical Association and to the American Medical Association, each of which in turn declared the expulsion regular, in accordance with the by-laws, and affirmed the order of expulsion.

In his complaint in the mandamus proceeding the petitioner alleged that the new constitution and by-laws were adopted irregularly and as part of a scheme and plan to control the operation and management of the Kern County Hospital and to prepare a foundation for the expulsion of the petitioner; that the charges against the petitioner were part of said scheme or conspiracy, and did not constitute violations of the principles of ethics or by-laws of the society; that the hearings were had without the taking of any evidence sustaining the charges; that the petitioner was not presented with a written copy of the charges, and that he did not have a fair opportunity to defend himself because of such alleged conspiracy; that the proceedings were contrary to the constitution and by-laws of the society; that the expulsion order if sustained would injure the petitioner in his property rights and in the practice of his profession. The petitioner sets forth the same contentions on the present appeal from the judgment denying him any relief.

The findings of the trial court and the evidence in support thereof are a complete answer to the petitioner's contentions. The court found that the amendments to the constitution and by-laws reducing the vote of the members at a meeting thereof from a three-fourths to a two-thirds majority on questions of expulsion were regularly and duly adopted and that the petitioner expressed his approval of such amendments and consented to be governed thereby by his signature duly and regularly endorsed thereon; and that he agreed to be bound by the principles of ethics adopted by the society. The court also found that the charges against him constituted a violation of the principles of medical ethics and of the laws of the society; that the proceedings against the petitioner were all duly and regularly taken; that neither the resolution adopted by the society nor the expulsion proceedings were part of any unlawful plan or scheme and that the board and the membership acted in good faith; that the petitioner would not be deprived of any property rights; that the only right to which he was entitled as a member of the society was access to reports and medical data which were reserved to the membership as a whole; that the petitioner had exhausted all of his remedies within the medical associations, and that application for reinstatement would be futile.

[2-5] There is sufficient evidence in the record to support the findings of the trial court. The procedure provided by the rules of the society was followed and the petitioner was accorded every opportunity to defend himself. He may not be allowed to complain that hearings, of which he had due notice and opportunity to attend, were conducted in his absence. The requirements of the law are fulfilled when the accused is afforded notice and an opportunity to be heard. Levy v. Magnolia Lodge, I. O. O. F., supra. If the society did not receive evidence from the accused himself, it was not a failure of the law or the rules adopted by the society, but a

failure on the part of the accused when he voluntarily absented himself from hearings of which he had due notice.

There is no merit in the contention that the required two-thirds majority of the membership did not vote for expulsion. The record shows that 22 members so voted and the minutes of the society declare that the members voting for expulsion constituted a two-thirds majority of those in attendance. The petitioner has not shown that a quorum was not present, nor that the qualified members voting for expulsion did not constitute a two-thirds majority. The minutes comprise sufficient proof of regularity in the absence of any contrary showing by the petitioner.

[6-12] Prior to the action of the board above noted, and in 1932 and 1933, written charges were filed against the petitioner for his failure to resign from the Kern County Hospital staff. No disciplinary action was taken at that time. The petitioner contends that the termination of those proceedings without disciplinary action amounted to an acquittal of the charges and precluded the society from again accusing the petitioner in 1935. There is also no merit in this contention. The practices which formed the basis of the charge were continuing, and the accusation was filed upon the failure of the petitioner to resign after the adoption of the 1935 resolution. No question may here be entertained of the propriety of the adoption of the Code of Ethics, the violation of which has been charged. It was not the service on the hospital staff alone which the society ruled to be a breach of ethics, but such violation was expressly deemed to be service on the staff while the conditions persisted which were contrary to the rules of ethical practice formulated by the associations. The petitioner was given an opportunity to seek to correct the objectionable conditions or to separate himself from the hospital staff without losing his membership in the society. The courts may not properly here declare that such an association may not expel a member who persists in practices which by the rules of the society and the written agreement of the member himself, are unethical. The showing before the trial court was sufficient to support the finding that the charge was one which constituted a violation of such rules. What was condemned was the indulgence in practices declared by the society and agreed by the petitioner to be unethical. The fact that a remedy may exist by contempt proceedings for violations of the injunctive order in the case of Goodall v. Brite, would not deprive the respondents of their right to expel the petitioner if such right existed. The case of Otto v. Journeymen Tailors' Protective & Benevolent Union of S. F., 75 Cal. 308, 314, 17 P. 217, 219, 7 Am.St.Rep. 156, involving an unincorporated association, states the applicable rule as follows: "The right of expulsion from associations of this character may be based and upheld upon two grounds: First, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation; second, for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute." In that case it was concluded that the trial court properly found that the ground for expulsion was not well taken and affirmed the judgment decreeing the plaintiff entitled to the writ of mandamus to effect reinstatement. In the present case the petitioner has not shown that the ground of expulsion was not well taken. He attempts to do so by the argument that the provisions of which violation was charged were part of other provisions relating to contract practice and that inasmuch as he was not engaged in contract practice as such, he should not be expelled for taking an active part in creating the same conditions condemned in relation to contract practice. The applicable provision quoted hereinabove from section 2, article VI, chapter III, of the principles of ethics adopted by the society, appeared as the first paragraph of the section under the caption "Contract Practice." A definition of the term "contract practice" followed. An express provision was also included that contract practice per se was not unethical. Obviously it was not necessarily the practice by name which was disapproved by the membership, but certain express conditions thereby created. The record discloses and the society found that the petitioner had continued an activity which created such conditions. Any matter of policy involved in the adoption of the by-laws, the code of ethics, and the resolution in conformity therewith, is a question for the membership itself and is not debatable here so long as it is not shown that such policy is in violation of law.

Here such violation is not shown. The petitioner, having agreed to be bound by the laws adopted by the membership, is therefore precluded from any relief in this proceeding. Levy v. Magnolia Lodge, I. O. O. F., supra; Lawson v. Hewell, 118 Cal. 613, 50 P. 763, 49 L.R.A. 400. As stated in the last cited case, the contractual relation between the association and one of its members is that which exists by virtue of the rules of the association, and so long as the association acts toward him in accordance with those rules there is no violation of the contract. See, also, Smetherham v. Laundry Workers' Union, supra.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.



19 Cal.2d 287

COPLEY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Sac. 5502.

Supreme Court of California.

Jan. 12, 1942.

1. Master and servant ⇐250½

The purpose of the 1939 amendment to the Federal Employers' Liability Act was to broaden the field in which the federal remedy is applicable. Federal Employers' Liability Act § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

2. Master and servant ⇐250½

By the 1939 amendment to the Federal Employers' Liability Act, Congress did not intend to alter the previous interpretation of the act so as to permit the continued functioning of local statutes, where exclusive nature of remedy afforded under the federal act had been established for a number of years, and it would not be supposed that, if Congress had intended to alter established construction of the act, it would have left such change to inference. Federal Employers' Liability Act § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

3. Commerce ⇐8(6), 27(8)

A bridge carpenter, who at time of injury resulting in his death was working on a railroad trestle over which cars passed as part of both interstate and intrastate commerce, was performing duties which had a direct relation to "interstate commerce" and hence came within exclusive operation of Federal Employers' Liability Act so that Industrial Accident Commission was without jurisdiction of claim for death benefits. Federal Employers' Liability Act § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

In Bank.

Proceeding under the Workmen's Compensation Act by Mary Copley, claimant, opposed by the Industrial Accident Commission and others. To review an order of the Industrial Accident Commission dismissing the application for an award of death benefits, the claimant brings a writ of error.

Order affirmed.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Keith & Creede, of San Francisco, for respondents Sacramento Northern Ry. and Pacific Indemnity Co.

PER CURIAM.

Petitioner seeks upon this writ of review to challenge an order of the Industrial Accident Commission which determined that the commission was without jurisdiction under the facts of this case. Mary Copley, the petitioner, is the surviving widow of James Henry Copley, who suffered an injury resulting in his death while working as a bridge carpenter in the employ of the Sacramento Northern Railway. At the time of the injury the decedent was working on a railroad trestle over which cars passed as a part of both interstate and intrastate commerce. Petitioner thereafter filed an application for an award of death benefits with the respondent commission

which dismissed the application for want of jurisdiction.

[1-3] Although under the decided cases the nature of decedent's duties at the time of his injury brings him within the exclusive operation of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. (Pedersen v. Delaware L. & W. R. Co., 229 U.S. 146, 33 S.Ct. 648, 57 L.Ed. 1125, Ann. Cas.1914C, 153; New York Cent. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L. Ed. 1045, L.R.A.1918C, 439 Ann.Cas.1917D, 1139), it is urged on behalf of the petitioner that the 1939 amendment to that statute should be interpreted as conferring concurrent jurisdiction upon the respondent commission to make an award of benefits. It is conceded that the purpose of the 1939 amendment (53 Stats. at L. 1404) was to broaden the field in which the federal remedy is applicable. See, Southern Pac. Co. v. Industrial Acc. Comm., Cal.Sup., 120 P. 2d 880, this day decided; Lewis v. Industrial Acc. Comm., Cal.Sup., 120 P.2d 886, this day decided. Petitioner argues that Congress must also have intended to alter the previous interpretation of the statute so as to permit the continued functioning of local statutes, particularly since, in many states, the imposition of liability upon an employer does not require proof of negligence as is the case under the federal act. This contention was rejected in Southern Pacific Co. v. Industrial Acc. Comm., supra. The exclusive nature of the remedy afforded under the federal act has been established for a number of years (New York Cent. R. Co. v. Winfield, supra), and it can hardly be supposed that if Congress had intended to alter the established construction of the act, it would have left so vital a change to inference. Southern Pac. Co. v. Industrial Acc. Comm., supra. Petitioner's contention that the nature of the relief afforded under local statutes is superior to the relief afforded under the federal statute has no bearing upon the issue presented here. If the federal remedy is inadequate, those subject to its exclusive control cannot alter their status by virtue of that fact but should address such complaints to Congress. Since the decedent was performing duties which have a direct relation to interstate commerce, the Industrial Accident Commission was without jurisdiction to proceed in the case.

The order is affirmed.

19 Cal.2d 271

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16641.

Supreme Court of California.

Jan. 12, 1942.

1. Statutes ⇐217

Committee reports and explanatory statements of members in charge, made in presenting a statute for passage, may be considered in construing the statute if its language is doubtful or obscure.

2. Statutes ⇐217

Statements made in report of the Senate committee on the judiciary relating to objectives of amendment to the Federal Employers' Liability Act, which accorded with reasonable interpretation of the amendment would be followed by the courts. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

3. Commerce ⇐58

The amendment to the Federal Employers' Liability Act providing that the act should apply to any employee of a carrier if any part of the employee's duties shall be the furtherance of interstate or foreign commerce or shall directly or closely and substantially affect such commerce is not unconstitutional when construed as applying to an employee engaged in repairing equipment used in both interstate commerce and intrastate commerce, on ground that the amendment as so construed in part covers intrastate business over which Congress has no jurisdiction. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51, et seq.

4. Commerce ⇐7

If and when interstate business is clearly a part of the subject to be legislated on, the fact that intrastate commerce may be interwoven therein does not prevent Congress from exercising its powers.

5. Commerce ⇐27(3)

Railroad tracks on which railroad engaged in interstate commerce operates trains are a part of "interstate commerce" and the matter of keeping the tracks clear and safe for transportation of commerce also involves interstate commerce.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

6. Workmen's compensation ⇐97

The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries sustained by employees while engaged in interstate commerce are regulated inclusively and exclusively by the Federal Employers' Liability Act and there can be no state regulation even in respect of injuries occurring without fault, as to which the federal act provides no remedy. Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51, et seq.

7. Workmen's compensation ⇐97

The 1939 amendment to the Federal Employers' Liability Act did not have the effect of making the act nonexclusive, permissive, or optional, so as to entitle an employee subject to the act to bring an action under the state Workmen's Compensation Act. Federal Employers' Liability Act as amended in 1939, 45 U.S.C.A. § 51 et seq., and § 1 et seq., and §§ 1, 4, 6, 10, 51, 54, 56, 60; St. 1937, pp. 265–306, §§ 3201–6002.

8. Commerce ⇐27(8)
Workmen's compensation ⇐97

Railroad car repairman who sustained injury while he was repairing a combination truck and boom car used to remove from railroad tracks obstructions and obstacles interfering with both interstate and intrastate business was performing a duty in the furtherance of "interstate commerce" and his work directly, closely and substantially affected such commerce, so that action for his injuries could be brought only under the amended Federal Employers' Liability Act and the injuries were not compensable under the state Workmen's Compensation Act. Federal Employers' Liability Act § 1 et seq., and §§ 1, 4, 6, 10, as amended in 1939, 45 U.S.C.A. § 51 et seq., and §§ 51, 54, 56, 60; St. 1937, pp. 265–306, §§ 3201–6002.

In Bank.

Proceeding under the Workmen's Compensation Act by Frank Mistretti, claimant, opposed by the Southern Pacific Company, employer and self-insurer. The Industrial Accident Commission entered an award granting compensation, and the employer petitions to review the order.

Award annulled.

Prior opinion, 113 P.2d 763.

Henley C. Booth and Burton Mason, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, amici curiae on behalf of respondents.

PER CURIAM.

This cause was taken over after decision by the District Court of Appeal, First Appellate District, Division Two. We adopt the opinion of Mr. Justice Sturtevant as the opinion of this court. It reads:

"This is an application for a writ of review for the purpose of having annulled an award made on July 27, 1940, by the Industrial Accident Commission. The first finding on which said award was based was as follows: 'Frank Mistretti, applicant, while employed as a car builder on November 8, 1939, at South San Francisco, California, by Southern Pacific Company, sustained injury arising out of and occurring in the course of his employment as follows: He sustained injury to his left eye subsequently requiring enucleation thereof. At said time the employer was permissibly self-insured for liability under the Workmen's Compensation Laws of the State of California, to which said laws both employer and employee were then and there subject."

"Said award was made and based on the following facts.

"1. Petitioner is a common carrier by railroad in interstate commerce in the respects hereinbefore more fully alleged. That part of its railroad system extending between San Francisco and Santa Barbara, California, is known as the 'Coast Division.' At Bayshore, a point on said Coast Division near San Francisco, petitioner maintained (as a part of said Coast Division) for exclusive railroad use its repair shops, where cars used in and already devoted to general freight service, as well as cars used in and already devoted to its railroad maintenance purposes, were repaired. New cars were not constructed at said shops. The repairs performed were of both the running-repair type, the light-repair type, and also of the heavy-repair type. The purpose of repairing freight cars is to permit their continued use by petitioner and its railroad connections in their general freight business as common carriers by railroad, including the movement of property in both interstate and intrastate commerce.

"2. Applicant was employed by petitioner as a car-repairman at its said Bayshore shops, and his duties as such called on him to make repairs to the wooden portion of freight cars undergoing repair therein. Part of applicant's duties also included repairing the wooden portion of cars used by petitioner in the clearance, repair and maintenance of its tracks used as highways of interstate commerce and transportation.

"3. The applicant was, at the time of the accident, engaged in making repairs to a special type of maintenance car, designed for and used as a part of a relief outfit known as the 'Watsonville Junction Relief Outfit.' That car was of the type known as a 'combination truck and boom car,' and was numbered 'SPMW-7019E,' 'SPMW' denoting 'Southern Pacific Maintenance of Way.' This car had been in use in that outfit prior to the accident, and at the time of the accident was undergoing necessary repairs, for the purpose of and with the intention of restoring it to the said outfit, so that it might be continued as a unit therein and used as such. Following the accident repairs were completed, and the car returned to said relief outfit and to use as a unit in said outfit. Said relief outfit was and is used to remove obstacles from the tracks, e.g., derailed cars or engines, wrecked cars or engines, and other obstructions, all of which impede, render unsafe and prevent the flow of traffic, and thus interfere with the movement of passengers and property in interstate as well as intrastate commerce.

"4. The said combination truck and boom car was sent on October 29, 1939, from Watsonville Junction on said Coast Division to the Bayshore shops, a distance of about one hundred miles from Watsonville Junction. It arrived at Bayshore on October 30, 1939, and the repair work thereon was commenced immediately by a shop crew which included applicant. That crew first stripped the superstructure of the car, leaving the trucks and the steel body frame, and then rebuilt the superstructure, completing the work of repair on November 16, 1939. On that day the car was returned to Watsonville Junction, arriving there November 17, 1939, and resuming actice service with the said Watsonville Junction relief outfit on November 19, 1939.

"From the date of its arrival at the shops, to the day repairs were completed and it was billed back to Watsonville Junction, the car remained on a track in the shops while the repairs were being performed, and while it was being repaired a substitute but not identical car temporarily took its place in said relief outfit.

"5. On November 8, 1939, while applicant was engaged in the course of his said employment upon said car (SPMW-7019E) at said shops, and while he and a fellow employee were engaged in removing a hinge from a door of said car, a flying piece of metal struck the applicant's left eye. Said injury resulted in the loss of the left eye, the applicant returning to work for petitioner in his usual occupation December 11, 1939, after having been fitted with an artificial eye.

"In his brief the petitioner pointedly narrows the issue and states its contention as follows: 'We emphasize, at the outset of this petition, that no question is here raised as to whether the injury arose out of or occurred in the course of the employment; nor is there any question as to the amount of the award, if any award at all may lawfully be made by the respondent Commission. Indeed it may be conceded, at least for purposes of argument, that if an accident similar in all respects to the one here involved had occurred prior to August 11, 1939, the Federal Employers' Liability Act as it then read would not have been applicable; and the sole remedy of the applicant would have been under the state workmen's compensation laws.'

"Having clearly stated the issue the petitioner proceeds to argue that the amendments of 1939 to the Federal Employers' Liability Act are so worded as to cover the instant case. Compare 35 U.S.Stats. at L. 65, 45 U.S.C.A. § 51 et seq., and 53 U.S.Stats. at L. 1404, 45 U.S.C.A. §§ 51, 54, 56, 60. The respondent board contends the facts in the instant case do not bring it within either of said federal statutes but that said case is governed by the provisions of sections 3201–6002 of the Labor Code of this state, St.1937, pp. 265–306. In other words the petitioner claims the remedy of Mistretti was that provided by the federal statutes and the respondent board contends his remedy was under the state statute.

[1] "The amendment added in 1939 to section 1 of the original act (35 U.S.Stats. at L. 65, 45 U.S.C.A. § 51) is as follows: 'Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign com-

merce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended.' Its meaning is certainly not free from doubt. In Railroad Commission v. Chicago B. & Q. R. Co., 257 U.S. 563, at page 589, 42 S.Ct. 232, [237], 66 L.Ed. 371, 22 A.L.R. 1086, Mr. Chief Justice Taft speaking for the court said: 'Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. Duplex [Printing Press] Co. v. Deering, 254 U.S. 443, 475, 41 S.Ct. 172, 65 L.Ed. 349 [354, 16 A.L.R. 196].'

"Before proceeding it will be best to state some historical facts regarding the development of the question that is here involved. Prior to the adoption of the amendments of 1939 (53 U.S.Stats. at L. 1404) the question was brought before the court by Bruce Shanks. While employed by the Delaware, Lackawanna and Western Railroad Company he was engaged as a machinist in removing a shaft-hanger in the defendant's machine shop. While so engaged a crane was negligently allowed to run over his hands. He brought an action to recover damages. The jury awarded him substantial damages. From the judgment the defendant appealed to The Second Department of the Appellate Division of the Supreme Court of New York. Shanks v. Delaware, Lackawanna & West. R. R. Co., 163 App.Div. 565, 148 N.Y.S. 1034. The case was well presented and the decision shows that the court carefully examined the authorities. By a divided court the judgment was reversed on the ground that the evidence did not show Shanks was engaged in interstate commerce at the time of the injury and the plaintiff was remanded to his remedy under the Workmen's Compensation Act of New Jersey, N.J.S.A. 34:15–1 et seq., that being the state where the accident occurred. Shanks appealed to the Court of Appeals. 214 N.Y. 413, 108 N.E. 644, Ann.Cas. 1916E, 467. By a divided court the judgment of the appellate division was affirmed. Thereafter Shanks sued out a writ of error in the Supreme Court of the United States. That court affirmed the judgment of the court of appeals. Shanks v. Delaware, Lack. & West. R. Co., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A.1916C, 797. On page 558 of 239 U.S., on page 189 of 36 S.Ct., 60 L.Ed. 436, L.R.A. 1916C, 797, the court stated: 'Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. v. United States, 196 U. S. 375, 398, 25 S.Ct. 276, 49 L.Ed. 518, 525), and that the true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?' It then analyzed the decided cases. Having done so it concluded as follows: 'Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case [Delaware, L. & W. R. Co. v. Yurkonis, 238 U.S. 439, 35 S.Ct. 902, 59 L.Ed. 1397], was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the employers' liability act.'

"Returning to the amendments of 1939 (53 U.S.Stats. at L. 1404) they were embodied in Senate Bill 1708. When that bill was reported by the Committee on the Judiciary the report was printed (Report 661). It set forth the bill in full. It included the sections of the old statute (35 U. S.Stats. at L. 65) which were amended and the amendments were set forth in italics. The amendment to section 1 was as follows: 'Any employee of a carrier, any part

of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908), as the same has been or may hereafter be amended.' Continuing the report set forth:

"'Objectives of the Bill

"'It is the aim of the bill to amend the Employers' Liability Act in three particulars:

"'1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce * * *

"'Amendment to Section 1

"'This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"'The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, "in transportation or work so closely related to it as to be practically a part of it" Shanks v. Delaware, L. & W. R. Co., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A.1916C, 797.

"'In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"'As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"'Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"'The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"'The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed.'

[2] "The statements made in that report accord with the reasonable interpretation of the paragraph added by the amendment to section 1. That being so they should be followed by the courts. 59 C.J. 1021; Hoover v. Intercity Radio Co., 52 App. D.C. 339, 286 F. 1003, 1006. Counsel have been able to find but one case in which the interpretation of the amendment was involved. That case is Ermin v. Pennsylvania R. Co., D.C., 36 F.Supp. 936. That case involved injuries to a brakeman. He was a member of a crew using engine No. 9912. They were engaged in moving both engines and cars which were, or had been, disabled to and from parking yards, repair shops, and the main lines. All such equip-

ment had been, from time to time, engaged in both intra and interstate commerce and, after being repaired, would be so used thereafter. He was injured while so moving a dead engine with engine No. 9912. The court held he was directly, closely, and substantially furthering the transportation of interstate commerce within meaning of 53 United States Statutes at Large 1404. In construing that statute the court based its decision, in part, on the reports made by committees of the Congress.

[3, 4] "But, the respondent argues, if the statute is to be so construed then it is unconstitutional. In that connection the respondent does not specify any word or words but relies on the effect of the entire amendment as so construed. In other words the respondent contends the amendment as so construed covers, in part, intrastate business, a subject over which the Congress has no jurisdiction. The point is not well taken. If and when interstate business is clearly a part of the subject to be legislated on, the fact that intrastate commerce may be interwoven therewith does not prevent the Congress from exercising its powers. Baltimore & Ohio R. Co. v. Interstate Com. Comm., 221 U.S. 612, 618, 31 S.Ct. 621, 55 L.Ed. 878; Southern Ry. Co. v. United States, 222 U.S. 20, 26, 32 S.Ct. 2, 56 L.Ed. 72; Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 42, 36 S.Ct. 482, 60 L.Ed. 874; National L. R. Bd. v. Jones & Laughlin S. Corp., 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

[5] "Applying the principles to the facts in the instant case, it is settled law that the railroad tracks on which a company engaged in interstate commerce operates its trains are a part of interstate commerce. Pedersen v. Delaware, Lack. & West. R. R. Co., 229 U.S. 146, 151, 33 S.Ct. 648, 57 L.Ed. 1125, Ann.Cas.1914C, 153. It is also settled law that the matter of keeping those tracks clear and safe for the transportation of commerce is also interstate commerce. Rader v. Baltimore & O. R. Co., 7 Cir., 108 F.2d 980, 985. A 'combination truck and boom car' has no other function than clearing tracks. One who is repairing such a car is clearly performing a duty which is '* * * the furtherance of interstate or foreign commerce * * *' Moreover his work does '* * * directly or closely and substantially, affect such commerce.' 53 U.S.Stats. at L. 1404, 45 U.S.C.A. § 51.

[6, 7] "In New York Central R. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann.Cas. 1917D, 1139, it was decided (quoting from the syllabus): 'The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy.' Later in Inter-Island Steam Nav. Co. v. Territory of Hawaii, 96 F.2d 412, 418, Mr. Justice Haney, speaking for the court in the Ninth Circuit, said: 'The exclusive effect of congressional action is quite clear. Thus in the case last cited, it is said that "there can be no divided authority over interstate commerce." The states may not "complement" the act of Congress, or prescribe "additional regulations" or "auxiliary provisions for the same purpose" [citing cases], nor "supplement" such act.' Amici curiae have filed a brief in which they contend that the amendments of 1939, 53 U.S. Stats. at L. 1404, had the effect of making the Federal Employers' Liability Act non-exclusive, permissive, or optional. We have carefully read the brief. The arguments are, generally speaking, the same that were urged by Mr. Justice Brandeis regarding the scope of 35 United States Statutes at Large 65. New York Central R. R. Co. v. Winfield, 244 U.S. 147, 154, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann. Cas.1917D, 1139. That was a dissenting opinion. The majority of the court ruled the other way. It held the state statute was suspended. A most careful reading of the amendments of 1939 shows they do not speak on the subject. Manifestly if the contention was not applicable to 35 United States Statutes at Large 65, much less is it applicable to 53 United States Statutes at Large 1404. A most casual reading of the amendatory statute discloses no intention on the part of the Congress to make such drastic changes.

[8] "We conclude that, at the time of the accident, both the employer and the employee were engaged in interstate com-

merce and were subject to the provisions of the Federal Employers' Liability Act but that neither the employer nor the employee was subject to the Workmen's Compensation Laws of the State of California."

The award is annulled.



19 Cal.2d 284

LEWIS v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. No. 17930.

Supreme Court of California.

Jan. 12, 1942.

Rehearing Denied Feb. 11, 1942.

1. Commerce ⇐8(6)

One of the main purposes of the 1939 amendment to the Federal Employers' Liability Act entitling any employee of a carrier, any part of whose duties as employee are in furtherance of interstate or foreign commerce, to the benefits of the act was to eliminate the necessity for establishing that at the moment of his injuries the employee was actually engaged in the movement of interstate traffic. Federal Employers' Liability Act § 1, as amended in 1939, 45 U.S.C.A. § 51.

2. Commerce ⇐8(6)

In order to effectuate the purposes of the Federal Employers' Liability Act as amended in 1939 and to avoid hardship involved in determining in each case whether federal or state remedy is to be applied, all doubts should be resolved in favor of federal jurisdiction. Federal Employers' Liability Act, § 1 et seq., as amended in 1939, 45 U.S.C.A. § 51 et seq.

3. Commerce ⇐8(6), 27(7)

Where switching crew did not handle any cars destined for interstate commerce until after member of crew was injured but after member sustained injury several cars were switched by the crew which were intended for interstate commerce and track upon which accident occurred was a highway of interstate commerce, the injured member was entitled to the protection of the Federal Employers' Liability Act as amended in 1939, and the Industrial Accident Commission was without jurisdiction, since the injured member's duties affected "interstate commerce" directly or closely and substantially. Federal Employers' Liability Act, § 1 et seq., as amended in 1939, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

4. Commerce ⇐58

Where switching crew had not handled any cars destined for interstate commerce until after member of crew was injured but after member's injury several cars were switched by the crew which were intended for interstate commerce and track on which accident occurred was a highway of interstate commerce, the construction of the Federal Employers' Liability Act, as amended in 1939, so as to give protection to the employee did not render the act unconstitutional. Federal Employers' Liability Act, § 1 et seq., as amended in 1939, 45 U.S.C.A. § 51 et seq.

In Bank.

Proceeding by Owen H. Lewis, employee of the Union Pacific Railroad Company, to review an order of the Industrial Accident Commission in taking jurisdiction under the Workmen's Compensation Act.

Order annulled.

James E. Martin, of Los Angeles, and Clifton Hildebrand, of Oakland, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for respondent Union Pac. R. Co.

PER CURIAM.

The petitioner, Owen H. Lewis, seeks by this writ of review to have annulled an order of the Industrial Accident Commission. On November 20, 1939, the petitioner was employed by the Union Pacific Railroad Company as a brakeman at Bly, California. During the course of his duties on that day as a member of a switching crew, the petitioner sustained an injury arising out of and occurring in the course of his employment. On February 20, 1940, the Union Pacific Railroad Company filed an application with the respondent commission for an adjustment of petitioner's claim against it. The petitioner has at all times contended that the Industrial Accident Commission has no jurisdiction upon the theory that at

the time of his injury he was engaged in interstate commerce under the Federal Employers' Liability Act, as amended in 1939, 45 U.S.C.A. § 51 et seq. At the time of its original decision on November 18, 1940, and at the time of its decision on rehearing on January 20, 1941, the respondent commission dismissed the proceeding for want of jurisdiction. On March 28, 1941, however, after reopening the case, the commission rendered a decision in which it held that both employer and employee were engaged in intrastate commerce at the time of the injury and were subject to the jurisdiction of the commission. It is this decision which petitioner seeks to have annulled.

[1] There is no conflict upon the facts of the case. The switching crew of which Lewis was a member did not handle any cars destined for interstate commerce until after he was injured. After petitioner's injury, however, several cars were switched by the crew which were intended for interstate commerce. The track upon which the accident occurred was admitted to be a highway of interstate commerce. Under these facts it is clear that, prior to the 1939 amendment, petitioner would not have been entitled to protection under the Federal Employers' Liability Act, for at the time of his injury Lewis was not actually engaged in the movement of interstate traffic. See Shanks v. Delaware, L. & W. R. Co., 239 U.S. 556, 558, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A.1916C, 797. The federal statute has been severely criticized, in large part because of the difficulty in ascertaining in a particular situation whether at the moment of the injury the employee was actually engaged in interstate transportation. See Schoene & Watson, "Workmen's Compensation on Interstate Railways," (1934) 47 Harv. L. Rev. 389; (1934) 43 Yale L. J. 906; (1934) 28 Ill.L.Rev. 587; (1933) 19 A.B.A.Journ. 377. In 1939, an amendment to section 1 of the Federal Employers' Liability Act was enacted which reads: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act [chapter]. * *" 53 Stats. at L. 1404, 45 U.S.C.A. § 51. One of the main reasons for thus amending the statute was to eliminate the necessity for establishing that at the moment of his injury the employee was actually engaged in the movement of interstate traffic. See Southern Pacific Company v. Industrial Acc. Comm., Cal.Sup., 120 P.2d 880, this day decided; (1940) 38 Mich.L.Rev. 754, 755.

[2-4] In order to effectuate the purposes of the amended federal statute and to avoid the hardship involved in determining in each case whether the federal or state remedy is to be applied, all doubts should be resolved in favor of the federal jurisdiction. In any event, petitioner's duty as a member of the switching crew of an interstate railroad seems to us to affect interstate commerce directly or closely and substantially, even though at the moment of his injury he was not engaged in the movement of interstate traffic. Respondents' contentions that, as so construed, the federal act is unconstitutional must be rejected. Southern Pac. Co. v. Industrial Acc. Comm., supra. The federal statute has exclusive application (Southern Pac. Co. v. Industrial Acc. Comm., supra; New York Cent. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann.Cas.1917D, 1139), and the Industrial Accident Commission was without jurisdiction to make the challenged order.

The order is annulled.



19 Cal.2d 281

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16640.

Supreme Court of California.

Jan. 12, 1942.

Commerce ⇐8(6), 27(7)
Workmen's compensation ⇐97

Where switchman was fatally injured while working as member of a yard crew which was engaged in breaking up main-line freight trains after their arrival and in making up such trains prior to their departure from the terminal and cars moving both in interstate and intrastate commerce were handled as regular part of switchman's duties, the Industrial Accident Commission was

without jurisdiction and the case was within exclusive operation of Federal Employers' Liability Act as amended in 1939, since the duties of switchman included the furtherance of "interstate commerce" in a way which directly or closely and substantially affected such commerce. Federal Employers' Liability Act, § 1 et seq., as amended in 1939, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

In Bank

Proceedings under the Workmen's Compensation Act by Doris Velma Rodgers and others, claimants, opposed by the Southern Pacific Company, employer. The Industrial Accident Commission made an order awarding compensation for death of R. P. Rodgers, employee and the employer petitions for writ of review.

Award annulled.

Prior opinion, 113 P.2d 770.

Henley C. Booth and Burton Mason, both of San Francisco, and W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, amici curiae on behalf half of respondents.

PER CURIAM.

The petitioner, the Southern Pacific Company, seeks by this writ of review to have annulled an award made by the respondent Industrial Accident Commission. This is a companion case to Southern Pacific Company v. Industrial Accident Commission et al., Cal.Sup., 120 P.2d 880, this day decided, and while the facts of the case are somewhat different, the legal principles there set forth are determinative of the issues presented here.

On November 3, 1939, R. P. Rodgers sustained an injury arising out of and occurring in the course of his employment as a switchman at the Los Angeles terminal of the Southern Pacific Company. The injury, which resulted in Rodgers' death, occurred in a particular portion of the petitioner's freight terminal yard known as the "bull ring." This portion of the main freight yard was used, among other things, for the purpose of "breaking up" main-line freight trains after their arrival, and of "making up" such trains prior to their departure from the terminal. Cars moving in both interstate and intrastate commerce were handled as a regular part of decedent's duties as a member of the yard crew. Upon the basis of these facts the respondent commission accepted jurisdiction and made an award in favor of the decedent's widow and others.

Under the principles set forth in Southern Pacific Company v. Industrial Accident Commission et al., supra, it is clear that the case comes within the exclusive operation of the Federal Employers' Liability Act, as amended in 1939, 45 U.S.C.A. § 51 et seq. It cannot be doubted that the duties of the decedent included the furtherance of interstate commerce in a way which directly or closely and substantially affected such commerce. It follows that the respondent Industrial Accident Commission was without jurisdiction to make the award.

The award is annulled.

19 Cal.2d 283

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16642.

Supreme Court of California.

Jan. 12, 1942.

Commerce ⇐8(6), 27(8)

Workmen's compensation ⇐97

Where freight car builder sustained injuries while engaged in repairing a freight car used by his employer in general freight service in both interstate and intrastate commerce, the Industrial Accident Commission was without jurisdiction and the case was within the exclusive operation of the Federal Employers' Liability Act as amended in 1939, since the duties performed in repairing the cars were in furtherance of "interstate commerce" in a way which directly or

closely and substantially affected that commerce. Federal Employers' Liability Act, § 1 et seq., as amended in 1939, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

In Bank.

Proceedings under the Workmen's Compensation Act by Fred Wills, employee, opposed by the Southern Pacific Company, employer. The Industrial Accident Commission made an order awarding compensation for personal injuries and the employer petitions for writ of review.

Award annulled.

Prior opinion, 113 P.2d 768.

Henley C. Booth and Burton Mason, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

The petitioner, the Southern Pacific Company, seeks by this writ of review to have annulled an award of the respondent Industrial Accident Commission. This is a companion case to Southern Pacific Company v. Industrial Accident Commission et al., Cal.Sup., 120 P.2d 880, this day decided, and the legal principles there set forth are determinative of the issues presented here.

On February 26, 1940, while employed as a freight car builder at Sacramento, California, by the Southern Pacific Company, Fred Wills sustained an injury arising out of and occurring in the course of his employment. At the time of his injury Wills was engaged in repairing a freight car used by petitioner in general freight service, in both interstate and intrastate commerce. Upon the basis of these facts the respondent commission accepted jurisdiction and rendered an award in favor of the injured employee and against petitioner.

Under the principles set forth in Southern Pacific Company v. Industrial Accident Commission et al., supra, it is clear that this case comes within the exclusive operation of the Federal Employers' Liability Act, as amended in 1939, 45 U.S.C.A. § 51 et seq. The duties performed by Wills in the repair of cars devoted to general freight service were in furtherance of interstate commerce in a way which directly, or closely and substantially, affected that commerce. It follows that the respondent commission was without jurisdiction to make the award.

The award is annulled.



48 Cal.App.2d 652

WOODCOCK v. PETROL CORPORATION et al.

Civ. 13304.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1941.

Hearing Denied Feb. 19, 1942.

1. Appeal and error ⇐1170(3)

Permitting defendants to amend their answer to set up affirmative defenses did not constitute prejudicial error, if, as contended by plaintiff, the defenses were not sufficient to constitute a defense. Const. art. 6, § 4½.

2. Appeal and error ⇐959(1)

The amendment of a pleading lies within the trial court's sound discretion, and, in absence of an abuse of such discretion, trial court's ruling will not be disturbed.

3. Pleading ⇐258(2)

The fact that new matter set up as amendment to answer was well known to defendants when defendants filed original answer was not good ground for declining defendants permission to allege such matter in amendment to answer, on ground that defendants were guilty of "laches."

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Creditors' suit ⇐21

An action in nature of creditor's bill and for accounting is a "proceeding in equity."

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Equity".

5. Equity ⇐65(1)

Those who come into a court of equity seeking equity must do so with clean hands and a pure conscience.

6. Equity ⇐65(1)

If a court of equity discovers that a transaction is tainted with fraud, the court of equity will, of its own motion, institute an investigation thereof, and it is unnecessary for either party to make objection.

7. Equity ⇐56

In a suit in equity, wherein fraud, oppression, or undue influence is charged, the court is not concluded by that which appears on the face of the record, but may inquire into the real facts relative to the transaction.

8. Equity ⇐65(2)

Where court's attention in action in nature of creditor's bill was directed to fact that plaintiff had procured a judgment inequitably, court was justified in receiving evidence relative to the conditions surrounding the obtaining of the judgment, and, if it found that such judgment had been obtained inequitably, it was justified in withholding relief from the plaintiff.

9. Equity ⇐65(2)

Where there was substantial evidence in action in nature of creditor's bill, to sustain finding that plaintiff, one of the principal stockholders of corporation, obtained a default judgment against the corporation, that corporation was unable to defend the action, because it had not paid its franchise tax, and that corporation was, in fact, not indebted to plaintiff in the amount of the judgment, and effect of granting plaintiff relief would deprive other creditors of corporation of right of recourse to corporation's assets, court was justified in denying right of recovery.

10. Corporations ⇐548(9)

In action in nature of creditor's bill, wherein defendants contended that plaintiff acted inequitably in obtaining a default judgment against corporation, finding that judgment against the corporation was obtained by plaintiff for purpose of defrauding corporation's creditors was authorized by conceded fact that corporation had not paid its franchise tax to the state, and hence was unable to defend action against it by plaintiff, and from evidence that it did not owe plaintiff any money.

11. Appeal and error ⇐1078(1)

Where appealing party failed to furnish the District Court of Appeal with either argument or authorities on point urged as ground for reversal, point would be deemed to have been "abandoned."

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action in the nature of a creditor's bill by Ben H. Woodcock against the Petrol Corporation and others. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Hearing denied; SHENK and CARTER, JJ., dissenting.

C. P. Von Herzen and Hampton Hutton, both of Los Angeles, for appellant.*

James P. Fitzpatrick and R. W. Walker, both of Los Angeles, and Clyde F. Murphy, of North Hollywood, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury on a creditor's bill filed by plaintiff against defendants, predicated upon a judgment that plaintiff had secured against the Big Ben Oil Company, plaintiff appeals.

Viewing the evidence in the light most favorable to defendants (respondents), the essential facts are these:

Two days before the day set for trial defendants gave notice that on the day set for trial they would move to amend their answer by adding the following affirmative defenses:

A.

"I. That on October 1, 1937, the corporate powers of the Big Ben Oil Company had been suspended.

"II. That in November of 1938 a suit by Ben Woodcock and Earl Wisdom as trustees for the Big Ben Oil Company had been brought against respondents and that it had been alleged therein that Ben Woodcock and Earl Wisdom were the surviving trustees charged with liquidating the assets of the Big Ben Oil Company.

"III. That respondents had filed a demurrer on the ground that the corporation had been suspended for failure to pay taxes, which had been sustained.

"IV. That Ben Woodcock then filed an action against the Big Ben Oil Company

*It is to be noted that Mr. C. P. Von Herzen, one of the attorneys for appellant, was not attorney for the plaintiff in the action of Woodcock v. Big Ben Oil Company referred to in the opinion.

for $20,000.00 for money had and received and that a default had been taken and judgment entered in favor of said Ben Woodcock.

"V. That after said judgment said Woodcock and Wisdom dismissed the suit against respondents.

"VI. That Ben Woodcock was the sole stockholder of the Big Ben Oil Company and that it was his *alter ego*.

"VII. That the judgment by Ben Woodcock against the Big Ben Oil Company was brought for the sole purpose of defrauding respondents and for the sole purpose of defrauding the United States of America, a claimant against the Big Ben Oil Company, and for the sole purpose of defrauding Katherine L. Blood, a judgment creditor of the Big Ben Oil Company, and that, by reason of this fraudulent intent, the judgment is void."

B.

"I. Realleges all of the allegations of defense number 8.

"II. That because the Big Ben Oil Company's corporate powers had been suspended no service of process could have been made upon the company and that, therefore, the court had no jurisdiction to render a judgment in the case of Ben Woodcock v. Big Ben Oil Company and that said judgment is void.

C.

"I. Realleges all of the allegations of defense number 8.

"II. That, due to the above facts, defendants cannot proceed to trial safely because defendants could not pay plaintiff's claims inasmuch as said Big Ben Oil Company had been suspended and that before trial Ben Woodcock should be required to reinstate said company and to cause said company to be made a party."

At the time of the trial the court directed proof, first, to the issue of whether plaintiff was entitled to equitable relief as a *bona fide* judgment creditor of the Big Ben Oil Company, or whether he should be denied relief because he was the holder of a judgment procured by fraud and collusion upon a spurious claim. After hearing all evidence that the parties had to adduce upon this issue the court found in substance that plaintiff had no standing in a court of equity, and that he was entitled to no relief because in procuring a judgment against the Big Ben Oil Company (upon which he predicated his right to bring the present action for equitable relief) he had practiced a fraud upon the Superior Court of Los Angeles County; also, that he had no legitimate claim for $20,000 or any other sum against Big Ben Oil Company, and the judgment was not upon the merits or for any proper purpose; and that he had been able to obtain the judgment against the Big Ben Oil Company because the latter could not defend itself.

Plaintiff relies for reversal of the judgment upon these propositions:

First: The trial court abused its discretion in permitting defendants to amend their answer to set up the affirmative defenses set forth supra, *because (a) none of the affirmative defenses stated facts sufficient to constitute a defense, and (b) defendants were guilty of laches in not moving to amend their answer sooner.*

Second: The trial court committed prejudicial error in receiving evidence relative to the correctness of the judgment which plaintiff had obtained against the Big Ben Oil Company.

Third: There is no substantial evidence to sustain the trial court's finding of fact as follows:

(a) "It is not true that on or about the 6th day of December, 1938, the Big Ben Oil Company owed or was indebted to Ben H. Woodcock in the sum of $20,000.00 or any other sum."

(b) "That Ben H. Woodcock dominated and controlled the other directors."

(c) "That the judgment against the Big Ben Oil Company was obtained for the purpose of defrauding the creditors of Big Ben Oil Company."

[1] Plaintiff's first proposition is untenable.

(a) If defendants' amendment to the answer did not state sufficient facts to constitute a defense, clearly such amendment did not prejudice plaintiff; and under article VI, section 4½ of the Constitution of the state of California, he may not urge error thereon in this court.

[2, 3] (b) It is the established law that the amendment of a pleading lies within the sound discretion of the trial court, and that in the absence of an abuse of such discretion, as in the instant case, the trial judge's ruling will not be disturbed upon appeal. (Fetterley v. Gibson, 210 Cal. 282,

283, 291 P. 411.) It is likewise established that the fact that new matter set up in an answer was well known to defendant when he filed his original answer is not a good ground for declining him permission to allege such matter in an amendment to his answer. (Tolbard v. Cline, 180 Cal. 240, 245, 180 P. 610.)

Plaintiff's second proposition is likewise without merit and is governed by the following pertinent rules of law:

[4] (1) An action in the nature of a creditor's bill and for an accounting is a proceeding in equity. (Bardwell v. Turner, 219 Cal. 228, 230, 25 P.2d 978; 7 Cal. Jur. (1922) 788, sec. 1.)

[5] (2) Those who come into a court of equity seeking equity must do so with clean hands and a pure conscience. (Manhattan Medicine Co. v. Wood, 108 U.S. 218, 227, 2 S.Ct. 436, 27 L.Ed. 706.)

[6] (3) It is unnecessary for either party to make objection; if a court of equity discovers that the transaction is tainted with fraud it will of its own motion institute an investigation thereof. (Richman v. Bank of Perris, 102 Cal.App. 71, 86, 282 P. 801; Primeau v. Granfield, 193 F. 911, 913, 114 C.C.A. 549.)

[7] (4) In a suit in equity where fraud, oppression, or undue influence is charged, the court is not concluded by that which appears on the face of the record, but may inquire into the real facts relative to the transaction. (Wagg v. Herbert, 215 U.S. 546, 551, 30 S.Ct. 218, 54 L.Ed. 321.)

[8, 9] Applying the foregoing rules to the facts of the instant case, it appears that the court's attention was directed to the fact that plaintiff had procured a judgment inequitably against the Big Ben Oil Company. Therefore, the trial court was justified in receiving evidence relative to the conditions surrounding the obtaining of such judgment; and if it found that such judgment had been obtained inequitably, it was justified in withholding relief from plaintiff herein. The record shows there was substantial evidence to sustain the trial court's finding that plaintiff, one of the principal stockholders of the Big Ben Oil Company, had obtained a default judgment in the sum of $20,000 against the company, which company was unable to defend the action, due to the fact that it had not paid to the state of California its franchise tax and that, in fact, the Big Ben Oil Company was not indebted to plaintiff in the sum of $20,000. The foregoing facts being true, it would have been inequitable for the trial court to have allowed plaintiff to recover, in satisfaction of the judgment, sums of money which the defendants might owe to the Big Ben Oil Company, since to do so would be to deprive other creditors of that company of recourse to assets which would have tended to satisfy the obligations due them.

[10] Plaintiff's final proposition is without merit.

(a) The secretary of the Big Ben Oil Company, Mr. Wisdom, who also kept its books, testified that the company did not owe plaintiff any money.

(b) Mr. Wisdom also testified that no answer was interposed to the suit filed by plaintiff against the Big Ben Oil Company because he was instructed by plaintiff's attorney not to do so.

(c) In view of the conceded fact that the Big Ben Oil Company had not paid its franchise tax to the state of California, and the evidence that it did not owe plaintiff any money, and that plaintiff obtained a judgment against the Big Ben Oil Company for $20,000, the inference may be reasonably deduced that the judgment was obtained by plaintiff for the purpose of defrauding the creditors of the Big Ben Oil Company.

[11] We have not considered errors in the admission of testimony for the reason that the rule is settled that, where, as in the instant case, the appealing party fails to furnish this court with either argument or authorities upon a point urged as ground for reversal of the judgment, the point will be deemed to have been abandoned. (People v. Epstein, 21 Cal.App.2d 488, 490, 69 P.2d 454; Security-First Nat. Bank v. Chapman, 41 Cal.App.2d 219, 222, 106 P.2d 431.)

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

49 Cal.App.2d 38

PEOPLE v. SCHULTZ.

Cr. 3505.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1942.

1. Infants ⇐20

In trial for committing lewd or lascivious acts on body of ten year old girl, her direct testimony as to defendant's acts and his manifest licentious and lewd conduct in taking pictures, introduced in evidence, of girl's private parts, authorized jurors to reject testimony contradicting that of girl, disbelieve defendant's testimony, and accept girl's testimony as to immediate circumstances of alleged assault and actions constituting it, notwithstanding discrepancies between her testimony on preliminary examination and at trial. Pen.Code, § 288.

2. Infants ⇐20

In trial for committing lewd or lascivious acts on body of ten year old girl, question whether defendant committed felonious assault charged was for jury. Pen.Code, § 288.

3. Criminal law ⇐1159(4)

In trial for committing lewd or lascivious acts on body of ten year old girl, it was within jury's province to base verdict of conviction on particular portion of girl's testimony bearing on immediate circumstances of alleged assault, if satisfied thereby of defendant's guilt beyond reasonable doubt, though they might have regarded girl's statements on other points as of doubtful verity, so that such verdict is conclusive on appeal. Pen.Code, § 288.

4. Criminal law ⇐1159(4)

In trial for committing lewd or lascivious acts on body of ten year old girl, her entire testimony, considered in connection with other witnesses' testimony, *held* not so inherently improbable as to require or justify reversal of conviction. Pen.Code, § 288.

5. Criminal law ⇐815(4)
Infants ⇐20

In trial for committing lewd or lascivious acts on body of ten year old girl, instruction that to constitute such offense, it is not necessary that child's bare skin be touched, but that touching of child's body through clothing, with intent to arouse lusts of child or accused, constitutes offense, was not erroneous as disregarding matter of lewd and lascivious touching, but proper as in conformity with statutory provisions. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

George Hilliard Schultz was convicted of committing lewd or lascivious acts on the body of a child under fourteen years of age, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

WHITE, Justice.

This is an appeal by defendant following his conviction on a charge of violating section 288 of the Penal Code. The appeal is from both the judgment of conviction and the order denying his motion for a new trial.

In view of the fact that appellant first assails the judgment on the ground that the same is not supported by the evidence, it will be necessary to summarize the factual background surrounding this litigation. From the record it appears that on Sunday, February 2, 1941, a ten-year-old girl went to one of the beaches in Los Angeles County to gather and sell moonstones. She was accompanied by her brother, twelve years of age, and a sister, nine years. Riptides had torn up the beach considerably, and more or less of a crowd had gathered there. The victim of the alleged assault had removed her shoes and stockings before she started to gather moonstones, and upon returning to get them she found that the water had washed them away. After spending about an hour searching for and gathering moonstones, she met the appellant, a man forty years of age, whom she had never known prior to this occasion. The prosecutrix testified that she asked the defendant and some other people there if they would like to buy moonstones, and they all responded in the negative. She then went to a place on the beach to obtain a box in which to carry her moonstones, where defendant again met her, washed the moonstones and put them in a box, and then accompanied the child on to the beach, where they sat down. Defendant thereupon told the child he would purchase ten cents worth of moonstones. Defend-

ant had with him a camera, and suggested to the child that he should take some pictures of her. Before taking these pictures the defendant posed the child with her legs spread apart and tucked back her dress, exposing her private parts. After photographing the child, appellant gave her twenty cents, with which she purchased some food for herself and her brother. While she was walking down the sidewalk with her brother, defendant came up to them, saying, "Come on, we will go over and look for your sister on the way to the show." They did not find the child's sister, but they went to a theater, where defendant purchased four tickets, two of which he gave to the victim's brother, whereupon the prosecutrix said, "I want to go with my brother and find my sister," but the defendant said, "No, we will go on in the show, and when they come in we can get them." Upon the departure of the victim's brother, she and defendant went into the moving picture theater.

We pause here to set forth the testimony of the witnesses Edward A. Pippen and Officer Hopkins. The former lived in Redondo Beach, where he conducted a furniture store. He was acquainted with the prosecutrix. On the Sunday afternoon in question he saw her on the beach and saw defendant taking her picture. Noticing the manner in which the defendant posed the child and the fact that upon the approach of anyone defendant would put the limbs of the child together again, Mr. Pippen watched the defendant, during which time he observed that the defendant had the child lie down and was petting and caressing her, feeling of her legs and patting her on the buttocks. Shortly thereafter defendant walked over to his automobile, folded the camera and put it in the pocket of his car, took his coat, locked the car, walked down the street a little way, and commenced looking around. The witness Pippen walked over to Hermosa Avenue, where he met the police officer. The two of them went back to defendant's car and remained there until around six o'clock, when defendant approached the automobile and the officer placed him under arrest. The police officer asked the defendant for the camera, which was given to him, and the films therein were subsequently developed and the pictures introduced as evidence in court. In answer to an inquiry by the police officer as to where defendant had left the child, defendant replied that she with her brother and sister was in the Fox Redondo Theater. Officer Hopkins then took the defendant to the theater, where the defendant, upon the suggestion of the officer, went into the theater and brought the child out into the lobby, from which place she was taken by the officer to the police station and was there interviewed. At the time of his arrest the defendant admitted that he had taken the pictures of the girl, had given her ten cents, and later took her to the theater. On being questioned as to his conduct in the show, defendant stated that he did not care to make any statement until he had talked with his attorney.

As to what took place in the theater, the victim testified that defendant sat next to her, and that shortly after they had entered the theater her brother and sister came in and seated themselves on her left. The child testified that while she was sitting next to defendant he put his leather jacket over her and his lap; that five or six minutes after her brother came into the theater, defendant started feeling around her and touched her private parts; that she tried to get away, but defendant had his hand on top of her hand and would not let go of her; that he took her hand and touched his private parts with it; that she tried to jerk her hand away, but could not. She further testified that she finally jerked her hand free and asked her brother if she could sit by him, but the seat next to him was occupied by another boy who refused to move. The victim further testified that defendant kept on trying to get his hand under her dress and that she kept tucking her dress over her and moving as far as she could to the side; that after the boy that had been sitting next to her brother had left she went and sat next to her brother. She further testified that during an intermission in the theater she went to the lavatory to wash her hands and met the defendant in the lobby; that she went back and sat down, and after a while defendant came in with police officer Hopkins. The victim's brother testified that while they were in the picture show she asked him if she could change seats with him. On the evening of February 2 at about nine o'clock, the victim of the alleged assault was examined by a physician, who testified at the trial that he found a small semi-lunar, that is, moon-shaped, laceration or break in the skin, which appeared to him to be a scratch possibly caused by a fingernail, on the outer border of the vagina, and that the laceration was less than six hours old. The physician also testified that the child's undergarment was torn quite badly.

At the police station following his arrest, as well as at the trial, defendant denied the charges made against him by the child in her narration of what took place at the picture show. Defendant admitted taking the pictures, which by the way might be said to furnish graphic and convincing evidence of the lewd and lascivious state of defendant's mind. When asked the question, "How did you come to take that kind of picture, or those pictures?" which as heretofore stated showed the child with her lower limbs and private parts exposed, defendant replied, "Well, I thought it would be odd to take a picture of a child like that exposed that way."

[1-4] Appellant's contention that the little girl's testimony was manifestly false and inherently improbable grows out of a number of apparent inconsistencies developed by the cross-examination of the witness. While the alleged variances or inconsistencies between the child's testimony given at the trial and that given at the preliminary examination, and the contradictions referred to, afforded opportunity for an argument to the jury against the reliability of her testimony, we find nothing in them from which a reviewing court could justly conclude that her entire testimony is per se unbelievable and that it was therefore the jury's duty not only to disregard it but to accept the defendant's denial of any wrongdoing on his part. When we consider the testimony of the young girl coupled with the manifest licentious and lewd conduct of the defendant in taking the pictures introduced in evidence, it necessarily follows that the jurors were authorized, if they conscientiously felt warranted in so doing, to reject any testimony which might have been contradictory to that of the child witness, and therefore to disbelieve the testimony of the defendant and accept that of the child as to the immediate circumstances of the alleged felonious assault and the actions constituting the same as they took place in the theater, however weak in places the child's testimony might have been made to appear. Even though we concede discrepancies between the child's testimony at the trial and that previously given at the preliminary examination, such discrepancies cannot justly be said to stamp the story of the witness as to the immediate circumstances of the alleged assault and the conduct of the defendant in the commission thereof as improbable or inherently unbelievable. The matters referred to were, as stated above, for the jury to consider, as was the ultimate question submitted for its decision, viz., whether or not the defendant committed the felonious assault charged against him. If, therefore, the jurors, as manifestly they did, believed the testimony of the child in the main, or if they believed only that portion of the testimony bearing on the immediate circumstances of the alleged assault, and thus became satisfied beyond a reasonable doubt of the defendant's guilt, it was of course within their province to base their verdict upon that particular portion of her testimony, although they might have regarded the statements of the child on other points as of doubtful verity. Consequently, the verdict returned by the jury against the defendant is conclusive on appeal. We find no similarity between the case at bar and the case of People v. McCullough, 38 Cal.App. 2d 387, 101 P.2d 531, 533, decided by this court. In the McCullough case we said, in referring to the exactness that should be required in the testimony of a child witness in cases of this nature, "Such exactness might not be necessary if the story told by the prosecutrix found corroboration in other facts or circumstances, but such is not the case here." In the case with which we are now concerned, the story told by the prosecutrix finds corroboration in the testimony of Mr. Pippen as to the conduct of the defendant when taking pictures of the child, and as heretofore pointed out, the pictures themselves point unerringly to a sensual and lascivious state of mind on the part of the defendant. From an examination of the entire testimony of the complaining witness and a consideration of it in connection with the testimony of other witnesses, it does not appear that her testimony is so inherently improbable as to require or justify a reversal by this court, for it cannot be said that viewing the case as a whole an injustice has been done.

[5] Finally, appellant urges a reversal on the ground that the court misdirected the jury in giving the following instruction:

"To constitute the offense charged in the information it is not necessary that the bare skin of the minor be touched.

"The touching, fondling, rubbing or feeling of the body, members or private parts of a minor, under the age of fourteen years, with the intent of arousing, appealing to and gratifying the lusts, passions and sexual desires of either the minor or the accused constitutes the offense charged in the infor-

mation, even though such touching, fondling, rubbing or feeling was through the clothing of the minor."

It is the contention of appellant that this instruction disregards entirely the matter of lewd and lascivious touching, and that the jury may well have believed that there was a touching, but that the same was not lewd or lascivious. This claim is without merit. The instruction was in conformity with the provisions of section 288 of the Penal Code. We have read the instructions given, and find the same, when considered as a whole, to be extremely fair. In fact the trial court cautioned the jurors in one of the instructions that they should scrutinize the testimony of the child with care to determine "whether her testimony is consistent with physical facts as shown by the evidence; whether she has been coached or otherwise, whether her testimony shows a knowledge of things and the use of words beyond the knowledge of children of such tender years, and from these, together with all the other rules laid down in these instructions for your guidance, you are to determine the weight, if any, you would give to the testimony of the little girl."

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.



49 Cal.App.2d 82

In re KATZ' ESTATE.

NEWMAN v. KATZ et al.

Civ. 2969.

District Court of Appeal, Fourth District, California.

Jan. 9, 1942.

1. Wills ⇐431

Contestant's voluntary dismissal of will contest did not bar contestant from filing another contest and his use of the words "without prejudice" in making the dismissal was surplusage and unnecessary, since the dismissal was without prejudice as a matter of law.

2. Wills ⇐307

Where contestant had voluntarily dismissed his will contest, court had no power to enter an order dismissing the contest with prejudice and such order was not only erroneous but void.

3. Wills ⇐359

Where will contestant would be an heir of deceased if contestant succeeded in upsetting will, order dismissing contest with prejudice was appealable by the contestant under statute which makes appealable an "order determining the persons to whom distribution should be made". Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Determining The Persons To Whom Distribution Should be Made".

4. Courts ⇐202(5)

The Probate Code which makes appealable an order determining persons to whom distribution should be made must be construed in consideration of Code of Civil Procedure authorizing an appeal from final judgment in a special proceeding in measuring the right of appeal in probate matters. Probate Code, § 1240; Code Civ.Proc. § 963.

5. Wills ⇐358

An order dismissing will contest with prejudice was a "final judgment" and was appealable under statute authorizing an appeal from a final judgment in a "special proceeding". Code Civ.Proc. § 963.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Special Proceeding".

6. Wills ⇐384

Question presented by contestant's appeal from order dismissing will contest with prejudice was not "moot" because contestant had filed another petition praying that probate of will be revoked, since if the order appealed from was allowed to stand it could be urged against the contestant in his proceeding seeking revocation of order admitting will to probate.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Proceeding in the matter of the estate of Maurice D. Katz, deceased, wherein Edward Newman filed a contest of purported last will of the deceased, to which an answer was filed by Zara Katz and others. From an order dismissing the will contest with prejudice, Edward Newman appeals.

Motion to dismiss appeal denied and order reversed.

Samuel M. Samter, of San Francisco, and Harry H. Parsons, of San Bernardino, for appellant.

John A. Hadaller and Martin J. Coughlin, both of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order dismissing with prejudice a contest to the probate of a will.

A petition for the probate of the purported last will of Maurice D. Katz, deceased, was filed on March 29, 1941. Before said will was admitted to probate a contest was filed by this appellant, a grandson of the deceased, to which an answer was filed by all of the respondents. Before these matters came on for hearing and on June 2, 1941, this appellant filed a dismissal of his contest "without prejudice." The next day, on motion of the respondents, the court entered an order dismissing "with prejudice" the contest which had been filed by this appellant and which he had already dismissed. The court's order recited that the appellant had already dismissed the contest without prejudice but that he had "failed to make any showing of any kind to this court why the said contest should not be dismissed with prejudice." This appeal was taken from that order. The respondents have moved to dismiss the appeal and the matter has been submitted both upon that motion and upon the merits.

[1, 2] The appellant's voluntary dismissal of his contest did not bar him from filing another contest and his use of the words "without prejudice" was surplusage and unnecessary since it was without prejudice as a matter of law. Estate of Cook, 205 Cal. 581, 271 P. 1083, 1086. In that case the court said: "It is clear, according to the authorities cited, that the voluntary dismissal by contestants of their first contest did not bar them from instituting the second contest. The court therefore had no authority to dismiss the second contest on the ground that the contestants named therein had joined with the other heirs of the testator in dismissing the prior contest." If the court had no power to dismiss a subsequent contest after a first contest had been dismissed it follows that it had no power to enter an order which, if upheld, would have the effect of preventing a contestant from filing a second contest. Moreover, the contest having been dismissed by the appellant before the court entered the order appealed from there was nothing before the court upon which that order could be based. It would appear, therefore, that the order was not only erroneous but void.

[3-5] In support of their motion to dismiss the appeal the respondents contend that the order in question is not an appealable order since it does not come within any of the provisions of section 1240 of the Probate Code. It appears from the record that the appellant would be an heir of the deceased if he succeeded in upsetting the will through a contest. If the order dismissing his contest with prejudice is allowed to stand and becomes final its probable effect would be to prevent the prosecution of any other contest by the appellant. The order would then have the effect of determining adversely to this appellant his claim that he is one of the persons to whom distribution should be made. In so far as the appellant is concerned, the order determines this issue against him and seems to come within the provision of section 1240 of the Probate Code which makes appealable an order "determining * * * the persons to whom distribution should be made." A further consideration is that section 1240 of the Probate Code must be taken in connection with section 963 of the Code of Civil Procedure in measuring the right of appeal in probate matters. Estate of Olmstead, 216 Cal. 585, 15 P.2d 495. The order having been made with prejudice as to the filing of a further contest it is a final judgment with respect to the rights of the appellant, and if it is not appealable under section 1240 of the Probate Code it should be held that it is a final judgment in a special proceeding within

the meaning of section 963 of the Code of Civil Procedure.

[6] The respondents further argue that any question involved in this appeal is moot because, as they allege in an affidavit, this appellant on November 29, 1941, filed a petition in the superior court praying that the probate of the last will and testament of Maurice D. Katz, deceased, be revoked, which petition is still pending. If the order here appealed from is allowed to stand and to become final it could and probably would be urged against this appellant and his right to appear and contest the will and seek a revocation of the order admitting it to probate. In our opinion, the question here presented is not moot.

For the reasons given, the motion to dismiss the appeal is denied and the order appealed from is reversed.

MARKS and GRIFFIN, JJ., concurred.



49 Cal.App.2d 52

WOOD v. BOARD OF POLICE AND FIRE PENSION COMMISSIONERS OF THE CITY OF LONG BEACH et al.

Civ. 13341.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1942.

Hearing Denied March 6, 1942.

1. Statutes ⇐181(1)

Courts, in interpreting statutes, should determine the legislative intent.

2. Municipal corporations ⇐187

Charter of the City of Long Beach providing that whenever any member of the police or fire department shall die as a result of an injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department, then an annual pension shall be paid to his widow, or children, or dependent parents, authorized grant of pension to widow of policeman whose death occurred after retirement because of physical disability received in discharge of his duties.

3. Constitutional law ⇐70(1)

Courts are not at liberty to alter the plain language of a city's charter in which there were no inconsistent or unreasonable provisions.

4. Municipal corporations ⇐187

The fact that city charter failed to provide specifically for the amount of a pension payable to the dependents of a deceased police officer, who has been retired because of disability before having worked in police department for a period of one year, did not justify refusal to grant pension to widow of deceased police officer who had retired for disability after having worked in the police department for more than one year.

5. Mandamus ⇐13

In view of provision of Long Beach city charter that board of police and fire pension commissioners should have exclusive control of administration of pension funds, policeman's widow seeking to compel payment of pension was not required to comply with charter provision that all claims for damages against the city must be presented to the city council and filed with the city clerk within six months after occurrence out of which the damages arose.

6. Municipal corporations ⇐1021

The rule requiring the filing of claims against a city will not be applied to one who seeks a hearing in the courts unless court is compelled to do so by statute validly enacted.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge pro tem.

Mandamus proceeding by Kathryn F. Wood against the Board of Police and Fire Pension Commissioners of the City of Long Beach and others to compel payment of pension to plaintiff as widow of a deceased police officer. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for appellants.

Joseph A. Ball and Kenneth Sperry, both of Long Beach, for respondent.

W. J. WOOD, Justice.

Defendants have appealed from a judgment granting plaintiff's petition for a peremptory writ of mandate and establishing petitioner's right to a pension as the widow of a deceased police officer.

Ben N. Wood, while employed by the police department of the city of Long Beach, sustained injuries in the course of his employment which caused permanent disability. Upon his application the Board of Police and Fire Pension Commissioners of the city on March 30, 1936, directed that he be retired because of physical disability received in the discharge of his duties and directed that he be paid an annual pension as provided by subdivision 3 of section 187 of the Charter of Long Beach. Mr. Wood died on May 27, 1938, and in the following July the petitioner herein, widow of Ben N. Wood, filed an application with defendant board for a pension, claiming that she was entitled thereto under the provisions of subdivision 4 of section 187 of the charter. The application having been denied, petitioner instituted the present proceeding to compel the board to pay to her the sum due as the widow of a retired police officer.

The petition contains two counts. The first count is based upon the claim that petitioner is entitled to a pension for the reason that Mr. Wood was retired for disability at the time of his death. The second count is based upon the claim that petitioner is entitled to receive a pension because of the fact that Mr. Wood's death resulted from injuries received during the course of his employment. The trial court made no finding on the second cause of action but found the facts in favor of petitioner on the first cause of action, and ordered the issuance of a writ of mandate compelling defendants to grant the application for a pension and to take such further action as might be necessary to cause to be paid to her the sum of $3,262.50, the sum due for past accruals.

The provisions for pensions for policemen are found in section 187 of the Charter of Long Beach. Subdivision 1 of this section provides for the creation of a board to be known as the Board of Police and Fire Pension Commissioners. Subdivision 2 provides that if a member has served in the department for 20 years or more he shall, on his application to the commission, or by order of the commission, if it be deemed for the good of the department, be retired from further service in such department and that thereafter he be paid a pension, the amount of which to be governed by the length of his service and the salary attached to the rank or position held by him one year prior to the date of his retirement. Subdivision 3 provides in part: "Whenever any member of the Police or Fire Department shall become physically disabled by reason of bodily injuries received in, or by reason of sickness caused by the discharge of duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service in such department; and thereafter such person so retired shall, during his lifetime be paid from said pension fund a yearly pension equal to one-half (½) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order."

The principal issue in this appeal concerns subdivision 4, which provides in part as follows: "Whenever any member of the Police or Fire Department shall die as a result of an injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department, then an annual pension shall be paid in equal monthly installments to his widow, or child or children, or dependent parent or parents, in an amount equal to one-half (½) of the salary attached to the rank or position which such deceased person held in such department at the time of his death or one year prior to the date of his retirement from active duty in such department." This subdivision further provides for the payment of such pensions during the life or until the remarriage of the widow or until any children surviving shall have reached the age of 18 years. Subdivisions 5 and 6 provide the method of creating a pension fund, which is largely dependent upon deductions from the salaries of various members of the departments.

[1] It is the contention of defendants that although a widow of a policeman retired after service of twenty years would be entitled to a pension, the widow of a

policeman who died after retirement because of physical disability is not entitled to a pension unless it can be established that death resulted from injuries received in or sickness caused by the discharge of official duties; but petitioner contends that the language of subdivision 4 compels the allowance of a pension to the widow of any officer whose death occurred after retirement, regardless of the cause of death. In their briefs both parties have printed quotations from various decisions referring to the well established rule that the courts in interpreting statutes should determine the legislative intent. Defendants assert that the language used in subdivision 4 is ambiguous and that it was not the intention of the framers of the charter to provide a pension for one in the position of petitioner.

[2, 3] Subdivision 4 provides in plain language for the payment of a pension to the dependents of a policeman whose death occurred (a) as the result of a service-connected injury; or (b) as the result of a service-connected sickness; or (c) after retirement; or (d) while eligible to retirement. Each of these contingencies establishes a separate and distinct classification of dependents entitled to receive a pension. Each contingency is separated by the word "or" and is appropriately punctuated by a comma. It is a clear and concise statement of the conditions under which rights to a pension are established. To uphold the contention of defendants it would be necessary to omit the comma after the words "or after retirement" and insert in place of the comma the words "because of length of service." The courts are not at liberty to alter the plain language of the charter, in which we find no inconsistent or unreasonable provisions. There is no occasion for speculation as to the intention of the framers of the charter, who have used language which is easily understood.

We find nothing unreasonable in petitioner's contention. It is obvious that policemen who die after retirement because of physical disability in most cases die at an earlier age than those who die after retirement because of length of service. The needs of the dependents of a younger member of the department who has been deprived of his earning capacity because of a service-connected disability are greater than those of the dependents of an older member of the department who has been retired because of long years of service; for his growing children are more probably dependent upon him for support during his earlier age than at the later age when he can retire because of a long period of service. The reasons for creating a pension for the dependents of a younger officer are as compelling as the reasons for creating a pension for the dependents of an older officer.

[4] Defendants base their contention that the petitioner is not entitled to a pension mainly upon the suggestion that the charter fails to specifically provide for the amount of a pension payable to the dependents of a deceased police officer who had been retired because of disability before having worked in the department for a period of one year. Without conceding that no means is provided for fixing the amount of the pension in such a contingency, petitioner points out that Mr. Wood had in fact served many years in the department. The commissioners, and in turn the court, would not be justified in ignoring the express provisions of the charter which clearly provide the right to and the amount of a pension because of the mere fact that the framers of the charter failed to take into consideration every possible contingency which might arise in fixing the amounts of the various pensions for which provision was being made.

Defendants contend that petitioner may not prevail for the reason that she did not file a claim with the city clerk. Section 338 of the Charter of Long Beach provides as follows: "All claims for damages against the City of Long Beach must be presented to the city council, and filed with the city clerk within six (6) months after the occurrence for which the damages arose." In July, 1936, the city council enacted an ordinance providing that "all demands or claims for damages against the City of Long Beach, or any officer, board or commission of the City, must be presented and filed * * * and * * * all other demands or claims of whatsoever kind or character, against the City, or any officer, board or commission of the City, must be presented and filed * * * within six (6) months after the last item of the act or demand or claim accrued." The ordinance further provides that such claims should be addressed to the city council and filed with the city clerk.

[5] Section 187 of the charter, after providing for the creation of "a governmental board," further provides: "The Board of Police and Fire Pension Commissioners shall have exclusive control of the administration and the investment of the pension fund or funds which may be established as hereinbefore provided, and to make all needful rules and regulations for its guidance in conformity with the provisions hereof." The section further provides that a member of the fire or police department shall "on his application to the commission" be retired in accordance with the detailed provisions set forth in the section. The section repeatedly refers to the application of the members of the department to the commission for the attainment of the rights accorded to them by the charter, but in no instance makes reference to the filing of any application or claim with the city clerk. It appears that the charter provides in section 187 a complete method to be followed by members of the department in obtaining their pension rights. It must be held that the framers of the charter, by providing in section 338 for filing with the city clerk general claims for damages only, intended that the provisions of section 187 should govern the practice to be followed by pension claimants. The council was without authority to enact an ordinance compelling the filing of a demand for pension rights with the city clerk.

[6] Requirements for the filing of claims with the clerks of governmental bodies have been upheld on the theory that timely opportunity should be given for the investigation of claims and for possible settlement before the commencement of court actions. In practical operation such enactments have often resulted in the failure of applicants to obtain hearings in court due to inadvertence or to the ignorance of the applicants concerning the requirements of ordinances, or to error on their part as to the necessity for filing claims. At times the courts have reluctantly refused hearings because of the strict statutory requirements on the subject, realizing that the bar of the statute had not aided in the administration of justice. We are unwilling to apply the rule requiring the filing of claims to one who seeks a hearing in the courts unless we are compelled so to do by statute validly enacted. In the present case the filing of a demand with the city clerk could not possibly have been of assistance to either party, for the defendant members of the commission were the only officials authorized to pass upon petitioner's application for pension rights.

Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 59 P.2d 104, relied upon by defendants, contains nothing inconsistent with the views herein expressed. In that case no issue concerning the proper place for the filing of demands or claims was before the court.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.



48 Cal.App.2d 845

PEOPLE v. JONES.

Cr. 3518.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1942.

1. Robbery ⇐24(1)

Evidence was sufficient to warrant conviction for robbery.

2. Criminal law ⇐595(1)

The denial of defendant's motion for continuance to produce witnesses who were to be called upon for the purpose of proving defendant's alibi was not abuse of discretion, where absent witnesses could have added little if anything to defendant's defense by appearing and testifying, and evidence adduced at trial was sufficient to establish defendant's guilt beyond reasonable doubt.

3. Criminal law ⇐552(3)

A defendant may be convicted upon circumstantial evidence alone, if such evidence is consistent with his guilt and inconsistent with his innocence.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

LeRoy Jones was convicted for robbery. From the judgment of conviction and an order denying a new trial, he appeals.

Judgment and order affirmed.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

DORAN, Justice.

After the waiver of a trial by jury, appellant was tried by the court and convicted upon all six counts of an information charging him with robbery. Appellant admitted a prior conviction for a felony after the information had been amended by interlineation to show the true facts regarding the same. This appeal is taken from the order denying appellant's motion for a new trial and from the judgment of conviction. Appellant contends that he was not accorded a fair trial and that the court abused its discretion in denying a motion made by appellant for a continuance of the trial in order to be allowed time to produce certain witnesses.

[1, 2] Appellant's principal defense was an alibi, namely, that he was elsewhere at the time of the commission of the crimes with which he was charged. It appears that no attempt was made to subpoena the witnesses for appellant until shortly before the trial date; and it was then discovered that several of the witnesses could not be located, two of them were outside the state and one was ill in the County Hospital. The witnesses in question were to be called upon for the purpose of proving appellant's alibi; and it was stipulated at the trial that if present they would corroborate appellant's testimony in this regard. While appellant indicates that the late effort at subpoenaing witnesses was due to substitution of counsel, it appears that throughout the proceedings appellant was represented either by the public defender or by private counsel. Other witnesses were called on behalf of appellant and testified as to his alibi. Upon the motion for a new trial the court stated: "* * * regarding the absence of certain witnesses you will recall that the district attorney stipulated with you as to what they would testify. I also had before me at that time I think three of these alibi witnesses. There were three or four and I got a very good idea of what the type and kind of testimony that (they) would give would be. There was little merit in the testimony of any of them. Their attempts at proving and establishing an alibi were really quite futile and would raise no doubt in anybody's mind but that they were friendly to this defendant and were doing their best to get him out of a bad hole. The testimony of the other witnesses, however, was very conclusive and very substantial and not shaken in any way. As far as this court is concerned there is no reasonable doubt whatever of this man's guilt * * *." The case for the prosecution hinged largely upon the ability of certain witnesses to identify appellant as the man who held them up. The identifications made were of a sufficiently positive nature. Appellant is a negro and the robberies in question were committed at night, but were all committed at lighted service stations. It appears from the testimony of a police officer that after his arrest appellant was taken to the several service stations and in some instances demonstrated to the police the manner in which he had committed the holdups. On direct examination appellant testified that on the night of one of the offenses charged he was in a barber shop at the time of the alleged offense, 10 o'clock. On cross-examination he stated that on that night he was home in bed about 8:30 or 9 o'clock. When confronted with this inconsistency, appellant merely stated that he "wasn't there in May," meaning the barber shop. It is clear from the record, and from the circumstances of the case there shown, that the absent witnesses could have added little if anything to appellant's defense by appearing and testifying, and that the evidence adduced at the trial was sufficient to establish the guilt of appellant beyond a reasonable doubt. The failure to have the absent witnesses produced and the refusal of the court to allow a continuance in order to obtain the said witnesses could not, therefore, be held to have been prejudicial to appellant; and the court, under the circumstances, did not abuse its discretion in denying appellant's motion for a continuance.

[3] Appellant also contends that the evidence was insufficient to warrant his conviction, but that contention has already been answered above. In this connection, though not pertinent to the instant case, appellant states: "* * * regardless of how or in what manner it may be said, no criminal case is tried unless both circumstantial and direct evidence is introduced." This is an incorrect statement. A defend-

ant may be convicted upon circumstantial evidence alone if such evidence is consistent with his guilt and inconsistent with his innocence. See 8 Cal.Jur. 191.

It does not appear from the record that there was any miscarriage of justice; and appellant was accorded a fair hearing at the trial.

The judgment and the order denying the motion for a new trial are affirmed.

YORK, P. J., and WHITE, J., concurred.



49 Cal.App.2d 65

BURDGE v. GOULD et al.

Civ. 13389.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1942.

1. Appeal and error ⇐345(1)

Where trial court failed to act on motion for new trial within sixty days after service of notice of entry of judgment, motion was denied by operation of law, and notice of appeal filed more than 30 days after 60-day period was too late, and appeal was dismissed, notwithstanding that trial court filed a written order denying motion after 60-day period, since that order was merely "surplusage". Code Civ.Proc. §§ 659, 660, 939.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

2. Appeal and error ⇐345(1)

The statute providing that an appeal may be taken from a judgment within 60 days from the entry thereof, but that, if proceedings on motion for a new trial are pending, time for appeal from judgment shall not expire until 30 days after entry in trial court of order determining such motion, or other termination in trial court of the proceedings on such motion, is "jurisdictional" and "mandatory", and, if the appeal is not taken within the time allowed therefor, the appellate court is without power to entertain the appeal. Code Civ.Proc. § 939.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdictional" and "Mandatory".

3. Appeal and error ⇐345(1)

Where notice of appeal was filed more than 30 days after dismissal of motion for new trial on ground that motion for new trial was not filed within statutory period, notice of appeal was too late to confer jurisdiction on the District Court of Appeal. Code Civ.Proc. § 939.

Appeals from Superior Court, Ventura County.

Action to quiet title to certain realty by Alonzo Burdge against Leroy C. Gould, Nell Sullivan, and another. From a judgment in favor of the plaintiff, Nell Sullivan and another appeal. On motion by plaintiff to dismiss the appeal.

Motion granted.

No appearance for appellants.

A. W. Brunton, of Los Angeles, for respondent.

YORK, Presiding Justice.

On November 24, 1941, pursuant to notice theretofore served upon counsel for appellants, counsel for respondent moved this court to dismiss the appeals of Nell Sullivan and Colima Oil Company upon the ground that they were not taken within the time provided by statute. Appellants have filed no written opposition to the motion.

The certificate of the county clerk of Ventura County accompanying the notice of motion reveals that the above entitled action was brought to quiet title to certain leased real property, for possession thereof and costs of suit; that on July 7, 1941, judgment was entered in favor of respondent against all of the defendants, and service of notice of such entry was made on July 8, 1941. Within ten days thereafter, on July 16th, appellant Colima Oil Company made its motion for a new trial. Sec. 659, Code Civ.Proc.

Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a judgment within sixty days from the entry thereof, but "if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, *or other ter-*

mination in the trial court of the proceedings upon such motion."

The last paragraph of section 660, Code of Civil Procedure, declares that the "power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment * * *. *If such motion is not determined within said period of sixty (60) days * * * the effect shall be a denial of the motion without further order of the court."* (All emphasis added.)

[1, 2] Accordingly, the court had sixty days from and after July 8, 1941, within which to pass upon said motion for a new trial, or until September 6, 1941. The fact that the court subsequent to that date, to-wit: on September 8th, filed a written order denying said motion was "surplusage and harmless" (Schomer v. R. L. Craig Co., 137 Cal.App. 620, 625, 31 P.2d 396, 398), because the motion was denied by operation of law on September 6th (sec. 660, Code Civ.Proc.), and it became necessary for appellant Colima Oil Company to file its notice of appeal within thirty days after September 6th, or on October 6, 1941. Therefore, the notice of appeal filed by appellant Colima Oil Company on October 7th was too late. "The statute limiting the time within which an appeal may be taken is jurisdictional and mandatory; and if the appeal is not taken within the time allowed therefor, the appellate court is without power to entertain it." Kocher v. Fidelity & Deposit Co., 137 Cal.App. 474, 476, 30 P.2d 535, 536.

[3] As to appellant Nell Sullivan, her notice of intention to move for a new trial was not filed until July 22nd, and on August 18th, the court dismissed such motion on the ground that it was not filed within the statutory period required by section 659, supra. As a result, Nell Sullivan was required to file her notice of appeal within thirty days after August 18, 1941, the date of the *"termination in the trial court of the proceedings upon such motion"* for new trial (sec. 939, supra), or on September 17, 1941. As a matter of fact, a notice of appeal signed by the attorneys for Nell Sullivan was filed on October 7, 1941, reciting that "defendant Colima Oil Company, a corporation, appeals * * * from the judgment therein entered on the 7th day of July, 1941." Even though the erroneous statements therein contained be overlooked, the notice was too late to confer jurisdiction upon this court.

For the reasons stated, the motion to dismiss the appeals of Colima Oil Company and Nell Sullivan is granted.

DORAN and WHITE, JJ., concurred.



BILA v. YOUNG et al. *

Civ. 13085.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1942.

Hearing Granted March 6, 1942.

1. Mandamus ⇐3(6)

Where no proper statutory method of review of decision of State Social Welfare Board denying petition for monthly old age security payments was provided in the Welfare and Institutions Code, mandamus was the only remedy of petitioner aggrieved by rulings of the board. St.1937, p. 1005, as amended; Code Civ.Proc. § 1085.

2. Mandamus ⇐1

The "writ of mandate" was conceived and invented to supply a remedy where no other remedy existed, and its purpose is to supply defects of justice, so that it will issue to the end that justice will be done in all cases where there is a specific legal right and no specific legal remedy for enforcing such right.

See Words and Phrases, Permanent Edition, for all other definitions of "Writ of Mandate".

3. Constitutional law ⇐80(2)

The Constitution prohibits the conferring of judicial powers on administrative boards such as the State Social Welfare Board. Const. art. 6, § 1.

4. Paupers ⇐3

The provision of Welfare and Institutions Code that any aged person qualifying under the Code shall be entitled to old age relief, unequivocally enjoins upon State Social Welfare Board the duty to extend aid

* Subsequent opinion 129 P.2d 364.

where the applicant meets the statutory requirements. St.1937, p. 1078, § 2001, as amended.

5. Constitutional law ⇐80(2)

The judicial power of a competent court cannot be circumscribed by any legislative arrangement designed to give finality to rulings and decisions of administrative boards, however unreasonable, arbitrary or capricious such rulings or decisions may be.

6. Paupers ⇐42

The findings of an administrative board, such as the Social Welfare Board, where formal hearings are had are entitled to and come before courts with a strong presumption in their favor. St.1937, p. 1005, as amended; Code Civ.Proc. § 1963, subd. 15.

7. Mandamus ⇐159, 168(2), 172

In view of "mandatory" duty placed on State Social Welfare Board in case of an appeal from action of county board of supervisors to grant applicant a fair hearing, a competent court, to determine the fairness of the hearing as well as reasonableness and presence or absence of arbitrary or capricious action on part of board, may issue alternative writ of mandate and upon hearing thereon must weigh evidence introduced before the board, giving due weight to presumption in favor of board's findings, but must nevertheless exercise its independent judgment thereon in determining whether the board acted beyond its powers, or arbitrarily or capriciously refused to perform an act. St.1937, p. 1005, as amended; Code Civ.Proc., § 1085.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

8. Paupers ⇐3

The moral obligation resting upon the state to care for its indigent aged was raised to the dignity of a legal obligation by the adoption of Welfare and Institutions Code providing that any aged person qualifying under the provisions thereof shall be entitled to old age relief. St.1937, p. 1005, as amended.

9. Statutes ⇐72

The statutes providing for old age relief are subject to constitutional provisions requiring that all laws of a general nature shall have a uniform operation. St.1937, p. 1005, as amended; Const. art. 1, § 11.

10. Paupers ⇐7

The State Social Welfare Board, or other administrative agency, must keep within the law and resort may be had to the courts to ascertain whether it has done so. St. 1937, p. 1005, as amended.

11. Paupers ⇐42

In the realm of fact finding that is committed to the State Social Welfare Board by the Legislature, the actions of such board are unassailable provided the findings are supported by some substantial evidence and do not descend to an abuse of fact-finding function. St.1937, p. 1005, as amended.

12. Paupers ⇐7

The State Social Welfare Board may not exercise its discretion arbitrarily, unreasonably or capriciously. St.1937, p. 1005, as amended.

13. Mandamus ⇐172

Where petition for writ of mandate to compel State Social Welfare Board to pay monthly old age security payments alleged facts which, if true, entitled the petitioner to state aid and alleged that the board had denied the petitioner's application, the petition stated a cause of action of which the trial court had jurisdiction to enforce by mandate, to the extent, at least, of deciding whether the board granted petitioner a fair hearing, acted unreasonably, arbitrarily or capriciously, or acted without a factual basis upon which to predicate its decision. St. 1937, p. 1005, as amended.

14. Paupers ⇐42

Findings of fact made by State Social Welfare Board and its decision based thereon, in proceeding for old age security payments, are conclusive if supported by evidence sufficient to support a jury verdict on appeal. St.1937, p. 1005, as amended.

15. Paupers ⇐43(2)

Where some two years prior to application for old age security payments applicant had transferred Colorado property in order to pay indebtedness and after the application was made applicant sold her Los Angeles home to her brother in order to raise money to pay Home Owners Loan Corporation's loan and to pay an indebtedness to another, and where the evidence showed that the debts were legitimate and bona fide, order of State Social Welfare Board making grant of aid contingent upon the applicant's obtaining either a transfer of her home prop-

erty back to her or dependent upon the brother granting the applicant a life estate in the home was arbitrary, and constituted an abuse of discretion. St.1937, p. 1005, as amended.

16. Mandamus ⇐182

In proceeding to compel State Social Welfare Board to make monthly old age security payments, the trial court exceeded its jurisdiction in attempting by its writ of mandate to determine the amount of aid to be extended the applicant and in fixing the commencement date of such aid payments. St.1937, p. 1005, as amended.

DORAN, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; Norman A. Bailie, Judge pro tem.

Proceeding for a writ of mandate by Rosanna Bila against Archibald B. Young and others, as members of the Social Welfare Board, to compel the board to make monthly old age security payments. From a judgment granting a peremptory writ of mandate, Archibald B. Young and others appeal.

Reversed, with directions.

Prior opinion, 117 P.2d 939.

Earl Warren, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Clarence A. Linn, of San Francisco, for appellants.

Joseph K. Coady and Henry K. Elder, both of Los Angeles, for respondent.

WHITE, Justice.

On March 14, 1939, respondent herein, pursuant to the provisions of the Welfare and Institutions Code (Stats.1937, ch. 369, p. 1005, and amendments thereto), made application to the Board of Supervisors of Los Angeles County for monthly old-age-security payments. On October 3, 1939, her application was denied. From such decision of the board of supervisors respondent appealed to the state Social Welfare Board, appellants herein (hereinafter referred to as the state board). The last-named tribunal heard such appeal and entered its order denying the same.

Thereafter respondent filed with the Superior Court of Los Angeles County her petition for a writ of mandate to compel said board to pay her, through the Board of Supervisors of Los Angeles County, monthly old-age-security payments in the sum of $40 per month from March 14, 1939, the date upon which her application for such payments was filed with the board of supervisors. The state board demurred to the first amended petition and the amendment filed thereto, and when its demurrer to the last-named pleading was overruled, answered the petition. The superior court rendered judgment January 30, 1941, granting petitioner a peremptory writ of mandate ordering said state board to pay the petitioner therein, through the Board of Supervisors of Los Angeles County, monthly old-age-security payments in the amount of $40 per month from October 3, 1939 (the date her application was denied), and awarding petitioner her costs. From this judgment the state board has appealed, on the grounds that the court erred (1) in overruling the objections of the state board to the introduction of any evidence for the reasons that (a) the petition did not state facts sufficient to constitute a cause of action, and (b) the court had no power to review the action of the state board; (2) in finding that the action of the state board was arbitrary, capricious and unreasonable. When the case was called for trial it was stipulated that the same might be heard on a transcript of the proceedings had before the state board on the appeal, subject to the objection of the board that the court was without jurisdiction to hear the matter.

In California, as in most of the states of the Union, relief is granted needy aged persons in conformity with a state-federal plan for extending such assistance. In the operation of this duo-governmental setup, the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., directs the allotment of federal funds to those states which put into effect plans for old-age relief which conform to certain minimum requirements of the federal act. Such federal requirements, so far as here pertinent, are that the state must either provide for the establishment or designation of a single state agency to administer the plan, or provide for the establishment or designation of a single state agency to supervise the administration of the plan. Further, it is required of the state that the latter's plan for old-age assistance provide for granting to any individual whose claim for old-age assistance is denied an opportunity for a hearing before such state agency. The State of California, in the several sections of the Welfare and Institutions Code (secs. 124, 2024, 2025, 2140 and 2160), enacted legislation

for the purpose of implementing the Federal Social Security Act and thereby securing from the federal government the aid offered to states which should adopt legislation in conformity with the congressional act. Sections 2022, 2180 and 2181 of the Welfare and Institutions Code provide for the filing of applications for old-age assistance with the county boards of supervisors, and invest such boards of supervisors with authority to act upon such applications and make awards thereunder. Section 2140 of the same Code vests in the state Department of Social Welfare the power to prescribe the form of application and to make rules and regulations necessary for the administration of aid to the needy aged, and further provides that such rules and regulations shall be binding upon the boards of supervisors of the respective counties of this state. Section 2182 provides for an appeal to and a fair hearing before the state Social Welfare Board in the case of an applicant who is dissatisfied with the action of the board of supervisors. By thus conforming to the provisions of the Federal Social Security Act, the State of California has obtained allotment of federal funds.

The first amended petition filed in the mandate action now before us alleged facts which, if true, concededly entitled Mrs. Bila to state aid. Such allegations fully met the requirements of sections 2160, 2163 and 2164 of the Welfare and Institutions Code, which sections in effect provide that aid *shall* be granted to any person who has not made any voluntary assignment or transfer of property for the purpose of qualifying for such aid, and provided that such applicant for aid does not own personal property the value of which exceeds $500. Section 2164 further provides that no aid shall be granted or paid to any person who owns real property the assessed valuation of which as assessed by the county assessor exceeds $3,000 at the time such person makes application for aid. The amount of aid to be granted to any needy aged person is governed by sections 2020 and 2025 of the Welfare and Institutions Code.

[1, 2] The first contention advanced by appellant state board is that the writ of mandate may not be resorted to in cases such as this for the asserted reason that nowhere in the Federal Social Security Act or in the Welfare and Institutions Code of this state is there any provision for judicial review of the action taken by the Social Welfare Board on the appeal of a dissatisfied applicant for aid; that the action of the county board of supervisors and of the state Social Welfare Board is executive in nature, and that neither the county nor the state administrative boards perform any judicial functions. It is further argued that any attempt by the courts through prerogative writs to interfere with these administrative agencies in the exercise of their functions of administering aid for needy aged people would amount to an assumption by the courts of executive powers and therefore would be violative of the constitutional provisions dividing the powers of government between the executive, legislative and judicial branches thereof and inhibiting the encroachment by one branch upon the powers and prerogatives of the other. With this claim of appellant we do not agree. The provisions of section 1085 of the Code of Civil Procedure in part authorize the issuance of the writ of mandate *"to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station* * * *." (Italics added.) Where, as here, no proper statutory method of review of the state board's decision is provided in the act, mandate is the only possible remedy of those aggrieved by rulings of such administrative board. When we contemplate the history of the writ of mandate, the conclusion seems inescapable that such writ was conceived and invented to supply a remedy where no other remedy existed. In 9 Halsbury's Laws of England, 744, section 1269, we find the following in reference to the writ of mandate: "Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right."

[3-7] The case of Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, is authority for the statement that the Constitution of this state (art. VI, sec. 1) prohibits the conferring of judicial powers on administrative boards such as the one with which we are here concerned. It should be noted that section 2001 of the Welfare and Institutions Code provides that any aged person qualifying under the provisions of the statute *shall* be entitled to old-age relief. By this language the law

unequivocally enjoins upon the state board the duty to extend aid where the applicant meets the requirements of the statute. In such cases the board has no alternative. Under the American form of government there is no warrant for the claim that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give finality to the rulings and decisions of administrative boards, however unreasonable, arbitrary or capricious such actions may be. Without doubt, the findings of an administrative board where formal hearings are had are entitled to and do come before the courts with a strong presumption in their favor, primarily attributable to the rebuttable presumption provided for in subdivision 15 of section 1963 of the Code of Civil Procedure that "official duty has been regularly performed." The statute under which the state board functions (sec. 2182, Welfare and Institutions Code, supra) makes it mandatory upon the board in the case of an appeal from the action of a county board of supervisors to grant the applicant a *"fair hearing"* before the state board. To determine the fairness of the hearing as well as the reasonableness and presence or absence of arbitrary or capricious action on the part of the board, a competent court may issue an alternative writ of mandate, and upon hearing thereon must of necessity weigh the evidence introduced before the board, giving due weight to the presumption in favor of the board's findings, but nevertheless exercising its independent judgment thereon in determining whether the board acted beyond or in excess of its powers or arbitrarily or capriciously refused to perform an act enjoined upon it by law.

[8-11] Appellant state board urges that the rules just announced are inapplicable here for the reason that the statutes authorizing grants of public assistance to needy aged persons do not confer property rights, but award public funds to such persons as gratuities. Appellant board concedes the existence of a strong moral obligation upon the part of the state to care for its indigent aged, but argues that the right of the aged to receive such aid is not a vested one, and the state may distribute or refuse distribution of such aid at will, unrestrained by judicial intervention. We take the position, however, that the moral obligation resting upon the state to care for its indigent aged was raised to the dignity of a legal obligation by the adoption of the legislation here under consideration; that in considering such legislation we are faced with a primary question of human relations which reaches to the very depth of organized society and to the very depth of human conscience. This legislation recognizes that what we call American life is builded on and can only survive by an observance of those primary inexorable laws of human relationship, and that our civilization, our culture, cannot succeed with the defense of Cain, "Am I my brother's keeper?" When by the adoption of appropriate statutes the state recognizes the duty to aid its indigent aged as a legal obligation, then such laws are subject to the provisions of section 11, article I of the Constitution, which requires that all laws of a general nature shall have a uniform operation. While recognizing the measure of discretion committed to it, the state board or other administrative agency, like all other governmental departments, must keep within the law, and resort may be had to the courts to ascertain whether or not it has done so; bearing in mind, of course, that in the realm of fact-finding that is committed to it by the legislature, the actions of such board are unassailable provided such findings are supported by some substantial evidence and hence do not descend to an abuse of the fact-finding function. Furthermore, as heretofore pointed out, mandate may be issued to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. Code Civ.Proc., sec. 1085.

[12, 13] Whatever discretion is vested in the state board, that body may not exercise it arbitrarily, unreasonably or capriciously. McDonough v. Goodcell, 13 Cal. 2d 741, 746, 91 P.2d 1035, 123 A.L.R. 1205. Petitioner's complaint as amended therefore stated a cause of action that the trial court had jurisdiction to enforce by mandate, to the extent, at least, of deciding whether or not the state board granted petitioner a fair hearing, acted unreasonably, arbitrarily or capriciously, or acted without a factual basis upon which to predicate its decision. The trial court therefore did not err in overruling defendants' objection to the introduction of any evidence under such pleading.

The cause was tried in the court below, by stipulation, on the record of the hearing before the state board. Such hearing was

informal, as administrative board hearings usually are, and consisted of statements by counsel and investigators and discussions among the members of the state board and with counsel. The only evidence given under oath was that of the applicant, Mrs. Bila.

[14, 15] In view of the decisions of our Supreme Court in the cases of Drummey v. State Board, supra, and McDonough v. Goodcell, supra, we feel justified in saying that the findings of fact made by the state board and its decision based thereon must be held conclusive if supported by evidence sufficient to support a jury verdict on appeal. The factual situation as presented to the state board and later to the trial court may, we think, be thus fairly summarized: Respondent, Mrs. Bila, in 1937 owned a farm in Colorado which in that year was sold on the open market for $2,400. In 1929 her husband was an invalid and they began borrowing money from respondent's brother, Frank Kelley. Mrs. Bila testified that she repaid her brother $1,500 of the money received from the Colorado property in payment for money he had advanced her and her husband up to the death of the latter in 1933, and that she used the balance of the money received from the Colorado property to pay expenses and to make her home in Los Angeles livable. She testified that she gave her brother $500 in the early part of 1937, "and when the other amount came in July 1938, he took that amount." It also appears that a Mr. Wheeler, who had been a friend of the family, had helped respondent take care of her husband, and had lent her money in small amounts at different times, as well as paid the back taxes on the Colorado property. On September 28, 1939, after she was denied relief by the board of supervisors, Mrs. Bila transferred to her brother, Frank Kelley, her home at Los Angeles in which she lived, the assessed value of the same being $550 and the consideration for its transfer approximately $610, of which it appears $235.69 was used to pay an outstanding loan from the Home Owners Loan Corporation, payment of which was due and had been demanded by such corporation, and $330 was paid to Mr. Wheeler for money lent by him in 1933 and services rendered by him in the preceding year.

At one time during the first hearing before the state board, a motion was made and seconded that the appeal be denied. Such motion was put after considerable discussion, but received no "aye" votes. During the discussions before the board and prior to the taking of a vote, the suggestion was made by Mr. Schreiber, Deputy Director of Los Angeles County Charities, to the effect that "if the property disposed of for $2,400 could be satisfactorily settled" and if "this brother Frank would give a life estate in that property" (referring to the Los Angeles home of respondent) "the records would then be cleared." Thereafter a motion was put before the board "that the appeal be granted * * * to the amount to which she may prove eligible," which motion was seconded. From the record it seems clear that before putting this motion to grant applicant relief, the board wished more evidence with reference to the circumstances surrounding the sale of the Colorado property and also desired to ascertain whether respondent's brother would give a life estate to her in the Los Angeles home property, because after some discussion the hearing was continued "for information." When the hearing was next resumed a letter from respondent's brother was read, which in effect stated that he could not give his sister a deed to the Los Angeles home as he had to borrow a part of the money he paid her for it and would have to sell the home to liquidate that loan. The following then appears in the transcript:

"Acting Chairman: In other words, they didn't comply with the request of the Board at the last meeting in order to qualify.

"Mr. L. C. Schreiber, Deputy Director, Los Angeles County Charities: My recollection was that at the last meeting of the Board thirty days time would be allowed the appellant to obtain a life estate or else the appeal would have to be denied.

"Mrs. Barkwill (member of state board): I would like to make a motion that the appeal of Rosanna Bila be denied.

"Mrs. Emmons (member of state board): I second."

This motion was carried.

While it is true, as contended by the Attorney General, that the record indicates a feeling upon the part of the members of the state board that some collusion existed between the applicant for aid and her brother and Mr. Wheeler, we are unable to find in the record any factual basis for such conclusion. The transfer of the Colorado property made in 1937 was presumed un-

der the state board's rule (sec. 135-00) to have been made in good faith, and such transaction having taken place some two years prior to her application for aid, surely it cannot be said to have been made "for the purpose of qualifying for such aid." Welf. & Inst. Code, sec. 2160, subd. (g). So far as the transfer of the Los Angeles home property is concerned, the record decisively establishes the existence of a Home Owners Loan Corporation mortgage which was due. In this regard respondent Mrs. Bila testified under oath, and it is uncontradicted, that she went to the Home Owners Loan Corporation, told them she "was unable to make any more payment, they told me briefly they would have to have their money. Mr. Wheeler made the payments." Furthermore, the sale of the home place having been made after Mrs. Bila's application for aid was filed, we fail to see how such transfer could have affected her eligibility at all. Not one iota of evidence was introduced to disparage the showing that all of the applicant's debts to her brother and Mr. Wheeler were legitimate and bona fide. It seems to us that the hearing was continued by the state board after it had determined to grant aid contingent upon respondent's obtaining either a transfer of the home property back from her brother to her, or dependent upon the former's granting his sister a life estate in such home. This action impresses us as being arbitrary, and constituted an abuse of the discretion vested in the state board, requiring of respondent as it did the performance of an act not within her power to accomplish.

[16] We must, however, hold that the trial court exceeded its jurisdiction in attempting by its writ of mandate to determine the amount of aid to be extended respondent and in fixing the commencement date of such aid payments. It is within the exclusive jurisdiction of the administrative board, in accordance with the legislative act, to award aid, determine the amount thereof to be paid within the established statutory limits, and also to determine the date when such payments shall commence.

The judgment is reversed with directions to the court below to quash the writ of mandate issued and to issue another writ directing the state board to award aid to respondent and fix the amount of such aid and the effective date from which such aid payments shall commence as prescribed by law.

YORK, P. J., concurred.

DORAN, Justice (dissenting in part).

I concur in that portion of the judgment which reverses the judgment of the court below, but I dissent from the balance thereof.

The board having acted upon and determined a matter within its jurisdiction, it is my opinion that the law is well settled that, however erroneous, such action cannot be reviewed in proceedings for mandamus. The exercise of discretion and judgment is not subject to control by mandamus.

In my opinion, section 1085 of the Code of Civil Procedure does not vest in the courts authority to invade the province of those officials charged with the responsibility of administering the Welfare Code. The phrase in section 1085, "to compel the performance of an act which the law specially enjoins," in my opinion does not furnish the authority contended for it in the prevailing opinion. The law does not "enjoin," either generally or "specially," the Social Welfare Board to pay petitioner, or any other applicant, a pension in any event. It is only such an act for which there is no alternative that the law specially enjoins and which therefore may be compelled by mandamus.



49 Cal.App.2d 1

BODKIN et al. v. SILVEIRA et al.

Civ. 11706.

District Court of Appeal, First District, Division 1, California.

Jan. 6, 1942.

Hearing Denied March 6, 1942.

1. Appeal and error ⇐1008(3)

Where construction given an instrument by a trial court appears to be reasonable and consistent with intent of parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it seems equally tenable.

2. Corporations ⇐198

A voting trust agreement to hold corporate stock, which granted to each party

thereto the option to purchase his proportion of stock of any party intending to sell, but which provided that failure to exercise the option within 10 days after receipt of notice of stockholder intending to sell would entitle such stockholder to hold his voting trust certificates representing the stock subject to the agreement or sell his stock for such price as he might deem advisable, would be construed as giving stockholder intending to sell stock, upon other parties to agreement failing to exercise their option, a reasonable time within which to sell stock, and if not then sold the certificates would again be subject to the agreement.

3. Corporations ⇐198

Where voting trust agreement to hold corporate stock granted each party thereto option to purchase his proportion of stock of any party intending to sell, and authorized a stockholder, upon failure of other parties to exercise their option, to sell his stock free of the agreement within a reasonable time, evidence that approximately 14 months elapsed from expiration of the option until date of sale of stock, during which time value of stock and of voting trust certificates had substantially changed, showed that sale was not within a "reasonable time", so as to be free from the voting trust agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

4. Appeal and error ⇐1008(1)

In equity suit tried without jury, all findings of fact by trial court must be taken at their full value in support of judgment.

5. Corporations ⇐198

In action to impress a trust on corporate stock allegedly sold in violation of a voting trust agreement, evidence supported finding that plaintiffs had not considered that notice of the intended sale freed the stock from terms of the agreement so as to "estop" them thereafter from challenging validity of the sale. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

6. Corporations ⇐198

In action to impress a trust on corporate stock allegedly sold in violation of a voting trust agreement, where it appeared that plaintiffs believed that party intending to sell would not sell without giving previous notice of such intent as required by agreement, that plaintiffs, immediately upon learning that such party had obligated to sell his stock to defendants, sent written notice to defendants protesting against consummation of sale, that, although complaint was not filed until 15 months later, negotiations were being carried on for settlement or all controversies, and that defendants were still owners of the stock, evidence supported finding that plaintiffs were not precluded from bringing the action by reason of "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Appeal and error ⇐949
Equity ⇐84

The question of "laches" is one to be determined primarily by trial court, and reviewing courts will not interfere with exercise of trial court's decision in the matter unless it appears that manifest injustice has been done or its decision cannot reasonably be held to find support in the evidence.

8. Corporations ⇐198

Even though law might have afforded parties to a voting trust agreement to hold corporate stock a remedy for breach of provisions in agreement granting to each party an option to purchase his proportion of the stock of any party intending to sell by way of an action for damages against seller, parties were also entitled to enforce their rights in an equitable action to impress a trust on stock allegedly sold in violation of the agreement.

9. Corporations ⇐198

In action to impress a trust on corporate stock allegedly sold in violation of a voting trust agreement, which granted to each party thereto option to purchase his proportion of the stock of any party intending to sell, mode of calculation of plaintiffs' proportion of stock so sold adopted by trial court was fair and just and in conformity with provisions of the agreement.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge pro tem.

Action by T. P. Bodkin and others against Mary E. Silveira, as administratrix, etc., and others, to impress a trust on corporate stock sold to defendants in violation of a voting trust agreement, and

to recover plaintiffs' proportion of the stock so sold. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Sullivan, Roche & Johnson and Eustace Cullinan, Jr., all of San Francisco, and George H. Harlan, of San Rafael, for appellants.

Brobeck, Phleger & Harrison and Moses Lasky, all of San Francisco, for respondents.

KNIGHT, Justice.

This suit in equity was instituted by certain stockholders of the Marin Dairymen's Milk Co., Ltd., to impress a trust on a block of the company's stock sold by F. P. Grady and wife to the defendants, and to compel the defendants to transfer to plaintiffs the proportion thereof to which plaintiffs claimed to be entitled. The cause of action is based mainly on allegations to the effect that the sale and purchase of the Grady stock was in violation of the terms of a voting trust agreement which granted to each party thereto the option to purchase his proportion of the stock of any party intending to sell. The parties to the agreement included the plaintiffs, the Gradys, several of the defendants, and two persons now deceased. At the time the agreement was entered into the parties thereto were the owners of all but 108 of the 4125 outstanding shares of stock in said company. The principal defense interposed was that at the time of the sale and purchase of the Grady stock it was entirely free of and unencumbered by any restrictions of the voting trust agreement. The trial court found in favor of plaintiffs on all material issues and entered a decree accordingly, wherein it was decreed, among other things, that plaintiffs were the equitable owners of 207.22 shares of the Grady stock, which represented their proportion of the 463 shares sold by the Gradys to the defendants; and it was ordered that said proportion be transferred by defendants to plaintiffs after compliance with certain prerequisites set forth in the decree, including reimbursement to defendants. From said decree defendants appeal.

The respective parties filed most comprehensive briefs, and consideration has been given to the numerous points and extensive arguments made therein. However, there is little if any dispute as to the essential facts, and in the final analysis the determinative legal issues are comparatively few. The major question presented involves the soundness of the construction placed by the trial court upon the sixth clause of the voting trust agreement. The important facts of the case may be stated as follows: In May, 1933, or thereabouts, plaintiffs and defendants and Grady succeeded in gaining control of the corporation from another group, which appears to have been eliminated from the stock ownership. At that time and on May 6, 1933, plaintiffs, all of the defendants who then owned stock in the corporation, and Grady and his wife, entered into a written agreement denominated a "voting trust agreement." Thereby, in consideration of the mutual promises therein made, plaintiffs T. P. Bodkin and A. D. Corda, and the defendants E. B. McNear, R. Ghisletta, M. A. Nunes and A. F. Silveira, and said F. P. Grady, were constituted voting trustees; and the parties to said agreement agreed to transfer to said voting trustees all stock of the corporation then owned or thereafter to be acquired by them (save that each might retain 5 shares free of said voting trust), to be held by the voting trustees until March 1, 1938, and the voting trustees agreed to issue to each party to the agreement voting trust certificates evidencing his beneficial interest in the stock, legal title to which was to be held by the trustees. Furthermore, it was agreed that the voting trustees should possess all the rights of stockholders with respect to the stock so transferred to them, including the right to vote the stock; but that the trustees should pay to the respective parties all dividends which the trustees might collect on the stock so transferred to them. It was further agreed that on March 1, 1938, the voting trustees would cause to be issued to the party owning or entitled to each voting trust certificate fully paid-up shares of the capital stock of the corporation in the amount represented by the voting trust certificate; that the voting trust certificates should be transferable only on books to be kept by the voting trustees, and that no such certificate should be valid unless signed by the voting trustees and countersigned by the registrar; that the voting trust certificates should be in a specified form, and might be sold and transferred only subject to the terms of the voting trust agreement, of which fact each voting trust certificate gave express notice on its face. The agreement then provides: "Sixth: Each of the parties hereto for himself hereby agrees that he will not assign or

sell his voting trust certificate or any of the same, or any interest in the shares of stock represented thereby, nor divest himself of any interest therein during the term hereinbefore specified, or any extension thereof, as hereinafter provided, unless and until he shall first notify the parties hereto in writing of his intention to sell said certificates, stating the price, terms and conditions upon which he desires or intends to sell said certificates, and the parties hereto may then exercise their right to purchase said certificates in proportion to their holding in preference to any person, firm or corporation making any such offer to purchase said certificates; Provided, However, that in the event any of the parties to this agreement shall not exercise their option to purchase the proportion of said Voting Trust certificates which he may be entitled to so purchase, the other parties to the agreement shall have the first right and option to purchase said certificates in the proportion that their certificates then owned bears to all voting trust certificates at that time issued and outstanding; and Provided, Further, that in the event Stockholders do not fully exercise said right and option within ten (10) days after receipt of said notice from the Stockholder desiring to sell his said certificates, said Stockholder desiring to sell his certificates, his heirs, executors or assigns, may hold such certificates as have not been acquired by Stockholders under said option subject to this agreement, or sell said certificates for such price as he may deem advisable to any person whatsoever." The rest of Clause Sixth is substantially the same as the first proviso above quoted, except that it refers to "stockholders" rather than to "the parties to this agreement."

According to plaintiffs, the purpose of the sixth clause and of the voting trust was to maintain the same proportions of the ownership of stock as existed at the time the agreement was made; and defendants say that the purpose was to prevent hostile competing interests in the dairy industry from insinuating themselves into the corporation. Whatever may have been the purpose, all of the parties to the agreement, in conformity with its provisions, transferred all of their stock to the voting trustees (each party retaining five shares free and clear of the agreement), and received voting trust certificates therefor. Sometime after May 6, 1933, the stockholders fell into two groups, a minority group, consisting of plaintiffs and the Gradys, and the majority, consisting of the defendants who then held stock. (Some of the defendants have died and their representatives have been substituted; the other defendants who were not parties to the agreement are those to whom the Grady stock was also distributed.) At that time the total outstanding stock was 4125 shares. The plaintiffs—the minority group—owned 1191 shares of the stock, and the principal defendants—the majority group—owned 2358 shares. Grady and his wife were aligned with the minority group. They were the largest single stockholders, owning together 463 shares (plus the five they, like the other stockholders, retained free of the voting trust). According to plaintiffs, early in May, 1934, the differences between the majority and minority groups reached such a breaking point that the minority group, including the Gradys, agreed to act as a unit, and as such either to buy out the entire majority or sell their stock to the majority. In pursuance of this plan they consulted attorney Gregory Harrison, and informed him what they wished to do. In this regard the trial court found on sufficient evidence that the members of the minority group then and there agreed and so instructed their attorney that any sale of their stock must be made through him alone and only as a block; that if they could neither sell their stock as a block to the majority, nor buy out the majority, said attorney was authorized to sell their stock elsewhere, but even then only as a block; furthermore, that in any event none of the minority would dispose of his stock individually at any time without first informing the entire minority group of his intention so to do. Thereupon said attorney prepared the necessary notices of intention to sell, fixing the sale price at $50 a share. In so doing he prepared individual notices for each member of the minority group to sign and send to each member of the majority group, the salutation of the notices being to "all parties" to the voting trust agreement and to "you and each of you"; and on May 15 or 16, 1934, said attorney sent said notices by registered mail to every member of the minority group. In other words, there were no notices interchanged among the members of the minority group; consequently the notice signed by the Gradys was not sent to or received by any of the plaintiffs, nor did the Gradys receive any of the notices sent by plaintiffs. The ten-day option period expired without any purchase being made by any of the

majority group; but fourteen or fifteen months afterwards and during the month of July, 1935, Grady, acting for himself and his wife, without intimating to any of the other members of the minority group or their attorney his intention so to do, sold all of his stock for $57.50 a share to a group of purchasers consisting of the members of the majority group and several outsiders, all of whom are made defendants herein. The sale was conducted by a broker whose commissions were paid by defendants. Later during July, the month of the sale, Grady resigned as a voting trustee, and a member of the majority group took his place; and on or about July 22, 1935, the majority group met and divided the Grady stock among themselves and the other defendants, none of the plaintiffs being included in such division. The defendant voting trustees then ordered Corda, the registrar, a member of the minority group, to cancel the Grady stock and issue new certificates to the defendants, which he refused to do; whereupon the defendant voting trustees ousted Corda from his position and appointed in his place their attorney, George H. Harlan, who cancelled the Grady stock and issued new certificates to the defendants in the amounts agreed upon. Included in the distribution were the several persons who were not parties to the voting trust agreement, including attorney Harlan, and Thomas Foster, who had been appointed general manager of the company by the defendant voting trustees. Meanwhile Corda informed plaintiffs of the sale, and on August 10, 1935, plaintiffs served on defendants a notice of protest and a demand for their share of the stock; but the demand was refused.

The evidence shows that for some time preceding and at the time of the Grady sale four of the seven voting trustees and directors represented the majority group, and the trial court found that defendants induced Grady to sell by refusing as the majority of the board of directors to declare any dividends, and by refusing as a majority of the voting trustees controlling the voting rights of some four thousand of the 4125 shares outstanding, to force the directors to declare a dividend, thus sterilizing Grady's investment and forcing him to sell to realize thereon. The court further found that at no time did Grady give any notice, either in writing or otherwise, to plaintiffs or to any of them that he intended to sell any of his stock or beneficial interests; that said defendants knew that he had given no such notice to plaintiffs, and that nevertheless they prevailed upon and induced him to sell to them, and that plaintiffs did not learn of Grady's intention to sell individually to the defendants until after he had obligated himself so to do.

The construction placed by the trial court on the sixth clause of the voting trust agreement is embodied in paragraph XXV of its findings, and is as follows: "* * * if an owner of voting trust certificates issued under the voting trust agreement gives to the others notice of intention to sell his stock and the parties notified do not exercise their first right to buy within ten days thereafter, the owner is permitted to dispose of his stock elsewhere, but is permitted to do so only for a reasonable period of time, and that if he does not sell his voting trust certificates to others within such a reasonable period of time, the said voting trust certificates again are subject to all the provisions of the voting trust agreement and Paragraph Sixth thereof, the preference rights and equities of all other parties to the said voting trust agreement again attach, and it again becomes necessary for the owner of voting trust certificates before selling them to give to the other parties to said agreement notice of intention to sell, giving to them for a period of ten days thereafter a further first right and option to purchase said voting trust certificates." And in giving application to such construction the trial court found that the lapse of approximately fourteen months from the expiration of the option in May, 1934, to the date of the sale of the Grady stock in July, 1935, was more than a reasonable time; and that the notices of intention to sell, issued in May, 1934, were abandoned by all parties concerned in the year 1934. As shown by the findings, one of the main reasons for holding that the period mentioned was more than a reasonable time was that during said period "the condition of Marin Dairymen's Milk Company, Ltd., and the value of its stock and of the voting trust certificates had substantially, utterly and completely changed."

[1-3] It is a well established principle of law that when the construction given an instrument by a trial court appears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation, even though it

seems equally tenable. Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193; Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Estate of Boyd, 24 Cal.App.2d 287, 74 P. 2d 1049; Estate of Burnett, 42 Cal.App. 2d 427, 109 P.2d 26; Coviello v. Moco Fruit Co., Inc., 42 Cal.App.2d 637, 109 P.2d 765. And after considering all parts of the voting trust agreement in the light of each other and the circumstances under which the agreement was entered into, we are convinced that the trial court's construction of the sixth clause of said agreement is not only reasonable, but entirely consistent with the intent of the parties thereto; furthermore, that the findings of fact made in connection therewith and on the other controlling issues find ample evidentiary support. With respect to the changes that took place in the conditions of said company and the value of its stock during the fourteen months which elapsed between the expiration of the option and the sale of the stock, the record discloses these facts: In May, 1934, the company had a cash balance of $73,610, but by July, 1935, this had more than doubled to $156,777. In May, 1934, its assets were $276,453, but by July, 1935, they had increased by nearly $100,000 to $370,166. Meanwhile its liabilities had decreased from $95,937 to $92,579. In May, 1934, it had a surplus of $98,016, but by July, 1935, this had increased by roughly 153% to $171,448. And all this happened with a capital of only $82,500, or 4125 shares. In May of 1934 the surplus behind each share of stock was about $23. In July, 1935, it had increased to over $41.50 or nearly double. The earning power of the company had likewise increased tremendously. In the five months preceding May 31, 1934, the company's net profits averaged $4,000 per month. For the first seven months of 1935 up to July 31, 1935, the net profit was $166,345.17 or an average monthly net profit of nearly $9,500 or an increase of nearly 240%. Thus in the first seven months of 1935 the company was netting a profit averaging $27.60 per year per share of stock of a par value of $20.

Defendants contend that the notice of intention to sell executed by the Gradys permanently "freed" their stock from the terms of the voting trust agreement; and that therefore the Gradys were entitled to sell and the defendants entitled to buy the Grady stock in July, 1935, regardless of the lapse of approximately fifteen months after the giving of said notice. But according to the voting trust agreement, stock covered by voting trust certificates issued pursuant thereto is always subject to its provisions, even though sold after the expiration of the option period to a person not a party to the agreement. To this end the sixth clause of the agreement provides in effect that in the event the option to buy is not exercised by a party to the agreement, the certificate holder may do one of two things: he "may *hold* such certificates * * * *subject to this agreement, or* sell said certificates * * * to any person whatsoever" (italics ours); and the eleventh clause provides that "Any person accepting a trust certificate hereunder, whether through transfer or otherwise, shall become a party to this instrument, bound by all of the terms, covenants and conditions hereof." In other words, fairly construed, the above provisions mean that after the expiration of the option period the certificates remain open for sale to any person, but, as held by the trial court, for only a reasonable time; and if not sold within a reasonable time, then, as provided by the sixth clause, the owner of the certificates holds the same subject to said agreement; or if after the expiration of the option period and within a reasonable time the stock is disposed of at open sale, then under the eleventh clause the purchaser holds the certificate subject to the terms of said agreement. In either event, therefore, certificates issued pursuant to such agreement are not, by the giving of notice of intention to sell, permanently freed or freed at all from the operation of the restrictive clauses of the voting trust agreement.

[4] The respective parties have devoted considerable portions of their briefs to a discussion of the effect of two additional findings upon which plaintiffs rely as further supporting the trial court's decree. One relates to the failure of Grady to deliver to any of the plaintiffs a copy of the May, 1934, notice of intention to sell; and the other involves the question of the violation by the defendant voting trustees of a fiduciary relationship between them and plaintiffs created by the execution of the voting trust agreement. As to the latter, the trial court found "* * * that the vot-

ing trustees appointed pursuant to said voting trust agreement occupied a fiduciary position as to all parties to said voting trust agreement, including the plaintiffs, and that the voting trustees, agreed to recognize the rights of plaintiffs pursuant to the agreement and to refrain from doing anything in contravention of any rights of the plaintiffs"; and that said defendant voting trustees discriminated between the parties to said agreement by acquiring the Grady stock for themselves and the other defendants to the exclusion of the plaintiffs for the purpose of making a profit for themselves and to retain and consolidate the control possessed by them over said company, thereby violating their fiduciary obligations to plaintiffs as well as the provisions of paragraph sixth of the voting trust agreement. While it is true, of course, that under well settled rules all findings must be taken at their full value in support of a trial court's judgment, it is quite unnecessary to a disposal of the present appeal to inquire into or determine whether either of the foregoing findings standing alone would be legally sufficient to support the decree for the reason that in our opinion the decree is clearly sustainable as above indicated, both factually and legally, upon the first ground hereinabove mentioned.

[5] On the last day of the trial defendants were permitted by the trial court to file an amendment to their answer whereby they sought to invoke the benefit of the doctrine of estoppel. The additional defense so pleaded is founded on subdivision 3 of section 1962 of the Code of Civil Procedure which provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." The contention defendants make in this behalf is based upon the claim that plaintiffs themselves considered that by the giving of the notice of intended sale in May, 1934, the Grady stock was free of the terms of the voting trust agreement; that plaintiffs "knew that defendants would believe" that the notices given by Grady and the plaintiffs were in compliance with paragraph sixth of said agreement, and that defendants would act on that assumption; that defendants acted in reliance on the conduct of the plaintiffs and Grady which, so defendants assert, was designed to make defendants believe that upon the giving of the notices of intention to sell, the stock owned by Grady and plaintiffs was free; that therefore plaintiffs were estopped afterwards from challenging the validity of the sale. However, the trial court made specific findings against the claims of the defendants as to the acts and conduct of the parties. Some of the findings on this issue have already been set forth; and it will suffice to say that those findings and all others relating to this issue are adequately supported by the evidence.

[6, 7] Nor is there any merit in defendants' claim of laches. The evidence adduced in behalf of plaintiffs shows that in accordance with the oral agreement made by the minority group in Attorney Harrison's office in May, 1934, plaintiffs believed that Grady would not at any time thereafter sell the Grady stock individually without giving plaintiffs previous notice of his intention so to do; that in August, 1935, immediately upon learning that Grady had obligated himself to sell the Grady stock to defendants, plaintiffs sent written notice to defendants protesting against the consummation of the sale and stating that they were ready then and there to take their proportion of the stock and pay their share therefor. However, despite the written protest and offer, defendants proceeded to consummate the purchase and divided the Grady stock among themselves and to the exclusion of plaintiffs in the manner already stated. True, the complaint herein was filed November 6, 1936, but during the interim negotiations were carried on for a settlement of all controversies, and up to the time the complaint was filed, the defendants were still the owners of the Grady stock. On this issue the trial court found that the situation of the defendants had not been changed materially or otherwise by reason of the fact that plaintiffs did not file their suit at an earlier date. As held in the following cases, the question of the existence of laches is one to be determined primarily by, and must be left largely to, the trial court; and reviewing courts will not interfere with the exercise of the trial court's decision in the matter unless it appears that manifest injustice has been done or its decision cannot reasonably be held

to find support in the evidence. Akers v. Hufford, 128 Cal.App. 146, 16 P.2d 802; McMahon v. Grimes, 206 Cal. 526, 275 P. 440. In the present case it does not so appear, nor can it be reasonably so held.

[8] Likewise without merit is defendants' contention that plaintiffs should have sought recourse against the Gradys rather than these defendants. The suit is in effect one to enforce the terms of the voting trust agreement, and for the recovery of plaintiffs' proportion of the stock purchased and sold in violation thereof, and it is apparent that the Gradys could not have complied with the relief sought or granted because they had parted with their stock; and even though the law may have afforded plaintiffs a remedy against the Gradys by way of an action for damages, such was not their exclusive remedy. They were entitled also to enforce their rights under the voting trust agreement through the medium of a suit in equity.

[9] The final contention of defendants requiring special notice is that at best plaintiffs' proportion of the Grady stock was 140 shares; whereas they were awarded 207.22 shares. It appears that this criticism is made for the first time on appeal. The mode of calculation adopted by the trial court, stated briefly, was this: since 463 of the total 4000 shares were divided, and since 951 shares thereof held by the parties to the voting trust agreement did not elect to participate in the division of the Grady stock, the number participating was 4,000 minus 463, minus a further 951, or 2586 shares. Plaintiffs owned 1156 shares, constituting 44.7% of the 2586 shares, and that percentage of the Grady 463 shares is 206.96 plus shares. As will be noted, the trial court fixed plaintiffs' proportion at 207.22, but the discrepancy arises from the fact that the decree necessarily calculated the interest of each of the seven plaintiffs individually and did not carry the calculations to an infinite number of decimal places. Defendants seek to determine the ratio as of the date before the sale of the Grady stock, and in doing so they fail to deduct the Grady stock from the total of 4,000 shares. But if the Grady stock is not eliminated, it would leave a percentage to which neither plaintiffs nor defendants would be entitled on the basis of proportional ownership before the Grady sale. Furthermore, defendants fail to deduct the 951 shares belonging to the parties to the voting trust agreement who did not elect to participate in the purchase or the division of the Grady stock. In this regard the record shows also that all of the parties to the voting trust agreement did not take the full percentage of the Grady stock to which they would be entitled on the basis of proportional ownership, while other defendants took more; and attorney Harlan and Foster, who owned no shares, were allocated a portion of the Grady holdings. Since the agreement provided that if a stockholder failed to purchase his proportion, such stock should be offered to the other stockholders proportionately, plaintiffs were entitled to claim a part of the stock which certain of the defendants would have been entitled to receive on a proportional basis, but who in fact took less or none. It also appears that defendants have erroneously computed the total number of shares held by plaintiffs at 1191 by including therein the five shares which each held outside of the voting trust agreement. It is evident that the mode of calculation adopted by the trial court is not only fair and just, but is in conformity with the provisions of the voting trust agreement.

The remaining points presented by the appeal are either incidental to those already considered or are not controlling. Consequently discussion of those points would be of no value to the disposal of the appeal.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

STERLING REALTY CO. v. RELFE. *

Civ. 11861.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1942.

Hearing Granted March 6, 1942.

1. **Municipal corporations** ⇐577, 579

Where, after sale of 78 lots on default in payment of bonds issued against each lot for street improvements, a single certificate of sale was issued to purchaser instead of separate certificates for each lot, the certificate, though invalid, was not void, and original owner could not obtain decree quieting title without paying or offering to pay reasonable value of improvements.

2. **Equity** ⇐66

The rule that "he who seeks equity must do equity" means that, whatever the nature of controversy and of remedy demanded, court will not confer equitable relief on party seeking its aid unless he has acknowledged or will provide for all equitable rights, claims and demands justly belonging to adverse party and growing out of or necessarily involved in subject matter of controversy.

See Words and Phrases, Permanent Edition, for all other definitions of "He Who Seeks Equity Must Do Equity".

3. **Municipal corporations** ⇐577, 579

Where single certificate covering all lots sold on default in payment of bonds issued for street improvements was invalid because one certificate should have been issued to purchaser for each lot, remedy of owner desiring to redeem from sale was to make proper tender of reasonable value of improvements, and if, thereafter, defendants had not tendered to owner a certificate in proper form, courts would have compelled them to do so and if proper certificate had not been issued in first instance to purchaser, courts would have ordered first certificate cancelled and a proper one issued in its place.

4. **Equity** ⇐66

In action to quiet title to lots, brought by plaintiff claiming to be owner, against purchaser at sale made by city board of public works on default in bonds issued against lots to pay for street improvements, plaintiff was not entitled to complain that sale was made for an excessive amount in that certain installments due on bonds were barred by limitations, where plaintiff had not offered to do equity by tendering payment of reasonable value of improvements.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action to quiet title by Sterling Realty Company against Emily Relfe and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Phil F. Garvey and Julia M. Easley, both of San Francisco, for appellant.

Ralph Alfred Wood, Jr., and Henry F. Wrigley, both of San Francisco, for respondents.

STURTEVANT, Justice.

This is an action brought by the plaintiff to obtain a decree quieting its title to seventy-five separate parcels of land in the City and County of San Francisco. The complaint was in the ordinary form of an action to quiet title. The City and County, Department of Public Works, and W. H. Worden as director of the Department of Public Works, filed an answer, and asked that any decree rendered should provide that the properties involved be held subject to certain easements of the City and County of San Francisco. The defendants Emily Relfe and Federal Construction Company, a corporation, filed a separate answer. They interposed numerous denials to the allegations contained in the complaint and pleaded a large amount of new matter. The trial court made findings in favor of the defendants and from the judgment entered on those findings the plaintiff has appealed.

In 1918, San Francisco adopted an ordinance known as Street Improvement Ordinance, being Ordinance No. 4720, New Series. On the 21st day of June, 1926, the Board of Public Works passed a resolution expressing its intention to recommend to the board of supervisors many improvements to be made to a number of streets, avenues, lanes, etc., located in the Sunset District and known as Golden Gate Heights. Thereafter such proceedings were had that the said improvements were duly constructed in accordance with the provisions of said ordinance. In that connection assessments were duly made, con-

* Subsequent opinion 130 P.2d 410.

tracts were let, materials were furnished, and the work was done and was thereafter duly and regularly accepted. As a part of said proceedings bonds were executed on February 4, 1928. One bond was issued against each separate parcel of land. The Federal Construction Company became the owner and holder of said bonds. Each bond provided for semi-annual payments of interest and a part of the principal. Payments were made down to and including August 4, 1937. Pursuant to the terms of said bonds and on the 4th day of February, 1933, there became due and payable the eleventh semi-annual installment of principal on said bonds and the tenth semi-annual payment of interest. Said installments were not paid and no subsequent installments were paid. On March 5, 1937, Federal Construction Company served written demands on the Department of Public Works of the City and County of San Francisco to give notice and advertise a sale of the lots described in said bonds. Said notice was duly given, and said lots were duly sold to Emily Relfe. Thereafter the Department of Public Works made, issued and delivered to defendant Emily Relfe one original certificate of sale covering each and all of the parcels of land described in plaintiff's complaint. The original certificate was duly recorded in the office of the county recorder and a duplicate copy was filed in the office of the Department of Public Works. The certificate of sale was in appropriate form referring to said Street Improvement Ordinance of 1918, describing the parcels sold, and containing the name of defendant Emily Relfe as the purchaser.

[1] As stated above in its complaint the plaintiff claimed to be the owner in fee of all of the lots and it alleged that the defendants' claim was without any right whatsoever and that they had no estate, right, title, interest or lien whatsoever in or to said lands. The sale above mentioned involved seventy-eight parcels of land. Three of the parcels were redeemed and at this time the plaintiff makes the claim that the Department of Public Works issued to the purchaser one certificate whereas it should have issued seventy-eight certificates, and that the one certificate is void.

The point is not a new one in this state. In Stege v. City of Richmond, 194 Cal. 305, 228 P. 461, after the sale was made the lots were grouped. For example, lots 23, 24 and 25 of Block M were grouped and sold as one item. After examining into the point the court held that the certificate was invalid. It did not hold that it was void.

However, the fact that the certificate in the case at bar was invalid is not determinative of this action. The defendant alleged and the trial court found that the plaintiff has not offered in its complaint, nor at any time or at all, to pay the reasonable value of the street improvements constructed by defendant Federal Construction Company. That omission is fatal to the right of the plaintiff to come into a court of equity and ask for relief.

In Stege v. City of Richmond, supra, at 194 Cal. page 318, 228 P. at page 466 the court said: "But the fact that the sale of appellants' property was invalid would not necessarily entitle the appellants to a decree quieting their title under the circumstances here shown. By appropriate proceedings the council acquired jurisdiction to order the work performed. In fact, all the proceedings leading up to and including the issuance of the bonds were valid. The work has been performed and the lands have been benefited by the improvements and the expenditure incident thereto. The plaintiffs in this equitable action seek to relieve the lands from the burden of the assessment for such benefits without paying or offering to pay their just portion of the cost of the improvements." Then, after citing a number of authorities, the court continued as follows: "The later case of Hayne v. San Francisco, 174 Cal. 185, 162 P. 625, was an action to quiet title. The defendant asserted a lien on the land by virtue of certain special assessments levied to pay the costs of the construction of a tunnel. The plaintiffs did not pay or offer to pay the assessments. The court said: 'As we find the assessment to be valid, the property of the plaintiffs is justly liable for its due proportion thereof. In such cases the plaintiff is not entitled to any relief in a court of equity unless he shall pay, or offer to pay, the amount actually due upon the assessment against his property. As was said in Ellis v. Witmer, 134 Cal. [249] 253, (66 P. [301] 303), "This being the case they cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of,

unless on the condition of paying what is due from them. Here no such condition has been imposed by the court, nor is there an offer in the complaint to pay what is due. The plaintiffs were therefore not entitled to relief." '" It follows that the plaintiff was not entitled to relief in a court of equity.

[2, 3] In reply to the point last stated the plaintiff says: "The question of doing equity upon which respondent (Federal Construction Company) dwells is really not involved. As appellant brings out in its opening brief herein, there is no contention on the part of appellant that the defendant Federal Construction Company should receive nothing for its work and labor done and materials furnished in the making of the improvements mentioned in the answer of defendant and respondent herein, but it is the contention of appellant that the particular sale heretofore made is void by reason of the single certificate of sale evidencing the proceedings and that such certificate of sale should be set aside. There is no question that proceedings may be brought to foreclose the lien of the assessment itself, but appellant should be afforded the opportunity to redeem one or two or any or all of the parcels of land sold under the improvement bonds as it may see fit." Those statements are incorrect statements of fact and also of conclusions of law. In its complaint the plaintiff challenged all rights of the Federal Construction Company. After putting that company to its defense in this proceeding the plaintiff now asserts that it is claiming only that the certificate was void. Merely because it has reduced the extent of its claim does not bring it within the rule that he who seeks equity must do equity. Professor Pomeroy says: "The meaning is, that whatever be the nature of the controversy between two definite parties, and whatever may be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy." 1 Pomeroy's Eq.Jur., sec. 385. As shown above the certificate was not "void," it was invalid. If in good faith the plaintiff desired to redeem, all it had to do was to make the proper tender. If thereafter the defendants had not delivered to it a certificate in proper form the courts would have compelled them to do so. If a proper certificate had not been issued in the first instance the courts would have ordered the first certificate cancelled and a proper one issued in its place. Cohn v. Federal Construction Co., 171 Cal. 547, 552, 153 P. 916.

[4] The eleventh installment of principal and the tenth installment of interest upon each of the bonds involved became due and payable on the 4th day of February, 1933. The Board of Public Works made its demand under the power of sale on March 7, 1937, over four years after those installments fell due. Later the sale was had for all installments remaining due and unpaid, including those mentioned above. The plaintiff complains that the sale was made for an excessive amount—that said two installments were barred. As herein recited the plaintiff never at any time made any offer to do equity. In this proceeding to quiet title it is not entitled to present the point. Ephraim v. Nevada & California Land & Live Stock Co., 9 Cir., 282 F. 610. On page 612 of 282 F. the court said: "It is fundamental that in such a case the complainant must offer to do that which is equitable. The offer is obligatory, notwithstanding that the statute of limitations may have run against the debt. Upon these principles the authorities are in accord. 5 R.C.L. 664. * * * Burns v. Hiatt, 149 Cal. 617, 87 P. 196, 117 Am.St.Rep. 157." See, also, 16 Cal.Jur. 600.

The plaintiff asserts that in a proceeding properly conducted under the provisions of the Street Improvement Ordinance two liens are created, (1) the lien of the assessment and (2) the lien of the bonds. It then argues that the doctrine quoted from Stege v. City of Richmond, supra, is inapplicable in the case at bar. That argument is not convincing. An examination of the case cited shows that there, as here, the record shows the same facts as to the number of the liens. The examination also shows that in the Stege case, as in this case, there was no excess of jurisdiction and that the proceedings down to and including the issue of the bonds was regular and that the number of certificates and the application of the statute of limitations

were merely incidental matters. To attack either of the two questions last mentioned in a court of equity it is clear that a plaintiff must first do, or offer to do, equity.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.



48 Cal.App.2d 806

PEOPLE v. MANDELL.

Cr. 2180.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1942.

1. Criminal law ⇐553

In prosecution for first-degree murder, jury was entitled to accept testimony of witnesses as true and to draw all reasonable inferences therefrom.

2. Homicide ⇐237

Circumstantial evidence *held* to sustain conviction of a boy under 18 years of age for first-degree murder of a 16-year-old girl who had been victim of an attempted rape, as against claim of insanity. Pen.Code, § 190.

3. Criminal law ⇐1171(1)

Even if district attorney's remarks in prosecution for first degree murder, taken separately or collectively, constituted misconduct, such remarks were not prejudicial where record showed that alleged misconduct was trivial.

4. Criminal law ⇐1166½(12)

A trial judge's remark, during defendant's cross-examination of a witness for the people, that it was not necessary to reprimand witness as to his answers, did not constitute "misconduct" and was not prejudicial against defendant, where remark was prompted by a statement of defendant's counsel carrying insinuations that in counsel's opinion the witness had not been frank in his previous testimony and probably would not be frank in his answer to question propounded.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Criminal law ⇐655(4)

Where a juror, after trial on defendant's plea of not guilty but before trial on plea of insanity, stated that he felt disqualified to act as a juror on latter plea, and trial judge then suggested use of an alternate juror, and defendant's counsel refused to stipulate to use of alternate juror, subsequent statements by judge asking counsel why he did not stipulate that juror could be dismissed if counsel did not want juror did not constitute "misconduct".

6. Criminal law ⇐406(1)

In prosecution for first-degree murder, testimony of police officers concerning their conversations with defendant on day of his apprehension, and which conversations embraced admissions by defendant, was admissible as against objection that testimony was "hearsay".

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

7. Homicide ⇐158(2)

In prosecution for first-degree murder, testimony relating to conversations with defendant several months before date of offense, wherein defendant stated that he would like to or was going to give deceased "the works", the meaning of which was shown on defendant's cross-examination of a witness, was admissible as tending to show defendant's intent or state of mind toward deceased, and claimed remoteness of conversations in point of time affected weight rather than admissibility of testimony.

8. Criminal law ⇐1169(5)

In prosecution for first-degree murder of a 16 year old girl, the admission of testimony by one of the girl's schoolmates, who had seen defendant walking with the girl on night of crime, that upon hearing a scream the schoolmate said to another, "I hope that isn't Josephine", even if error, was not prejudicial where trial court stated that testimony was limited to reaction produced and that it was worthless for anything else.

9. Criminal law ⇐829(1)

Refusal to give an instruction requested by defendant was not prejudicial where instruction was expressly and completely covered by given instructions.

10. Criminal law ⇐814(13)

In prosecution for first-degree murder, refusal of defendant's requested instruction that prosecution was bound to prove that death of deceased could not have been caused by accident or by any person other than defendant was not prejudicial, where defendant's theory that some person other than defendant committed murder was not supported by evidence.

11. Criminal law ⇐789(4), 814(1)

In prosecution for first-degree murder where defendant's theory that some person other than defendant committed murder was not supported by evidence, it was sufficient to instruct jury that prosecution was required to prove defendant's guilt beyond a reasonable doubt and it was not necessary to instruct upon any assumed issue which found no support in evidence.

12. Homicide ⇐309(3)

Where defendant was charged with murder, and there was abundant evidence to prove his guilt but no evidence to indicate that the crime was manslaughter, an instruction with respect to manslaughter was not required.

13. Criminal law ⇐923(2)

Denial of defendant's motion for new trial on ground of alleged misconduct of jurors was not an abuse of discretion, where claimed misconduct consisted of a juror stating that he felt disqualified to act as a juror on defendant's plea of insanity and such juror, after being interrogated, indicated that he was willing to abide by instructions in determining issue on plea, and defendant had refused to stipulate to use of an alternate juror.

14. Criminal law ⇐938(1)

A motion for new trial based upon a claim of newly discovered evidence is looked upon with disfavor.

15. Criminal law ⇐938(1), 1156(3)

Much must be left to trial court's discretion in granting or denying a motion for new trial on ground of newly discovered evidence, and, where trial court refuses to grant a new trial, an appellate court should not interfere except upon a clear showing of an abuse of discretion by trial court.

16. Criminal law ⇐958(6)

Refusal of defendant's motion for new trial on ground of alleged "newly discovered evidence" that a witness claimed that he had seen deceased in company of an unidentified man on night of offense was not an abuse of discretion, where contents of witness' affidavit were impeached by affidavits filed in opposition to motion, and trial court was probably not impressed with showings made or with likelihood that production of such evidence would bring about a different result upon a second trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Robert Mandell was convicted of murder in the first degree, and he appeals.

Affirmed.

Hugh S. Center, Marshall S. Hall, and John E. Longinotti, all of San Jose, for appellant.

Earl Warren, Atty. Gen., David K. Lener, Deputy Atty. Gen., and John P. Fitzgerald, Dist. Atty., and A. Andreuccetti and J. B. Peckham, Asst. Dist. Attys., all of San Jose, for respondent.

SPENCE, Justice.

Defendant was charged with the murder of Josephine Parsen, a girl sixteen years of age. He entered the pleas of not guilty and not guilty by reason of insanity. On the plea of not guilty, the jury found the defendant guilty of murder in the first degree and further found that defendant was under the age of eighteen years at the time of the commission of the offense. Penal Code, sec. 190. On the plea of not guilty by reason of insanity, the jury found that defendant was sane at the time of the commission of the offense. Defendant's motion for a new trial was denied and he was sentenced to the state prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

The main contention of defendant on this appeal is that the evidence was insufficient to sustain the conviction and it therefore becomes necessary to summarize some of the unpleasant details revealed by the evidence. It may be stated preliminarily that defendant was convicted upon circumstantial evidence and that he did not take the witness stand in his own defense.

The deceased and defendant lived a few blocks apart in the city of San Jose. They

were students and they had known each other for some time. They were approximately the same age but defendant had not as yet reached his sixteenth birthday. Defendant lived on First Street and the deceased lived on Hobson Street which intersects First Street at right angles. On the night of July 1, 1940, deceased had been swimming at one of the schools in San Jose and she was returning home by walking along First Street and then along Hobson Street. As she passed the home of defendant, he spoke to her and accompanied her on her journey. She was seen by two schoolmates walking with defendant shortly before 10 p. m. in a westerly direction on Hobson Street toward her house and approaching the Hobson Street Bridge. This bridge spans the bed of Guadalupe Creek. Deceased was last seen passing over the crest of the bridge in the company of defendant. Shortly thereafter, said two schoolmates heard a scream from the direction of the bridge and one of them expressed the hope that it "was not Josephine." These schoolmates went up near the bridge but saw nothing and returned.

Early the following morning, the dead body of the deceased was found near a pathway in the bushy section of the bed of Guadalupe Creek about fifty feet or more north of the Hobson Street Bridge. This pathway runs down from the westerly side of the bridge. The condition of the body clearly demonstrated that the deceased had been the victim of an attempted rape and murder.

Along the pathway between the westerly side of the bridge and the place where the body was found, were strewn various articles of wearing apparel and personal effects of the deceased including a hair ribbon, a handkerchief, a shoe, a book, and a towel wrapped around a bathing suit and cap. The body of the deceased was found lying full length upon her back with her feet slightly apart. Her dress was pulled up and her shorts were pulled down, exposing the mid portion of her body. One shoe was missing from her foot. There was blood and dirt in her hair and ants were present in large numbers about her body. A piece of brick, which was triangular in shape and which appeared to be freshly broken, was found near her head. At some time during her struggle the deceased had had an evacuation and fecal matter was found upon her dress, slip and shorts as well as upon her buttocks and thighs. The nature of the loose soil in the vicinity made it impossible to obtain any definite footprints but this loose soil was dented and cut up.

An autopsy was performed which showed among other things a gaping wound in the right temple region and a maceration of the right side of the head and scalp. There were other injuries to the body including contusion and abrasion about the private parts and a severe contusion about the neck as if caused by gripping or choking. The immediate cause of the death was brain injury.

In the late afternoon of July 2, 1940, defendant was taken into custody near his home. He was wearing a khaki shirt and dark jeans. Portions of the shirt were covered with small blood spots. When asked by the police how these blood spots got upon his shirt, he replied that he did not know. He was interrogated at length by the police and admitted that he knew the deceased; that he went to school with her; that he had seen her at about 9:30 p. m. on the night before; and that he had walked down First Street with her for a short distance when she passed his home at that time. He repeatedly denied, however, that he had walked along Hobson Street with her or that he had been on Hobson Street at any time on that night. He was confronted with the two schoolmates of the deceased who had previously known both the defendant and the deceased. They stated in his presence that they had seen him on the previous night walking with deceased by the home of one of the two girls on Hobson Street and toward the Hobson Street Bridge. They also told of hearing the scream and of their going to the bridge but seeing nothing. Defendant replied, "The girls are mistaken, I wasn't there." These girls also stated that at the time mentioned, defendant had worn the same khaki shirt but different trousers; that he had worn light corduroy trousers on the night before. Defendant admitted that he had worn the khaki shirt and light corduroy trousers on the previous night and stated that the corduroy trousers were at his home to be washed. These trousers were immediately obtained from his home and it was found that there were brown colored spots along the thighs and knees which were later found to be fecal matter which gave the same refractive index as that found upon the body and clothing of the deceased.

Upon the trial, the two schoolmates of deceased testified as above indicated and further testified that they had seen defendant on Hobson Street on two previous occasions on the same night. Police officers testified to the other facts relating to the conditions at the scene of the crime and also to the conversations with defendant following his apprehension. Expert testimony was also introduced including testimony concerning the blood spots and the brown spots of fecal matter found on the clothing of the defendant. It also appeared that two handkerchiefs were found in the pocket of defendant's trousers and that one of these contained brownish spots which proved to be fecal matter. It further appeared that the woolen jacket of the deceased was covered with numerous foxtails and that foxtails were found in the cuffs of the defendant's corduroy pants and also on the right leg and at the waist band. Black wool fibers, mixed with sand, were also found in the cuffs of defendant's trousers and said wool fibers compared with the black fibers taken from the woolen jacket of the deceased.

There was also introduced in evidence two conversations in which defendant participated during the earlier part of the year 1940. Another school girl, who knew both the deceased and defendant, testified that she was walking home from school one evening with the deceased; that they met defendant and that he asked to walk home with them; that deceased said "——— no, that she didn't want to walk home with him and she made some remark about disliking him ———"; that defendant left them but before leaving he said that "——— some day she'd get the works or some day he'd give her the works." The second conversation was one between defendant and another student at a school dance. This student had danced with deceased and after dancing with her, he went over to defendant and talked to defendant concerning deceased. In the conversation, defendant said, "——— he'd like to give her the works." On cross-examination the witness was asked whether defendant meant by said remark "something of a sexual nature" and he replied, "That's the way I understand it."

We believe that the foregoing constitutes a sufficient summary of the evidence for the purposes of this discussion. It is obvious that said evidence showed that the deceased had been murdered and it is entirely clear that the evidence pointed directly at the defendant as the perpetrator of the crime. In the face of this evidence, defendant failed to take the stand to deny or explain, if he could, any of the numerous circumstances which clearly indicated his guilt.

[1, 2] In contending that the evidence was insufficient to sustain the conviction, defendant presents an argument which would be a more appropriate argument to address to the triers of the facts rather than to an appellate tribunal. He takes each of the several circumstances which tended to connect the defendant with the crime, and argues either that the testimony with respect to each such circumstance was not true or that if true, such circumstance alone had little, if any, tendency to implicate the defendant. Defendant argues that the two schoolmates of the deceased were mistaken and that their testimony was but the figment of the imagination of two adolescent girls; that even if true, such evidence would not "satisfactorily connect him" with the murder; that the testimony of "alleged threats" did not show any threats at all and, in any event, the incidents were too remote; that the expert testimony was unsatisfactory and inconclusive; that the experts, owing to the condition of the blood spots, could not positively identify said spots as spots of human blood rather than of animal blood; that the experts would not positively state that the fecal matter on the girl's clothing and on the defendant's clothing came from the same person but only that it gave the same refractive index; that the blood spots on defendant's clothing were small spots while the injury to the deceased's head would indicate that anyone perpetrating the crime would have had larger blood spots upon his clothing; that the fecal matter found on defendant's trousers was found in small quantities in numerous spots and not in large quantities; that foxtails are found everywhere in the vicinity and that their presence on the defendant's clothing should therefore be totally ignored; that with respect to the wool fibers on defendant's clothing, the experts admitted that all common wool fibers look about the same; and also that the evidence tended to indicate that the crime was a "left-handed" crime while defendant was right-handed. It seems entirely clear that these arguments relate either to the credibility of the witnesses or to the weight to be attached to each of the numerous circum-

stances to which reference has been made. These questions were the questions which were submitted to the jury for its determination. The jury was entitled to accept the testimony of the witnesses as true and to draw all reasonable inferences therefrom. In our opinion, there was ample evidence to sustain the conviction of the defendant. People v. Newland, 15 Cal.2d 678, 104 P.2d 778; People v. Perkins, 8 Cal. 2d 502, 66 P.2d 631; People v. Tom Woo, 181 Cal. 315, 184 P. 389. We find nothing inherently improbable about said testimony as claimed by defendant.

Before leaving the foregoing discussion concerning the alleged insufficiency of the evidence, a word might well be added concerning defendant's argument that it was "physically impossible for a right-handed person to have murdered the girl." This argument is based upon the theory that several blows were struck with great accuracy on the right side of the deceased's head and that said blows were struck while the deceased was standing, facing her assailant, and was being held by the throat by the right hand of her assailant. It is argued that a right-handed person could not have struck the several blows with such accuracy on the right side of the deceased's head during the struggle. This argument is highly speculative as it presupposes that the deceased was standing while all the blows were struck. It appears more probable that deceased was on the ground and perhaps unconscious at the time that the blows, which resulted in the head injuries which caused her death, were struck.

[3] Defendant next complains that there was prejudicial misconduct on the part of the district attorney. It is frankly stated at the outset, however, that "we will agree that certain incidents, remarks and references complained of hereinafter would not of themselves if standing alone constitute prejudicial misconduct." Defendant then proceeds to set forth numerous instances of alleged misconduct. With respect to some, no assignment of misconduct was made and with respect to others, the trial court promptly admonished the jury to disregard the remarks to which objection had been made. It would serve no useful purpose to set forth and discuss the numerous portions of the record to which reference is made. We have examined the record with particular reference to these instances and we are of the view that there is nothing to be found in the conduct of the district attorney which would warrant a reversal. The trial was a lengthy one and it may be conceded that some of the remarks made might well have been left unsaid. But if these remarks, taken separately or collectively, may be said to constitute misconduct, we believe the situation presented by this record shows that the alleged misconduct was trivial in character and that it may not be held to have been prejudicial to defendant under the circumstances. People v. French, 12 Cal.2d 720, 87 P.2d 1014; People v. Hanks, 35 Cal.App.2d 290, 95 P.2d 478; People v. Cabaltero, 31 Cal.App.2d 52, 87 P.2d 364; People v. Hodges, 116 Cal.App. 61, 2 P.2d 174; 8 Cal.Jur. 621, sec. 602.

[4] Defendant also complains of alleged prejudicial misconduct of the trial judge. But two instances are cited. The first occurred during the cross-examination of the chief of police. Counsel for defendant asked the witness to describe the "technique" used by the police department in questioning the defendant. Counsel stated to the witness, "I am going to ask you a very frank question and I hope you'll be just as frank." The court said, "One moment, it isn't necessary to reprimand the witness as to his answers. * * * We don't need any reprimanding of witnesses in this court." No assignment of misconduct was made and no request for any admonition to the jury was asked until a later session of the court. The trial court then declined to give such admonition. We find no misconduct in the above incident. The trial court's remark was prompted by the remark of defense counsel. Said remark of counsel carried the insinuations that in his opinion the witness had not been frank in his previous testimony; that he probably would not be frank in his answer to the question propounded; and that there had been unfair methods used in questioning the defendant. While these matters might have been the proper subjects for argument to the jury, the witness was entitled to protection from such insinuations in the questions of counsel asked during the cross-examination.

[5] The second incident occurred after the trial on the first plea and before the trial on the second plea. The juror Min-

ton stated that he felt disqualified to act as a juror on the second plea as he had visited insane wards and could not vote to send the defendant to an insane ward. The trial court suggested the use of an alternate juror, the district attorney expressed his willingness to stipulate to the use of an alternate juror but counsel for defendant refused to so stipulate. In the discussion which followed, the trial court said, "Well, if you don't want Mr. Minton, why didn't you stipulate that he be dismissed?" Counsel for defendant said he felt that the remarks of the juror Minton had affected the whole jury despite the fact that the trial court had admonished the jury to disregard them. The trial court said, "There is nothing in that at all." Here again we find no misconduct on the part of the trial judge. Our review of the record shows that the trial judge conducted the trial in a fair and impartial manner and that there was nothing in his conduct which prejudiced the defendant.

[6-8] Defendant further contends that the trial court committed prejudicial error in admitting certain evidence. Defendant concedes that he did not offer an objection to every portion of the claimed inadmissible testimony. But assuming that he did, we find no prejudicial error in the admission of the testimony to which reference is made in defendant's brief. The first testimony to which defendant directs our attention is that of the police officers, which testimony related to their conversations with defendant on the day of his apprehension. The sole objection made is that these conversations constituted hearsay. While defendant did deny his guilt, it is entirely clear that these conversations embraced many admissions by the defendant including the admission that he had been in the company of the deceased at a late hour on July 1, 1940, and at a point not far from the place where her dead body was found on the morning of July 2, 1940, and that on the night of July 1, 1940, he had worn the shirt which was covered with blood spots and had worn the trousers which were covered with spots of fecal matter. It requires no citation of authority to demonstrate the admissibility of such evidence. Defendant also directs our attention to the evidence showing that in two conversations earlier in 1940, defendant had made statements to the effect that he would like to or was going to give the deceased "the works." As above stated, the meaning of these expressions was shown on cross-examination of one of the witnesses by defendant's counsel. Such statements of deceased, if not in the nature of threats, were clearly admissible as tending to show the intent or state of mind of the defendant toward the deceased and the claimed remoteness in point of time was a matter which affected the weight rather than the admissibility of such statements. Lastly, defendant directs our attention to the evidence of one of the schoolmates who testified to saying to the other schoolmate upon hearing the scream, "I hope that isn't Josephine." The trial court, in overruling the objection to this testimony, stated that the testimony was limited entirely to the reaction produced and that it would be "worthless for anything else." Assuming, without deciding, that the admission of such testimony constituted error, such error cannot be held to have been prejudicial under the circumstances presented by the record before us.

[9-12] Defendant contends that the trial court committed prejudicial error, in refusing to give certain instructions requested by defendant. The first of these requested instructions was to the effect that the prosecution was required to prove the guilt of the defendant beyond a reasonable doubt and that the death of the deceased "could not have been caused by an accident or by any person other than the defendant." The first part of the requested instruction was expressly and completely covered by the instructions given. The refusal to give the portion above set forth in quotation marks cannot be held to be prejudicial error under the circumstances revealed by the record before us. It is a sufficient answer to defendant's contention to point out that defendant's alleged "theory" that some person other than defendant committed the murder found no support whatever in the evidence. It was therefore sufficient to instruct the jury that the prosecution was required to prove the guilt of the defendant beyond a reasonable doubt and it was not necessary to instruct the jury upon any assumed issue which found no support in the evidence. People v. Roe, 189 Cal. 548, 209 P. 560; 8 Cal. Jur. 321, sec. 371. The second of the requested instructions was one embracing an instruction respecting manslaughter as

well as murder. The trial court instructed the jury solely upon murder and refused to instruct the jury upon manslaughter. We find no error in this refusal. The defendant was charged with murder and there was abundant evidence to prove his guilt. There was no evidence whatever to indicate that the crime was that of manslaughter rather than that of murder. Under these circumstances, an instruction with respect to manslaughter was not required. People v. Mitchell, 14 Cal.2d 237, 93 P.2d 121; People v. Shannon, 203 Cal. 139, 263 P. 522; People v. Hickok, 28 Cal.App.2d 574, 83 P.2d 39; 13 Cal.Jur. 607 and 608, sec. 20.

[13–16] Finally, defendant contends that the trial court abused its discretion in denying his motion for a new trial. He argues that the jury was guilty of misconduct by which a fair and impartial trial was denied him. He refers to the conduct of the jurors Minton and Bronner. The alleged misconduct of the juror Minton was previously discussed with relation to the alleged misconduct of the trial judge. After juror Minton had stated that he felt disqualified to act on the second plea, he was interrogated at length and it appeared that he was entirely willing to abide by the instructions of the court in determining the issue on the second plea. The juror Bronner merely said he "would like to be excused also." We find no misconduct on the part of the jury or any member of the jury. In any event, defendant was offered the opportunity to stipulate to the use of an alternate juror but he refused to so stipulate. Defendant also argues that a new trial should have been granted upon the ground of newly discovered evidence. The alleged newly discovered evidence was that of a witness who claimed to have seen the deceased in the company of an unidentified man, other than the defendant, between 10 p. m. and 10:15 p. m. on the night of July 1. The contents of the affidavit of the alleged newly discovered witness was seriously impeached by affidavits filed in opposition to the motion and, in view of the case made against the defendant upon the trial, the trial court was probably not impressed with the showing made or with the likelihood that the production of such evidence would bring about any different result upon a second trial. A motion for a new trial based upon the claim of newly discovered evidence is universally looked upon with distrust and disfavor (8 Cal. Jur., pages 427, 428, sec. 452; People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Granillo, 140 Cal.App. 707, 36 P.2d 206) and much must be left to the discretion of the trial court in granting or denying a motion for a new trial on that ground or any other ground. Where the trial court refuses to grant a new trial, an appellate court should not interfere except upon a clear showing of an abuse of discretion by the trial court. People v. Norton, 45 Cal.App.2d 789, 115 P.2d 44; People v. Egbert, 43 Cal.App.2d 117, 110 P.2d 495; People v. Addington, 43 Cal. App.2d 591, 111 P.2d 356. We find no such clear showing of an abuse of discretion in the present case.

The judgment of conviction and the order denying a new trial are affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.



48 Cal.App.2d 835

DOUGLAS v. STATE.

Civ. 11902.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1942.

1. Taxation ⇐105½

The purpose of the Gift Tax Act is to supplement the income and inheritance tax by reaching transactions which would otherwise escape taxation. St.1939, p. 2079, § 1 et seq.

2. Statutes ⇐226

Where the State Gift Tax Act was modeled after the Federal Gift Tax Act, and there were no decisions under the state act to aid in solving the question of construction, in view of the fact that material provisions of the federal act and the state act were substantially identical, decisions interpreting the federal act furnished a guide in construction of the state act. St.1939, p. 2079, § 1 et seq., Revenue Act 1924, §§ 319–324, 26 U.S.C.A. Int.Rev.Acts, page 79; Revenue Act 1932, §§

501–532, 26 U.S.C.A.Int.Rev.Acts, page 580; 26 U.S.C.A.Int.Rev.Code, § 1000; Revenue Acts 1932, §§ 803, 811, 26 U.S.C.A.Int.Rev. Acts, pages 641, 649.

3. Statutes ⇐226

Where legislation is patterned after a statute of another state or of the federal government, which has been judicially construed, there is a very strong presumption of intent to adopt a construction as well as the language of the prior enactment.

4. Taxation ⇐105½

A transfer in trust of a contingent remainder, wherein the trustor reserved neither the power of revocation nor right to change beneficiaries, was subject to the Gift Tax Act, notwithstanding that the contingent interest was limited to take effect upon the termination of the life estate in the trustor rather than in a third person. St.1939, pp. 2080, 2081, 2083, 2085, 2090–2092, §§ 4, 12, 13, 29, 37, 67–70.

5. Taxation ⇐105½

Under the Gift Tax Act, where there is a transfer in trust, the essence of the transfer for purposes of taxation is the passage of control over the economic benefits of property rather than any technical changes in its title. St.1939, pp. 2079, 2080, §§ 1 et seq., and 12.

6. Taxation ⇐105½

That a transfer of a contingent remainder interest in trust wherein the life beneficiary was a trustor would be subject to an inheritance tax upon the death of the trustor under the express provisions of the Inheritance Tax Act did not preclude the assessment of the gift tax on such transfer, since the gift tax was designed to supplement the inheritance tax, and since the statutes disclose that the liability for inheritance and estate taxes is not a certain criterion of nontaxability under the Gift Tax Act. Gen.Laws 1937, Act 8495, § 2(3) (b), (5); St.1939, p. 2084, § 31, as amended by St.1940, 1st Ex.Sess., p. 112, and by St.1941, p. 2676.

7. Taxation ⇐347

Where an irrevocable transfer of a contingent remainder in trust, taxable under Gift Tax Act, provided for payment in discretion of trustee of trustor's expenses of last illness and burial, taxes, costs and attorneys' fees, under provision of the act for the imposition of highest possible tax with a refund in the event contingency did not happen, the state controller did not err in making no allowance for the discretionary provision of the trust in computing the tax. St.1939, p. 2090, § 67.

8. Appeal and error ⇐934(3)

In action to recover gift tax imposed on transfer in trust of a contingent remainder, where complaint did not allege that remainder was valueless but showed that trust property was of great value, appellate court would not presume in support of default judgment entered against the state upon refusing to answer after the overruling of its demurrer to the complaint, that remainder was worthless merely from a recital in the judgment that evidence had been introduced. St.1939, pp. 2079, 2080, §§ 1 et seq., and 12.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Anne Douglas against the State of California to recover gift taxes paid under protest. From a judgment for plaintiff, defendant appeals.

Reversed.

James W. Hickey, Inheritance Tax Atty., of Sacramento, and Donald R. Peck and Walter H. Miller, Asst. Inheritance Tax Attys., both of Los Angeles, for appellant.

Nourse & Jones, of Los Angeles, for respondent.

KNIGHT, Justice.

Plaintiff brought this action to recover gift taxes paid the state controller under protest in the sum of $3,041.72. The state's general demurrer to the complaint was overruled. The court thereafter granted the state's motion to reconsider its ruling, but on reconsideration upheld its order. Upon the state's failure to answer, a default was entered and judgment rendered for plaintiff in the amount prayed for.

It appears from the complaint that on November 9, 1939, plaintiff transferred property of the approximate value of $169,585.31 to the Security National Bank of Pasadena, in trust to pay the income to her for life, with the provision that if the income should be insufficient to pay her $300 a month, the deficiency should be made up from principal. The trust was created after the effective date of the gift tax act and was expressly provided to be irrevocable. Upon the death of the trustor, undis-

tributed income and principal were to be paid to Eric A. Douglas, brother of the trustor, if then living. If the brother predeceased the trustor the trust was to continue after the death of the trustor for the purpose of paying income to her two nephews, or their issue, until one of the nephews should reach the age of forty years at which time the trust was to terminate and the trust property was to be distributed equally between the two nephews, the issue of any deceased nephew taking by representation.

The declaration of trust further provided that on the decease of the trustor the trustee, in its discretion, might pay out of principal any part or all of trustor's expenses for last illness and burial, federal estate tax, state inheritance tax, costs and attorneys' fees. The trust contained a spendthrift provision to the effect that the interest of beneficiaries in principal or income should not be subject to claims of their creditors or others, nor to legal process, and that it should not be voluntarily or involuntarily alienated or encumbered.

The complaint alleges that the tax to recover which this suit is brought was levied on the "alleged gift to Eric A. Douglas of the residue of the corpus of the trust." Plaintiff contends that since the interest of her brother is contingent on his surviving her, and on the principal not being consumed in payments to her during her lifetime and payments of expenses on her death, there is no taxable gift to him within the meaning of the gift tax act.

[1-3] The gift tax act was enacted in this state in 1939. (Stats.1939, chap. 652, p. 2079; Deering's Gen.Laws, 1939 Supp., Act 8495c.) Its purpose appears to be the same as that of the federal gift tax—to supplement the income and inheritance tax by reaching transactions which would otherwise escape taxation.

In important particulars our state act is modeled after the federal gift tax, first enacted in 1924, repealed as of January 1, 1926, and enacted again in 1932. 1924: 26 U.S.C.A. Int.Rev.Acts, 1924 to date, p. 79, §§ 319–324; 1932: 26 U.S.C.A. Int. Rev.Acts, 1924 to date, p. 580, §§ 501–532. There are no decisions under the state act to aid in solving the problem presented by this case. However, in view of the fact that material provisions of the federal statute and state act are substantially identical, decisions interpreting the federal law furnish a guide in construction of the state act. Where legislation is patterned after a statute of another state or of the federal government which has been judicially construed there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment. Union Oil Associates v. Johnson, 2 Cal.2d 727, 735, 43 P.2d 291, 98 A.L.R. 1499; Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428.

[4] By both the federal and state acts the tax is imposed on transfers of property by way of gift. Internal Revenue Code, sec. 1000 (the Internal Revenue Code is found in Title 26, U.S.C.A.); state act, Stats.1939, chap. 652, sec. 12. Both federal and state laws contain a provision that the tax applies whether the transfer is in trust or otherwise and whether the gift is direct or indirect. Internal Revenue Code, sec. 1000; sec. 13 of the state act, supra. By section 37 of the state act it is provided that "the tax does not apply to a transfer of property in trust where the power to revest in the donor title to the property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the property or the income therefrom." This section does not render the transfer herein tax free, since, as noted above, the trust instrument provided that the trust was irrevocable.

The Federal Revenue Act of 1932 originally contained a provision similar to section 37, supra (Rev.Act of 1932, § 501(c), 26 U.S.C.A. Int.Rev.Acts, page 580). However, in Burnet v. Guggenheim, 288 U.S. 280, 53 S.Ct. 369, 77 L.Ed. 748, it was held that the above principle of non-taxability of a revocable trust was the law under the 1924 statute which did not contain an express provision to that effect. Section 501 (c) was thereafter repealed as being unnecessary. Rev.Act of 1934, sec. 511, 26 U.S.C.A. Int.Rev.Acts, page 769; see 55 Harvard Law Review, 31.

Plaintiff urges that three decisions of the Supreme Court of the United States indicate non-taxability under the gift tax law of such transfers as that herein. The decisions are: Burnet v. Guggenheim, supra; Estate of Sanford v. Commissioner, 308 U.S. 39, 60 S.Ct. 51, 84 L.Ed. 20; Rasquin v. Humphreys, 308 U.S. 54, 60 S.Ct. 60, 84 L.Ed. 77. In the Burnet case the court held that where a trust is created under which the trustor retains the power

to revoke the trust there is not a completed gift at the time of the creation of the trust, but if the trustor subsequently surrenders the power of revocation a gift is made at that time which is subject to gift tax. It was this case which, as noted above, held that this was the rule under the 1924 act, although not expressly declared in the statute. In the other two cases it was held that where the trustor has no power to revoke the trust, but power to change beneficiaries, although not to name himself as a beneficiary, the gift is likewise incomplete in the absence of a surrender of such power. If the power is surrendered during the lifetime of the trustor, a gift is then complete which is subject to the tax, otherwise the transfer in trust is subject to the estate tax upon the death of the trustor.

[5] The theory of these cases is that while the trustor retains such power over the trust, the transfer is as to the beneficiaries incomplete and inchoate. The cases emphasize the essence of a transfer for purposes of taxation is the passage from the trustor of control over the economic benefits of property, rather than any technical changes in its title. While the grantor retains the right to revoke or amend the trust he has not parted with economic control of the property in the analysis of these cases. It is also stated in Burnet v. Guggenheim, supra, that since the donee is secondarily liable for the tax, the donor being primarily liable, it would be unfair to impose the tax burden on him when it is uncertain by reason of the trustor's retention of control whether the donee will ever actually receive the property.

In the present case the trustor reserved neither a power of revocation nor right to change beneficiaries. Here the uncertainty as to whether the beneficiary in remainder will ever receive any interest in possession and enjoyment depends on whether he survives the trustor, and on the additional contingency that the trust corpus is not consumed in payments to the trustor during her lifetime and payments of expenses upon her death. Plaintiff urges that a like rule should be applied where the uncertainty depends on such facts as where it is due to a reserved right in the trustor to revoke the trust or change beneficiaries. The question here is as to the right of the state to tax the remainder interest of the trustor's brother under the gift tax act. The reserved life interest of the trustor is admittedly not subject to a gift tax.

It is plain from a reading of the state act that the interest of a remainderman which depends on his surviving a life tenant, or on other contingencies, is not by reason of that fact outside the purview of the gift tax. That is, if the life tenant in the present case had been a person other than the trustor, and the interest of the trustor's brother depended on his surviving such life tenant, there can be no doubt that under our state gift tax act the contingent interest of the brother would have been subject to the gift tax.

The taxability under the gift tax act of future interests, including those which are contingent, finds repeated recognition in the state act. Section 4 provides: "As used in this act, 'transfer' includes the passing of property or any interest therein, in possession or enjoyment, present or future, by gift, or any transfer made with donative intent." Section 29, which allows an exemption not exceeding $4,000 on a gift from any donor or any donee in any calendar year, provides that it is not applicable where the "transfer" is "of a future interest in property."

Sections 67, 68 and 70 regulate in some detail the mode of taxation under the gift tax act of contingent future interests. Section 67 provides that "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this act * * * provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person exempt from taxation under the provisions of this act, or to any donee taxable at a rate less than the rate imposed and paid", the difference between the amount paid and the amount actually payable shall be refunded. Section 68 provides for appraisal of "estates in expectancy which are contingent or defeasible", while section 70 fixes the manner of computing "the value of every future, or contingent or limited estate, income or interest".

In view of the above provision it is plain that the interest of the brother of the trustor herein, had it been limited to take effect upon his surviving a life beneficiary other

than the trustor, would have been subject to the gift tax despite its contingent aspect. We are of the view that it makes no difference in the taxability of the brother's interest that it is limited to take effect upon the termination of a life estate in the trustor, rather than in a third person. The argument for non-taxability where the life beneficiary is the trustor will be considered hereafter.

The federal act does not contain detailed provisions such as sections 67, 68 and 70, but that contingent future interests may be subject to the gift tax is plain from the recent decisions in Ryerson v. United States, 312 U.S. 405, 61 S.Ct. 656, 85 L.Ed. 917, and United States v. Pelzer, 312 U.S. 399, 61 S.Ct. 659, 85 L.Ed. 913.

The computation of the tax on contingent future interests presents a difficult administrative problem, but one which must be assumed in view of plain provisions of the act declaring the taxability of such interests. Hardship to the taxpayer is tempered by a variety of provisions. Section 66 provides that "When property is transferred in trust, the trustee may pay the entire tax on all interests therein out of the corpus of the property transferred." Section 67, which provides for a tax at the highest possible rate, with provision for subsequent refund, when property is transferred in trust or otherwise and the rights of the transferees are contingent, sets forth that the tax so imposed shall be payable in full out of the corpus of the property transferred, and shall not be charged against the interest of or collected from the beneficiaries thereof. The section further provides that the donee beneficially interested, or the trustee, may elect not to pay the tax until the donee shall come into the actual possession or enjoyment of the property, in which case a bond shall be executed to pay the tax plus interest.

[6] The argument for non-taxability of the remainder interest where the life beneficiary is the trustor, rather than a third person, counts heavily on the fact that a transfer in which the grantor reserves a life income or interest is subject to the inheritance tax upon the death of the grantor. The inheritance tax act so provides. Stats.1935, p. 1266, sec. 2, subd. 3(b); Deering's Gen. Laws, 1937, Act 8495. The federal estate tax contains a similar provision. Rev.Act, 1932, §§ 803, 811, Int.Rev.Code, 26 U.S.C.A. Int.Rev. Acts, pages 641, 649. Since the gift tax was designed to supplement the inheritance tax of the state government, the federal gift tax to supplement the federal estate tax, it is contended that when a transaction will be subject to the estate and inheritance taxes it is not subject to the gift tax.

But that liability for inheritance and estate taxes is not a certain criterion of non-taxability under the gift tax acts appears from the statutes themselves. Section 31 as it stood when the tax in this case was paid provided: "In case a tax has been imposed and paid under this act upon any gifts, and thereafter upon the death of the donor there is imposed by this State on the transfer to the donee an inheritance or succession tax on account of property embraced within such gift, there shall be credited against and applied in reduction of the inheritance or succession tax which would otherwise be chargeable against or on account of such property an amount equal to the tax paid on account of such gifts * * *." Stats.1941, p. 112, extra session of 1940. Section 31 was repealed in 1941 (Stats.1941, p. 2676), and a new section 31 added which is much more extended than the old section 31, but which continues the provision for credit of gift taxes paid against inheritance taxes. The corresponding section of the federal act is section 813, Internal Revenue Code. The state gift tax is at the same rates as the inheritance tax, while the federal gift tax rates are three-fourths of the estate tax rates.

The correlation of income, inheritance and gift taxes presents difficult unsolved problems. The estate and inheritance tax acts define with some precision the transfers to which the tax is incident, but the gift tax acts merely impose the tax in general terms on transfers by way of gift. The decision in Estate of Sanford v. Commissioner, supra, develops the concept of taxability under the estate tax as establishing non-taxability under the gift tax. But that case recognizes that there are exceptions to the test, such as transfers in contemplation of death. (For discussion of correlation of gift taxes and estate taxes see articles 55 Harv.Law Rev. 1; 40 Col.Law Rev. 773; note, 40 Col.Law Rev. 467; articles, 34 Ill.Law Rev. 119; 32 Ill.Law Rev. 891; notes, 133 A.L.R. 986; 124 A.L.R. 872; 112 A.L.R. 1448.)

A rule which would uniformly decree freedom from gift taxation when the estate

tax will reach the transfer, loses sight of the fact that the gift tax supplements the income tax as well as the estate tax, and is designed to reach funds which escape income taxation. 55 Harv.Law Rev. 18–23.

Such a rule also offers possibilities for tax avoidance by means of transactions between the date of transfer and the death of the transferor. For example, the whole of property held in joint tenancy is expressly made subject to an inheritance tax except where it originally belonged to the surviving joint tenant. Stats.1935, p. 1266, sec. 2, subd. 5; the correlative provision of the federal law is found in sec. 811, subd. 4(e), Int. Rev.Code. Yet when one owning property in sole ownership places it in joint tenancy without receiving consideration, the other joint tenant has a present interest in possession and enjoyment, and can sever the joint tenancy by transfer of his interest to another. In the event of such a transfer there would be no liability for the inheritance tax upon the death of the creator of the joint tenancy, as to the half interest previously given to the joint tenant, since the joint tenancy and right of survivorship would have been destroyed before death by the transfer. Unless a gift tax was incurred on creation of the joint tenancy it would escape taxation, which result it was an object of the gift tax to prevent. (For other illustrations of transfers probably subject to both gift and inheritance or estate taxes see article 55 Harv.Law Rev. 1, Correlation of Gift and Estate Taxes, by William C. Warren.)

The above discussion is directed to the point that reasons may exist for imposing a gift tax although the transaction is such that if no intervening event occurs there will be liability for an estate and inheritance tax. In the present situation it is not clearly made to appear either that the gift tax is neded as a substitute for the income tax, or that there are possibilities of avoidance of the inheritance by means of transactions between the creation of the trust and the death of the trustor. Nevertheless, since the interest of the brother of the trustor, had it been limited on the life of a person other than the trustor, would be of a type clearly subject to the gift tax is needed as a substitute for the the view that it should not be held free from that tax because the life interest is in the trustor, rather than in another. We find nothing in the gift tax act to warrant such a distinction. The trustor in the present case retained neither a power of revocation or right to change beneficiaries.

It would seem to be implicit in the decision of the Board of Tax Appeals in Loew v. Commissioner of Internal Revenue, 42 B.T.A. 17, that where a donor creates a trust and reserves the income to himself for life, the remainder interests are subject to the gift tax. The board had previously held in Trevor v. Commissioner, 40 B.T.A. 1241, where the trustor not only reserved the income of a trust to herself for life, but also reserved a right to amend or revoke with consent of the trustee after the expiration of ten years from the date of the trust, that no gift tax was due. See, also, Herzog v. Commissioner, 2 Cir., 116 F.2d 591

[7] In addition to claiming that no taxable gift was made, plaintiff alleged in her complaint that the state controller erred in computing the tax in that he failed to take into consideration the right of the trustee on the trustor's decease to pay expenses of her last illness and burial, taxes, costs and attorneys' fees. The use of funds for this purpose rests in the discretion of the trustee. There may be other funds of the trustor available for this purpose, with the result that the trustee may determine not to use trust funds. Since the law provides for imposing the highest tax possible, with provision for refund in the event the contingency on which it is imposed does not happen, the state controller did not err in making no allowance on account of this discretionary provision in his computation of the tax.

[8] Plaintiff further contends that since the judgment which was entered following the default of the state recites that evidence was introduced, it must be presumed in support of the judgment that such evidence showed that the remainder interest was without value. It is not alleged in the complaint that the interest of the brother was worthless. It is alleged that the property transferred to the trustee was of the approximate value of $169,585.31. The trustor may die at any time, leaving her brother surviving, in which event he will come into ownership of property of large value through termination of the trust. In the circumstances it cannot be

presumed in support of the judgment that it is based on a determination that the interest taxed is without value.

Since a gift tax became due upon the transfer of the remainder interest to the brother of the trustor, and since the only claim of error in computation is the failure to consider the discretionary right of the trustee to pay certain expenses upon the death of the trustor, which claim is not well founded, it follows that the demurrer to the complaint should have been sustained. The judgment entered upon overruling the demurrer is erroneous and is reversed.

PETERS, P. J., and WARD, J., concurred.



49 Cal.App.2d 71

In re ROBERTS' ESTATE.

LYTLE v. BELSHAW.

Civ. 13372.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1942.

1. Executors and administrators ⇐504(6)

Only allowed claims are subject to contest at hearing of an account in probate. Probate Code, §§ 921, 927.

2. Executors and administrators ⇐504(6)

The rule that only allowed claims are subject to contest at hearing of an account in probate does not apply to debts of estate paid by executor without allowance and claimed by him as credits in his account under provision of Probate Code, and such debts would be subject to contest on the settlement of the account, not as "claims" merely, but as items of credit claimed by the executor. Probate Code, §§ 927, 929.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

3. Executors and administrators ⇐236
Statutes ⇐231

The provision of Probate Code relating to procedure to be followed to obtain allowance of claim presented by executor against estate must be construed with provisions of the Code relating to procedure for claims generally, and the probate judge is required to act in the same manner as on claims in general, and must indorse on the claims his approval or rejection with the date thereof. Probate Code, §§ 703, 710, 711.

4. Executors and administrators ⇐236

Even if provision of Probate Code relating to procedure to be followed to obtain allowance of claim presented by executor against estate does not require the trial judge to indorse upon the claim his approval or rejection with the date thereof, the provision at least authorizes such action. Probate Code, §§ 703, 710, 711.

5. Executors and administrators ⇐237

A probate judge's indorsement of approval or rejection of an executor's claim against estate is an "order" within provision of Code of Civil Procedure that every direction of a judge made or entered in writing and not included in the judgment is denominated an order. Probate Code, §§ 703, 710; Code Civ.Proc. §§ 23, 1003, 1064.

See Words and Phrases, Permanent Edition, for all other definitions of "Order".

6. Courts ⇐202(4)

Probate proceedings are "special proceedings" within provisions of Code of Civil Procedure defining a special proceeding and making the statutory definition of a motion and an order applicable to special proceedings. Code Civ.Proc. §§ 23, 1003, 1064.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Proceeding".

7. Statutes ⇐231

Provision of Probate Code vesting in judge power to make an order approving a probate claim must be considered in connection with other laws conferring power on court commissioners, which are manifestly intended to empower them to do acts which without such laws could be done only by a judge or other officer authorized to do those acts by the various laws providing therefor. Probate Code, §§ 703, 710, 711; Code Civ.Proc. §§ 259, 259a; Const. art. 6, § 14.

8. Constitutional law ⇐30

The constitutional provision authorizing Legislature to provide for appointment of

court commissioners is not self-executing. Const. art. 6, § 14.

9. Court commissioners ⇐3

The Legislature may confer such power on court commissioners as otherwise only a judge would have. Const. art. 6, § 14.

10. Court commissioners ⇐3

Under constitutional provision authorizing Legislature to provide for appointment of court commissioners with authority to perform "chamber business" of judges, the quoted term is a technical one and must be construed in the light of definitions of chamber business contained in the Code of Civil Procedure when the constitutional provision was adopted. Const. art. 6, § 14; Code Civ.Proc. § 166.

See Words and Phrases, Permanent Edition, for all other definitions of "Chamber Business".

11. Court commissioners ⇐3

The words "chamber business" in constitutional provision that Legislature may provide for appointment of commissioners with authority to perform "chamber business" of superior court judges include everything which was chamber business in courts superseded by the superior courts, as well as everything Legislature might thereafter properly include within that term. Const. art. 6, § 14.

12. Executors and administrators ⇐235

The act of approving or rejecting a claim against an estate is "chamber business" within constitutional provision authorizing Legislature to provide for appointment by superior court of commissioners with authority to perform chamber business of the court. Const. art. 6, § 14.

13. Executors and administrators ⇐235, 504 (6)

A court commissioner had authority to approve probate claims filed by executor, and upon approval the claims were "allowed claims" which were subject to contest at hearing of account in probate. Probate Code, §§ 703, 704, 710, 711, 921, 927, 929; Code Civ.Proc. §§ 23, 259, 259a, 1003, 1064, 1233; Const. art. 6, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Allowed Claim".

14. Executors and administrators ⇐241

The allowance of claims of executor against the estate by a court commissioner was "prima facie evidence" of their correctness, and cast upon contestant burden of showing that they were not proper claims. Probate Code, §§ 703, 713.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

15. Executors and administrators ⇐241

The word "judge" as used in provision of Probate Code that allowance of a claim of an executor by the judge is sufficient evidence of its correctness is construable as including any officer who is authorized to function as or for the judge in doing the specified acts. Probate Code, § 703.

See Words and Phrases, Permanent Edition, for all other definitions of "Judge".

16. Evidence ⇐83(1)

Generally, an official duty is presumed to have been regularly performed

17. Evidence ⇐88

The presumption of invalidity of a note obtained by decedent's confidential adviser, resulting from the confidential relationship, would not overcome presumption that note was supported by sufficient consideration, in absence of showing that the relationship was used by the confidential adviser to obtain an unfair advantage. Civ.Code, §§ 1614, 1615, 2235, 3105; Code Civ.Proc. § 1963, subd. 21.

18. Executors and administrators ⇐506(1)

In proceeding to contest allowance of an executor's claims against a decedent's estate at hearing of an account in probate, the contestant had the burden of proving invalidity of the claims.

19. Executors and administrators ⇐506(3)

In proceeding to contest allowance of executor's claims against decedent's estate at hearing of an account in probate, the contestant who showed only that note was executed to the executor at a time when he was decedent's confidential adviser, and that he presented it for execution, failed to sustain burden of proving invalidity of the note, on ground that it was executed as result of undue influence, especially in view of presumptions that there was an adequate consideration for the note and that the claim was rightly allowed. Civ.Code, §§ 1614, 1615, 2235, 3105; Code Civ.Proc. §§ 1961, 1963, subd. 21.

20. Evidence ⇐86, 87

The court must find according to a presumption, in absence of evidence legally sufficient to overcome it.

21. Executors and administrators ⇐504(6)

In contest of an executor's account, contestants are limited by exceptions presented and the evidence is to be limited accordingly, and although the court has duty to scrutinize the account and correct all errors therein, it is only where an independent investigation is set on foot by the court that the rule limiting evidence is inapplicable.

22. Executors and administrators ⇐504(1)

The rule that probate court may on its own motion and without any objection being filed thereto disallow or reduce any of the items in an executor's account which it may upon its own examination thereof find to have been improperly charged is limited to items charged in the account, and a claim which is merely listed but is not charged to the estate as an expenditure does not come within that category.

23. Executors and administrators ⇐504(1)

In contest of executor's account wherein contestant objected to claims of the executor for amount due on note and for services rendered by executor in looking after decedent's property prior to her death, the proper pleading of undue influence was necessary to entitle the contestants to make proof thereof against the claims.

24. Executors and administrators ⇐506(1)

In the contest of an executor's account wherein contestant objected to claim of executor for services in looking after decedent's property prior to her death, evidence was insufficient to overcome presumption in favor of validity of the claim, arising from its allowance by the court commissioner.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding in the matter of the estate of Maggie J. Roberts, deceased, wherein J. K. Lytle, executor of the will of the deceased, filed an account in which he listed several claims against the estate, stating that they had been allowed and were unpaid, and wherein Victor H. Belshaw, a legatee under the will, filed a contest of some of the claims thus listed. From an adverse order, the executor appeals.

Reversed.

Stephenson, Gingery & Rowe, of Los Angeles, for appellant.

Reiter & Reiter and John Oliver, all of Los Angeles, for respondent.

SHAW, Justice pro tem.

Appellant, the executor of the will of the above named decedent, filed an account in which he listed several claims against the estate, stating that they had been allowed and were unpaid. Respondent, a legatee under the will, filed a contest of some of the claims thus listed. Two of the claims so contested are claims by the appellant himself. Each of these claims bears a dated endorsement of allowance and approval signed by a "Court Commissioner of Los Angeles County," but no approval of either claim by a judge appears.

[1, 2] The first question arising on the record is whether these two claims, approved only by a court commissioner, were properly classed as "allowed claims" at the time respondent undertook to contest them. Such claims only, are subject to contest at the hearing of an account in probate. Section 927 of the Probate Code, under which such a hearing is had, provides that "allowed claims not passed upon on the settlement of any former account and not reduced to judgment, may be contested for cause shown," but makes no such provision for claims which have not been allowed, although section 921 of the Probate Code requires them, if filed or presented, to be listed in the account, along with the allowed claims. See, also, Estate of Whitmore, 1876, Myr.Prob. 103, 108; Estate of Hoover, 1934, 139 Cal.App. 762, 765, 35 P.2d 193; Estate of England, 1931, 214 Cal. 298, 5 P.2d 428. The rule above stated does not apply, of course, to debts of the estate paid by the executor or administrator without allowance and claimed by him as credits in his account, under section 929 of the Probate Code. Such debts would be subject to contest on the settlement of the account, not as "claims" merely, but as items of credit claimed by the executor or administrator.

[3, 4] The mode of procedure to obtain allowance of a claim presented by the executor against the estate is established by section 703 of the Probate Code. That section provides, in part, that "If the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims in due course of administration." This differs from the procedure for claims generally, as set forth in sections 710 and 711 of the Probate Code, mainly in eliminating there-

from the presentation to and allowance by the executor or administrator. Section 703 does not expressly require the judge to endorse his action on the claim, as do the other sections just cited. The same apparent omission is found in section 704 relating to a claim of the judge, which is to be presented to another judge "with power to approve or reject it." Sections 703 and 704 speak in general terms, but they should be construed with sections 710 and 711 as requiring the judge to act in the same manner as on claims in general, that is, to "indorse upon the claim his approval or rejection, with the date thereof." Section 710. Even if sections 703 and 704 do not require, they at least authorize, the judge to act by means of such a written endorsement.

[5, 6] Such an endorsement comes within the definition of an order stated in section 1003 of the Code of Civil Procedure, which is, "Every direction of a court, judge, or justice, made or entered in writing, and not included in a judgment, is denominated an order." The same section declares that "An application for an order is a motion." Section 1064 of the Code of Civil Procedure makes both of these definitions applicable to a "special proceeding," and section 23 of that Code defines a "special proceeding" as "every other remedy" than a civil action. Probate proceedings were formerly set forth in the Code of Civil Procedure among the "special proceedings" provided for by that Code; and while the entire title on that subject has now been removed from that Code and placed in the Probate Code, such proceedings remain essentially of the same nature as before, and are within the meaning of the term "special proceeding," as used in section 1064 and defined by section 23 of the Code of Civil Procedure. This is sufficient to make applicable to probate proceedings the definitions of "motion" and "order" above quoted; and in addition we find in section 1233 of the Probate Code a provision making applicable to probate proceedings "the provisions of part II of the Code of Civil Procedure," in which part section 1003 appears.

The cases have also referred to and treated the act of a judge in allowing a claim as an order, and even as an ex parte order. Thus in Bryant v. Superior Court, 1936, 16 Cal.App.2d 556, 562, 61 P.2d 483; Hotel Park Central, Inc., v. Security-First Natl. Bank, 1936, 15 Cal.App.2d 293, 298, 59 P.2d 606; Estate of Wilson, 1929, 97 Cal.App. 529, 531, 275 P. 977; and In re Sullenberger, 1887, 72 Cal. 549, 552, 14 P. 513, orders vacating the allowance of claims by the judge were upheld under section 937 of the Code of Civil Procedure, which authorizes the vacation of "an order made out of court, without notice to the adverse party." Other cases also have designated the judge's allowance of a claim as an "order." Haub v. Leggett, 1911, 160 Cal. 491, 495, 117 P. 556; Estate of Spanier, 1898, 120 Cal. 698, 699, 53 P. 357.

[7-12] The question now under consideration is thus resolved into this: has a court commissioner power to make an order approving a probate claim? The Probate Code vests this power only in a judge, but its provisions must be considered in connection with other laws conferring power on court commissioners, all of which are manifestly intended to empower them to do acts which, but for such laws, would and could be done only by a judge or other officer authorized to do those acts by the various laws providing therefor. The first provision to be considered appears in section 14 of article VI of the Constitution of California, as follows: "The Legislature may also provide for the appointment, by the several superior courts, of one or more commissioners in their respective counties, or cities and counties, with authority to perform chamber business of the judges of the superior courts, to take depositions, and to perform such other business connected with the administration of justice as may be prescribed by law." This is clearly not a self-executing provision, so we must look to acts of the legislature to discover what authority is possessed by court commissioners (Quiggle v. Trumbo, 1880, 56 Cal. 626; Jackson v. Puget Sound Lumber Co., 1898, 5 Cal.Unrep. 966, 968, 52 P. 838; but it is equally clear that the powers conferred may be such as otherwise only a judge would have. When this provision was first adopted, as a part of the Constitution of 1879, the Code of Civil Procedure contained definitions of "chamber business," and as this is obviously a technical term, this provision must be construed in the light of those definitions. San Francisco & S. M. E. Ry. Co. v. Scott, 1904, 142 Cal. 222, 224, 75 P. 575. Section 166 of that Code then provided that "district and county judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications * * *" and section 167 declared that "The judges of the probate court may, at chambers * * * approve claims

* * *." (All of these provisions have now been gathered into section 166 and applied to the superior courts.) The courts thus referred to in the Code were abolished by the Constitution of 1879 and the functions of all of them were vested in the newly created superior courts; and when this Constitution referred to the "chamber business" of the judges of the superior courts, it must be held to have included therein everything which was "chamber business" in the superseded courts, as well as anything which the legislature might thereafter properly include in that term. The act of approving or rejecting a claim is also well within the common law understanding of "chamber business" as stated in Von Schmidt v. Widber, 1893, 99 Cal. 511, 513, 34 P. 109, 110, by which such business was "limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues presented by the pleadings."

The legislative grant of authority to court commissioners is found in sections 259 and 259a of the Code of Civil Procedure. Section 259 is a general section applying to court commissioners in all counties, whereas section 259a applies only in a limited class of counties, which includes the county of Los Angeles where this case arose. Nothing in section 259 appears to cover the present case, but section 259a confers a more extensive authority, and reads in part as follows:

"§ 259a. Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall, in addition to the powers and duties contained in section 259 of this code, have power:

"1. To hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court of the county, or city and county, for which he is appointed."

[13] Applying to this provision the conclusions already reached that an application for approval of a claim is a motion made ex parte and that the approval of a claim is an ex parte order, we conclude further that the power conferred upon court commissioners by section 259a extends to and includes the approval and rejection of probate claims. For our particular case we need make this ruling only as to claims of the executor or administrator, although the statutory provisions concerned seem to afford no ground for differentiation between them and other claims. The answer to our first question is, therefore, that the claims here were properly allowed and rank as "allowed claims."

[14-16] The allowance of the claims herein was prima facie evidence of their correctness, and cast upon respondent, who contested them, the burden of showing that they were not proper claims. Estate of Crosby, 1880, 55 Cal. 574, 579; Estate of Loshe, 1882, 62 Cal. 413; Shiels v. Nathan, 1910, 12 Cal.App. 604, 615, 616, 108 P. 34. These decisions rest in part upon the provision now in section 713 of the Probate Code that "every claim allowed by the executor or administrator and approved by the judge shall be ranked among the acknowledged debts of the estate." The provision more particularly applicable here is that of section 703 of the Probate Code relating to a claim of the executor or administrator, that "Its allowance by the judge is sufficient evidence of its correctness." This is fully as effective to declare a presumption as the provision of section 713, and it was so regarded in Shiels v. Nathan, supra. It is true, the Code sections just cited speak only of action by "the judge"; but since the law, as above construed, authorizes the specified action to be taken also by a court commissioner, it must be intended that such commissioner's action shall have the same effect as that of the judge, and the word "judge" here must be construed broadly enough to include any officer who is authorized to function as or for the judge in doing the specified acts. The rule, thus extended, is no more than an application of the general rule that official duty is presumed to have been regularly performed.

Coming now to the merits of the two claims in question, appellant contends that the evidence is insufficient to support the decision of the trial court against them. One of the claims is based upon two promissory notes executed by the decedent in favor of appellant, one for $1,500 dated December 7, 1937, and one for $994.32, dated July 20, 1936. The trial court found the latter note to be valid and allowed this claim for its amount with interest but disallowed it entirely as to the $1,500 note. The disallowance of this note was based on findings that it was obtained by undue influence exercised by appellant on the decedent. The decedent was an elderly

woman, aged 93 years at the time of her death on April 13, 1939, and was not in good health, but it does not appear that her mental powers were weakened by age or disease, or that she was easily influenced. In 1926, appellant, whose occupation was selling and managing real estate, went to work for her in a confidential capacity as business advisor. In 1932 he was given authority to draw checks on her bank account and from that time until her death he had sole charge of her business and of her bank account, depositing her income in it and from it paying her bills. During the early years of his employment by decedent he rendered her extensive and valuable services toward obtaining for her a settlement with her former attorney, who had obtained a large amount of her property and had failed to account for it. In consideration of these services she paid him sums of money, amounting in the aggregate to $1,560, during the period from November, 1926, to November, 1930.

The note of July 20, 1936, included in the claim, was given as a renewal note for the balance due on a note for $1,000 made November 20, 1930. This $1,000 note was given to apply as additional compensation to appellant for services he had rendered up to that time. In October or November, 1933, decedent gave appellant a note for $1,500 in further consideration of his services. This note was soon paid, and is not the note on which the claim is partly based. At this time she had agreed with appellant to pay him $1,750 in full settlement for his services up to that time and she had a $1,750 note prepared by her attorney for that purpose; but later she caused the amount of the note to be changed to $1,500, and then signed it and delivered it to appellant, saying that she would pay him the other $250 later. At this time also she agreed to pay appellant $25 per month for his services to be rendered thereafter. This was on or about November 1, 1933. On December 7, 1937, she executed and delivered to appellant the note for $1,500, which is set forth in the claim. This note was drawn by appellant and he presented it to her for execution. Some time later she stated to her attorney that this amount represented services of appellant for four years and two months, from November 1, 1933, to January 1, 1938, at $25 per month and the sum of $250 which she had deducted from the 1933 note.

[17] As already stated, the trial court's rejection of this claim as to the $1,500 note was put on the ground of undue influence. No direct evidence that appellant had any undue influence over the decedent or that he exerted any influence to procure the execution of the note was produced. In support of the judgment respondent relies entirely on the presumption of undue influence which, as he claims, arises from the relationship of the parties, and cites section 2235 of the Civil Code in support of his argument. That section provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Here we have a written instrument, a promissory note, which erects a counter-presumption of a sufficient consideration (Code Civ.Proc., sec. 1963, subd. 21; Civil Code, secs. 1614, 3105); and the burden of showing a want of such consideration is on the party seeking to invalidate the instrument. Civil Code, sec. 1615. The presumption created by section 2235 of the Civil Code does not overcome this other presumption unless it is shown that the relationship was used by the trustee to obtain an unfair advantage. Dimond v. Sanderson, 1894, 103 Cal. 97, 101, 103, 37 P. 189; Cole v. Wolfskill, 1920, 49 Cal. App. 52, 55, 192 P. 549; Estate of Mallory, 1929, 99 Cal.App. 96, 102, 278 P. 488. Nothing of the sort appears here. The facts above stated show that decedent had agreed to pay to appellant the amount for which the note in controversy was given, and in executing the note she was merely carrying out her previous obligation.

[18-20] The facts above stated, as showing the fairness of the transaction, were shown by the testimony of appellant, and also by that of decedent's attorney. The trial court might reject the appellant's testimony because of his interest; and if we assume that, for some reason, it also rejected that of the attorney, still the record contains no evidence to the contrary. The situation then is, that the respondent, who had the burden of proof on his contest, has shown only that the note was given to one who was then the decedent's confidential agent, and that he presented it for execution. Under the authorities already cited, and in view of the presumptions

above mentioned, that there was an adequate consideration for the note and that the claim was rightly allowed, this would not support the finding of undue influence. The court must find according to a presumption, in the absence of evidence legally sufficient to overcome it. Code of Civ. Proc., sec. 1961.

[21, 22] Appellant objected to evidence in support of respondent's contest of this claim on the ground that the statement of contest is insufficient to raise the issue of undue influence, for want of adequate allegations of the facts. The sufficiency of the allegations in that respect may well be doubted. See Estate of Bixler, 1924, 194 Cal. 585, 589, 229 P. 704; Estate of Sheppard, 1906, 149 Cal. 219, 221, 85 P. 312. The trial court overruled appellant's objection on the ground that the contest constituted objections to items in an account and not a pleading, and respondent defends the ruling on the same ground, citing Estate of Randall, 1922, 188 Cal. 329, 335, 205 P. 118, 121, which holds that the probate court "may upon its own motion, and without any objections being filed thereto, disallow or reduce any of the items in an administrator's account which it may, upon its own examination thereof, find to have been improperly charged." But it is also the rule that "The contestants are limited by the exceptions presented, and the evidence is to be limited accordingly. * * * While it is the duty of the court to scrutinize the account and correct all errors therein, it is only where an independent investigation is set on foot by the court that the rule limiting evidence is inapplicable." Estate of Mallory, 1929, 99 Cal.App. 96, 102, 278 P. 488, 490; to the same effect see Estates of Boyes, 1907, 151 Cal. 143, 147, 148, 90 P. 454. Here no independent investigation was set on foot by the court. It is also to be noted that the rule stated in Estate of Randall, supra, is limited to items charged in the account. A claim which is merely listed but is not charged to the estate as an expenditure does not come within that category.

[23] We are satisfied that a proper pleading of undue influence was necessary to enable respondent to make proof thereof against the claim, but since the judgment must be reversed, regardless of this ruling, we do not pass upon the sufficiency of the allegations criticized. The trial court should permit their amendment, if timely application is made before another trial.

[24] The other claim of appellant which was in contest was for $450 and interest for his services to decedent in looking after her property from December 8, 1937, until her death, at the rate of $25 per month. Attached was an affidavit of decedent's attorney that appellant had been paid up to December 31, 1937, and that the amount due on the claim was $387.50. The claim was allowed for the last mentioned sum, and apparently appellant has accepted this reduction in amount. The evidence showed that appellant rendered services during this period of time, and that decedent had agreed to pay him $25 per month therefor. The only evidence in conflict with this tended merely to minimize slightly the extent of the services, not to show that none were rendered. As in the case of the other claim, if we assume the rejection of all evidence in support of this claim, we find no evidence to overcome the presumption in its favor arising from its allowance. The contest of this claim did not even attempt to make an issue of undue influence in regard to it; hence that issue cannot be raised against it by the contestant, under the rules already stated. It is even more apparent here than on the other claim that the court did not undertake any independent inquiry on that issue; for the findings do not attempt to state any undue influence as a cause for rejecting this claim.

The order appealed from is reversed.

YORK, P. J., and WHITE, J., concurred.

49 Cal.App.2d 44

SWART v. SWART et al.

Civ. 13319.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1942.

1. Appeal and error ⇐781(1)

An appellate court will not review questions which have become moot and are merely academic.

2. Appeal and error ⇐790(3)

The question respecting ownership of corporate stock raised on appeal from a judgment, in action by father against son and daughter to quiet title to the stock, was "moot" and would not be considered, where it appeared that superior court in a prior guardianship proceeding had jurisdiction and had entered an order determining that each of the parties owned an undivided one-third interest in the stock and that the orders in the guardianship proceeding had become final upon the dismissal of the appeals taken therein. Code Civ.Proc. § 955.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

3. Guardian and ward ⇐159

Orders settling final account of guardian, which determined that guardian and his two wards each owned an undivided one-third interest in corporate stock, were not void on ground that trial court failed to make written findings of fact, and to state them separately where the findings made were upon the ultimate fact in issue.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Grover C. Swart against Blanche Alta Swart and another to quiet title to corporate stock. From a judgment for defendants, the plaintiff appeals.

Appeal dismissed.

See, also, 120 P.2d 942.

Jerrell Babb, of Los Angeles for appellant.

James C. Ingebretsen, Dillon & Dundas, and Freston & Files, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff commenced this action to quiet title in himself to 201 shares of the capital stock of the Charles Ellsworth Corporation. The two defendants are the daughter and son of plaintiff, and each of them claims to be the owner of an undivided one-third interest in the stock and that plaintiff is the owner of the other one-third. Plaintiff prosecutes this appeal from a judgment upholding the claims of defendants.

The shares of stock in question had been acquired by plaintiff's wife, Grace Swart, by gift from her father after her marriage and approximately five years prior to her death. During her last illness, when she was suffering from an incurable disease, Mrs. Swart was confined to her bed for more than a month under the care of physicians and nurses. Approximately two weeks before her death plaintiff induced Mrs. Swart to assign to him the certificates for the shares of stock involved in the litigation. Plaintiff gave no consideration for the assignments and at the time they were executed Mrs. Swart was under the influence of sedatives and opiates and was without the benefit of independent advice. Defendants Blanche Alta Swart and Jack Warren Swart were both minors at the time of their mother's death.

After Mrs. Swart's death plaintiff was appointed guardian of the person and estate of each of the defendants. When Blanche Alta Swart attained her majority in February, 1938, plaintiff filed his first and final account as guardian of her estate. Objections to that account were filed by the ward, who contended that she was the owner of an undivided one-third interest in the shares of stock involved herein and that the guardian had failed to account for that interest. Proceedings were instituted for the removal of plaintiff as guardian of the estate of Jack Swart, who was still a minor, and on May 20, 1938, plaintiff was removed and the Bank of America National Trust and Savings Association was substituted as guardian. It was stipulated that the first current account which plaintiff had filed in connection with the removal proceedings should be treated as the final account. The substituted guardian filed objections to the account, also contending that its ward was the owner of an undivided one-third interest in the shares of stock which plaintiff

claimed as his own. Plaintiff thereupon filed the present suit to quiet title to the stock against any claims of his children, and at approximately the same time Blanche Alta Swart, as administratrix of her mother's estate, filed an action against plaintiff in which she sought possession of the stock for purposes of administration. By stipulation all four actions were tried before one judge in consecutive order, it being agreed that evidence in any one case could be considered by the court in any of the other proceedings. Following the trial of these four matters appropriate orders and judgments were entered, all being adverse to plaintiff. By the orders settling the final accounts in the guardianship proceedings and the judgment in the present action it was adjudged that plaintiff and each of the defendants was the owner of an undivided one-third interest in the stock, subject to the right of the administratrix to its possession for purposes of administration and distribution. Grover Swart, plaintiff in the action under consideration, appealed from each of the four judgments. However, on August 29, 1939, the two appeals from the orders made in the guardianship matters were dismissed on motion duly made, on the ground that Mr. Swart had failed to perfect the appeals therein within the time allowed by law. On September 29, 1939, the remittiturs in those actions were sent down to the trial court and the orders settling the final accounts of the guardian (plaintiff herein) have long since become final.

[1, 2] It is now urged by defendants that the present appeal should be dismissed, since the final orders in the guardianship proceedings have determined the ultimate issue as to the ownership of the stock in accordance with the judgment herein, and that the questions presented by this appeal have been rendered moot. An appellate court will not review questions which have become moot and are merely academic. Keefer v. Keefer, 31 Cal.App.2d 335, 87 P.2d 856. In the guardianship proceedings the superior court had personal jurisdiction over all of the parties who are involved in the present action. It also had jurisdiction to determine as between the guardian (plaintiff herein) and his wards (defendants herein) the question of the ownership of the shares of stock which the guardian claimed in his individual capacity. Guardianship of Vucinich, 3 Cal.2d 235, 243, 44 P.2d 567. By the orders settling the final accounts it was determined that the guardian and each of his wards was the owner of an undivided one-third interest in the shares of stock, subject to the right of the administratrix of the estate of Grace Swart to have possession of the stock for purposes of administration. The same determination was made by the judgment in the case under consideration. Upon the dismissal of the appeals in the guardianship matters the orders entered therein were in effect affirmed (Code Civ.Proc., sec. 955) and have become a final adjudication of the rights of all of the parties to the present action respecting their ownership of the shares of stock. A reversal in this action could in no way affect the conclusiveness of the determination in the guardianship matters. It is apparent that when the orders settling the final accounts of the guardian became final the questions involved on this appeal became moot.

[3] Plaintiff argues that the orders are void because of the asserted failure of the court to make written findings of fact. Although no separate findings of fact were signed and filed, each of the orders in the guardianship proceedings recited: "That said Grover C. Swart failed to report or account to said ward for an undivided one-third interest in two hundred one (201) shares of the capital stock of Charles Ellsworth Corporation * * * received by said guardian and at all times during the pendency of said guardianship proceedings held by said Grover C. Swart as constructive trustee for the use and benefit of the heirs at law of the estate of Grace Swart, deceased, subject to the right of the administratrix of said estate to possession thereof for purposes of administration and distribution; that the heirs at law of the estate of Grace Swart, deceased, are Jack Warren Swart * * * Blanche Alta Swart * * * and Grover C. Swart, and that each of said heirs is the owner of an undivided one-third interest in and to the shares of stock above described." These findings were upon the ultimate fact in issue and were sufficient. It was not necessary to file them separately. Estate of Janes, 18 Cal.2d 512, 116 P.2d 438.

For the foregoing reasons the appeal is dismissed.

MOORE, P. J., and McCOMB, J., concurred.

49 Cal.App.2d 48

SWART v. SWART.

Civ. 13320.

District Court of Appeal, Second District, Division 2, California.

Jan. 8, 1942.

1. Appeal and error ⇐790(3)

The question respecting ownership of corporate stock raised on appeal from a judgment, in action by an administratrix of estate of decedent to set aside transfer of the stock to decedent's husband by decedent during her lifetime, was "moot" and would not be considered, where superior court in a prior guardianship proceeding had jurisdiction of all the parties and had entered an order determining ownership of the corporate stock, which order had become final upon dismissal of appeals taken therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Limitation of actions ⇐72(1)

An action by decedent's daughter, as administratrix, to require decedent's husband to account for an automobile transferred to him by decedent during her lifetime, which had been sold by husband prior to commencement of action, was not barred by 4-year statute of limitations, although more than four years had elapsed since date of transfer until bringing of the action, where the only two persons who could have set transfer aside were decedent's two children, who were both minors at time cause of action accrued, and the daughter, who was the elder of the children, brought the action approximately 11 months after having attained her majority and seven months after having been appointed administratrix of decedent's estate. Code Civ.Proc. § 352.

3. Appeal and error ⇐1011(1)

Findings of fact based upon conflicting evidence will not be disturbed on appeal.

4. Executors and administrators ⇐59

Evidence that decedent at time she transferred automobile to her husband was in great pain, that she was unable to understand nature of the transaction, that husband had made repeated attempts during decedent's last illness to obtain her signature on the ownership certificate, and that decedent received no consideration for the transfer, supported findings that husband, by fraud and undue influence, induced decedent to transfer to him title to automobile which had been her separate property, so as to require husband to account to administratrix for value of automobile.

5. Husband and wife ⇐262(1)

Where certificate of ownership showed title to automobile to be vested in wife alone, trial court was warranted in concluding under the presumption afforded by statute that automobile was wife's separate property. Civ.Code, § 164.

6. Executors and administrators ⇐450

In action by administratrix to require decedent's husband to account for an automobile transferred to him by decedent during her lifetime, trial court was justified in fixing value of automobile at time it was transferred to husband at sum of $450, although there was no expert testimony as to actual value of automobile at such time, where it was established that when automobile was originally purchased, approximately 1½ years prior to the transfer, the price paid was $775, and that four years after it was purchased husband sold the automobile for $225.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Blanche Alta Swart, as administratrix of the estate of Grace Swart, deceased, against Grover C. Swart, to set aside transfer of corporate stock to defendant by decedent during her lifetime and to require defendant to account for an automobile transferred to him by decedent. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Jerrell Babb, of Los Angeles, for appellant.

James C. Ingebretsen, Dillon & Dundas, and Freston & Files, all of Los Angeles for respondent.

W. J. WOOD, Justice.

By this action Blanche Alta Swart, as administratrix of the estate of Grace Swart, deceased, sought to set aside the transfer made by Grace Swart during her lifetime to defendant Grover C. Swart of 201 shares of the capital stock of the Charles Ellsworth Corporation and to require defendant to account for a Buick automobile transferred to

him by Mrs. Swart. Defendant has appealed from a judgment by which plaintiff (in her individual capacity), defendant and Jack Swart were each held to be the owners of an undivided one-third interest in the stock and by which plaintiff was awarded the sum of $450, representing the value of the automobile, which had been sold by defendant prior to the commencement of this action.

[1] The action was tried concurrently with the case of Grover Swart v. Blanche Swart, in which an appeal has been this day decided, 120 P.2d 940, and the other proceedings therein mentioned, and was decided upon the same evidence. Upon the authority of that decision we hold that any question concerning the correctness of the judgment herein, insofar as it purports to determine the issues concerning ownership and right to possession of the shares of stock in question, have become moot. We are called upon, however, to determine whether the trial court properly awarded plaintiff the sum of $450 as the value of the automobile.

At the time that the certificates for the shares of stock were transferred to defendant by Mrs. Swart he induced her to assign to him the ownership certificate for a Buick automobile. This transaction occurred about two weeks before her death and while Mrs. Swart was constantly under the influence of opiates and sedatives.

[2] Defendant contends that the present action is barred by the statute of limitations because it was not commenced until more than four years after the alleged transfer of title to the automobile. The only persons who could have maintained an action to set aside the transfer of title to the automobile were defendant and his two children, they being the sole heirs of decedent. Obviously defendant would not, in fact could not, have maintained an action against himself for that purpose. The two children were the only persons who could have commenced this action and at the time the cause of action accrued both were minors. Plaintiff, who is the elder of the two children, attained her majority approximately eleven months before the filing of the present action and was appointed administratrix of her mother's estate only seven months prior thereto. The time during which the disability of minority exists is not a part of the time limited for the commencement of an action. Code Civ. Proc., sec. 352. No administrative proceedings had been commenced by Grover Swart or any other person before the appointment of plaintiff as administratrix.

[3-5] It is contended that the trial court's findings to the effect that defendant, by means of fraud and undue influence, induced decedent to transfer to him title to the automobile are not supported by the evidence. The findings in question were based upon conflicting evidence and therefore, under settled rules of law, will not be disturbed on appeal. There was substantial evidence that at the time of the transfer decedent was in great pain; that the sedatives and opiates administered to her so dulled her faculties that she was unable to understand the nature of the transaction; that defendant had made repeated attempts during decedent's last illness to obtain her signature on the ownership certificate; and that decedent received no consideration for the transfer. The evidence is clearly sufficient to support the questioned findings. The further contention that the finding that the Buick automobile was the separate property of Mrs. Swart is not supported by the evidence cannot be sustained. There was evidence from which the court would have been justified in inferring that the automobile was purchased with the separate funds of Mrs. Swart. Moreover, the certificate of ownership ("pink slip") showed title to the automobile to be vested in Mrs. Swart alone. Under the presumption afforded by section 164 of the Civil Code, the court was warranted in concluding that the automobile was the separate property of the deceased wife. Altramano v. Swan, —— Cal.App.2d ——, 119 P.2d 401.

[6] The court did not err in finding the value of the automobile to be $450 at the time it was transferred to defendant. Although there was no expert testimony as to the actual value of the car at that time, it was established that when it was originally purchased, approximately one and one-half years prior to the death of Mrs. Swart, the price paid was $775. Four years after it was purchased defendant sold the automobile for $225. The court was justified in fixing the value of the automobile at the time it was transferred to defendant at the sum of $450.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

49 Cal.App.2d 67

DEMARTINI v. KATZ.

Civ. 11841.

District Court of Appeal, First District, Division 2, California.

Jan. 9, 1942.

1. Executors and administrators ⇐210

When an express oral contract to compensate for services by will is not fulfilled, the law implies a promise to pay their reasonable value.

2. Executors and administrators ⇐221(7)

Where the evidence showed a promise of deceased to compensate plaintiff by will for services, the rendition of the services, the reasonable value thereof, and the intestate death of deceased, plaintiff could recover on an "implied contract" the reasonable value of the services.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Contract".

3. Limitation of actions ⇐46(5)

In action to recover on implied contract for services for which decedent had promised to compensate by will, statute of limitations did not apply to continuous services from June 24, 1919, until decedent's death on October 20, 1937. Code Civ.Proc. § 339, subd. 1.

4. Limitation of actions ⇐49(2)

In action to recover on implied contract for services, where plaintiff served decedent from September 1, 1910, to June 1, 1914, and later served the decedent from June, 1919, until decedent's death, two-year statute of limitations on any implied contract to pay for the earlier services commenced to run at the termination of such services. Code Civ. Proc. § 339, subd. 1.

5. Executors and administrators ⇐453(1)

In action to recover on implied contract for services for which decedent had promised to compensate by will, where there were two periods of service, one of which was barred by the statute of limitations, a finding of a lump sum as the value of all of the services was reversible error. Code Civ.Proc. § 339, subd. 1.

6. Appeal and error ⇐1170(6)

In action to recover on implied contract for services for which decedent had promised to compensate by will, where trial court committed reversible error in finding a lump sum as the value of all of the services when plaintiff's claim for part of the services was barred by the statute of limitations, and all of the other findings were supported, the appellate court limited the new trial to a finding of the value of the services not barred. Code Civ.Proc. § 339, subd. 1.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Erminia Demartini against Phil C. Katz, as administrator, etc., for the reasonable value of services. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Henry F. Boyen, Frank J. Fontes, Stanislaus A. Riley, and Andriano & Lowery, all of San Francisco, for appellant.

J. J. Doyle, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment in favor of plaintiff for $3150. The trial court found that plaintiff rendered services to decedent Raffetto from September 1, 1910 to June 1, 1914 and from June 24, 1919 to October 20, 1937 for and in consideration of and with the agreement, promise and understanding that for the continuous and indefinite period of such services the decedent as compensation would leave by will to plaintiff an adequate and reasonable amount, that decedent died intestate on October 20, 1937, and that the reasonable value of all such services was $3150.

Appellant states the questions presented on this appeal as follows:

"1. The court found that the decedent expressly promised to compensate plaintiff by testamentary bequest and if the evidence is insufficient to support such finding, can such judgment be sustained on the theory of an implied agreement?

"2. Is plaintiff's alleged cause of action partly barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure * * * where a part of the services upon which the judgment is based, terminated 23 years before the death of decedent?

"3. Where a substantial part of the alleged services is barred, do the findings based thereon support a judgment for a lump sum, where there is nothing by which the court can apportion the amount of the

judgment between what is barred and what is not barred?"

[1, 2] In connection with point 1 the appellant argues that the complaint failed to state a cause of action because an oral contract to leave property by will is unenforceable. However the complaint and findings both bring this case clearly within the rule of Burr v. Floyd, 137 Cal.App. 692, on page 696 of the opinion, 31 P.2d 402, 405, and the cases cited in that case, that when an express oral contract to compensate for services by will is not fulfilled the law implies a promise to pay their reasonable value. The court found the oral promise to compensate by will, the failure to perform it, and the reasonable value of the services. It thus found all the elements set out in those cases as justifying a recovery. The recovery is not on the oral contract, but on the contract which the law implies upon the failure to perform the oral contract.

The evidence is ample to support the findings as to the services rendered, the promise to compensate for them by will, and as to their reasonable value.

[3, 4] The defense of the statute of limitations admittedly has no application to the continuous period June 24, 1919 to the time of decedent's death. Wax v. Adair, 16 Cal.App.2d 393, 60 P.2d 904. However, as to the period September 1, 1910 to June 1, 1914, the cause of action is clearly barred. The evidence shows that about June 1, 1914, the decedent ceased to live in plaintiff's home and plaintiff rendered him no services from that date until he came again to live with plaintiff in June of 1919. There is no evidence of any promise made by decedent during the period from 1910 to 1914 to compensate plaintiff by will or at all for the services rendered during that period. It follows that as to any possible implied contract to pay for the services from 1910 to 1914 the statute commenced to run when the decedent left plaintiff's home on June 1, 1914. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146.

[5, 6] Respondent does not dispute this but argues that the findings should be construed as allowing compensation only for the period from June 24, 1919 to October 20, 1937. The findings will not bear this construction.

Finding I reads, so far as necessary to quote it to make its meaning clear:

"That plaintiff rendered services to Carlo Emanuele Raffetto * * * from the 1st day of September, 1910, to on or about the 1st day of June, 1914, and from the 24th day of June, 1919, to on or about the 20th day of October 1937 * * * that the reasonable value of all of the foregoing services was and is the sum of Thirty-one Hundred Fifty Dollars."

"*All* of the foregoing services" clearly refers back to the services rendered in both periods described in the first part of the findings.

Since the court allowed a lump sum for the services rendered in both periods the conclusion that the claim for services in the earlier period is barred necessitates a reversal. However, it will only be necessary to have a retrial on the single issue of the reasonable value of the services covered by the later period, since all other findings were supported by the evidence. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Pretzer v. California Transit Co., 211 Cal. 202, 203, 294 P. 382; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 131, 17 P. 2d 712.

The judgment is reversed with directions to the trial court to find that the claim for services rendered between September 1, 1910 and June 1, 1914 is barred by subdivision 1, section 339, Code of Civil Procedure, to retry the question of the reasonable value of the services rendered between June 24, 1919 and October 20, 1937, and to render judgment for plaintiff for the reasonable value of such services. Appellant is allowed his costs on appeal.

NOURSE, P. J., and STURTEVANT, J., concurred.

PEOPLE v. BROPHY.

Cr. 3460.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1942.

Rehearing Denied Jan. 20, 1942.

Hearing Denied Feb. 5, 1942.

1. Perjury ⇐11(1)

"Perjury" can be predicated on the giving of false testimony only when such testimony is material to the issues presented in the cause in which the alleged false testimony was given. Pen.Code, § 118.

See Words and Phrases, Permanent Edition, for all other definitions of "Perjury".

2. Perjury ⇐11(2)

Ordinarily, testimony is "material testimony" within rule as to perjury when the testimony could have properly influenced the trial judge before whom the case was being tried, on the material issues therein. Code Civ.Proc. § 463.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Testimony".

3. Criminal law ⇐1134(3)
Perjury ⇐36

The materiality of testimony for the giving of which perjury is charged is for the trial judge in a criminal case to decide in the first instance and for the District Court of Appeal to decide on appeal. Code Civ.Proc. § 463; Pen.Code, § 118.

4. Perjury ⇐36

The question of the materiality of evidence in a perjury prosecution, whenever and however the question arises, is always one for the court. Code Civ.Proc. § 463; Pen. Code, § 118.

5. Perjury ⇐11(1)

A false oath must be material to the issue, and, therefore, prejudicial to someone, otherwise, however wilful, it cannot be "perjury". Code Civ.Proc. § 463; Pen.Code, § 118.

6. Perjury ⇐11(2)

An issue, concerning which a false oath is made, must be valid and not false or fictitious before the giving of the false oath will amount to "perjury". Pen.Code, § 118.

7. Attorney general ⇐6

The constitutional provision giving the attorney general direct supervision over every district attorney and sheriff, and over such other law enforcement officers as may be designated by law, does not contemplate absolute control and direction of such officials, especially as to sheriffs and district attorneys, since such officials are "public officers", as distinguished from mere "employees" with public duties delegated and entrusted to them. Const. art. 5, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Public Officer".

8. District and prosecuting attorneys ⇐8
Sheriffs and constables ⇐86

The word "supervision" as used in the constitutional provision that the attorney general shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, does not contemplate control, and sheriffs and district attorneys cannot avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment. Const. art. 5, § 21, art. 11, §§ 7½, 7½a, 8, 8½.

See Words and Phrases, Permanent Edition, for all other definitions of "Supervision".

9. District and prosecuting attorneys ⇐8
Sheriffs and constables ⇐86

The constitutional provision that whenever, in the opinion of the attorney general, any law of the state is not being adequately enforced in any county, it shall be the duty of the attorney general to prosecute, in which cases he shall have all the powers of a district attorney, does not authorize a district attorney or a sheriff to yield the general control of his offices and duties to the attorney general. Const. art. 5, § 21.

10. Attorney general ⇐6

Enforcement of the laws contemplates enforcement according to law, the procedure for which is definitely established, and the attorney general is not authorized to depart from that procedure by the constitutional provision that the attorney general shall be the chief law officer of the state, and it shall be his duty to see that the laws of the state are uniformly and adequately enforced in

every county of the state. Const. art. 5, § 21.

11. Attorney general ⇐6

The attorney general had no authority, under the section of the constitution dealing with the powers and duties of the attorney general, to order telephone company to discontinue service to subscriber on ground that such service encouraged the perpetration of unlawful acts. Const. art. 5, § 21.

12. Attorney general ⇐6

The constitutional provision that the attorney general shall be the chief law officer, interpreted in the light of limitations that follow, can be no more than descriptive and vests no more authority in the attorney general than the constitutional provision that the supreme executive power of the state shall be vested in a chief magistrate, who shall be styled the governor, vests in the governor. Const. art. 5, §§ 1, 21.

13. Telegraphs and telephones ⇐26½

Where the attorney general had no authority to order a telephone company to discontinue its service to a subscriber, the telephone company was not bound to abide by the order of the attorney general. Const. art. 5, § 21.

14. Contracts ⇐102

A contract, legal in itself, is not rendered unenforceable by the mere fact that one of the parties thereto has knowledge of an intended purpose of the other party thereto, by means of the contract or subject matter thereof, to violate some law or public policy of some state.

15. Contracts ⇐102

Where there is no moral turpitude in the making or performing of a contract, the mere fact that an agreement, the consideration and performance of which are lawful incidentally, assists one in evading a law or public policy, is no bar to enforcement of the contract, and if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation.

16. Injunction ⇐102

Courts of equity will not undertake to enforce the criminal law and will not enjoin the commission of a threatened act merely because the act would be a crime.

17. Nuisance ⇐80

Only where threatened acts will constitute a public nuisance as that term is defined by statute is a court of equity vested with jurisdiction to interpose its injunctive processes to prevent injury which will result from the maintenance thereof. Civ.Code, § 3369.

18. Injunction ⇐102
Nuisance ⇐80

Threatened crimes need not be enjoined as such, but the acts out of which they grow must come within the definition of a public nuisance, before a court of equity will intervene. Civ.Code, § 3369.

19. Equity ⇐27
Injunction ⇐102

The statutory rule that neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, applies where the acts complained of constitute merely a crime or a series of crimes. Civ.Code, § 3369.

20. Nuisance ⇐80

The dissemination of racing news to bookmakers does not constitute a "nuisance per se" within meaning of statute providing that neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance. Civ.Code, § 3369.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance Per Se".

21. Gaming ⇐79(3)

The furnishing of racing news to bookmaking establishments by telephone does not constitute an "aiding and abetting" in violation of statute dealing with pool-selling and bookmaking. Pen.Code, § 337a.

See Words and Phrases, Permanent Edition, for all other definitions of "Aiding and Abetting".

22. Carriers ⇐39, 236(1)
Telegraphs and telephones ⇐31

Neither public utilities, such as telephone companies, or common carriers are authorized or required to investigate or regulate the public or private conduct of those who seek services at their hands.

23. Gaming ⇐79(3)
Telegraphs and telephones ⇐42

Merely because persons who receive horse racing information transmitted over

telephone facilities, are enabled, as the result of such information, if they are so inclined, to violate the statute dealing with pool-selling or bookmaking, does not make a telephone company a violator of the statute, and the company has no right to refuse its facilities to such persons because of company's belief that such persons will use such service to violate the statute. Pen.Code, § 337a.

24. Gaming ⇐79(3)

The furnishing or the receiving of horse racing or sporting information is not "gambling" and is not a "crime".

See Words and Phrases, Permanent Edition, for all other definitions of "Crime" and "Gambling".

25. Injunction ⇐114(4)

In suit by subscribers to enjoin telephone company from discontinuing telephone service in violation of contract, no ground of intervention was stated by city's complaint in intervention that city had interest in litigation because city's police department had duty to enforce state laws within limits of city, that telephone company, in furnishing service to subscribers, used city's streets, that the use of telephone service would aid and assist in violation of statute forbidding pool-selling or bookmaking, that subscribers' business was unlawful, and that law enforcement agencies of the state were the real parties in interest. Pen.Code, § 337a; Code Civ. Proc. § 387.

26. Injunction ⇐114(4)

In suit by subscribers to enjoin telephone company from discontinuing telephone service in violation of contract, no ground for intervention was stated by attorney general's complaint in intervention alleging that the state had an interest in the matter of litigation because granting of injunction would enable subscribers to aid in violation of gambling laws and contribute to the maintenance of public nuisances, that subscribers would use telephone facilities to distribute horse racing information to persons who would violate the gambling laws of the state, and that such persons would be enabled to maintain bookmaking establishments. Pen. Code, § 337a; Code Civ.Proc. § 387.

27. Parties ⇐44

The one seeking to intervene in an action has the burden to show that his is a proper case for intervention. Code Civ.Proc. § 387.

28. Parties ⇐44

When an intervener is admitted in an action, the pleading which he presents and files must state facts sufficient, if true, to establish the right or interest which he claims, or else he has no longer a standing in court as a litigant if proper objection is made. Code Civ.Proc. § 387.

29. Parties ⇐40(2)

The interest which entitles a party to intervene in an action must be an interest in the matter in litigation in the action as originally brought and of such a present, direct and immediate character that the intervener will either gain or lose by the direct effect of the judgment. Code Civ.Proc. § 387.

30. Parties ⇐48

An intervener cannot be permitted to broaden the scope or function of the proceeding by urging claims or contentions which have their proper forum elsewhere. Code Civ.Proc. § 387.

31. Perjury ⇐11(3)

Where city and attorney general on behalf of the state were improperly permitted to intervene in suit by subscribers to enjoin telephone company from discontinuing telephone service to subscribers, the fact that one of the subscribers by his sworn affidavits was alleged to have falsely denied allegations that subscribers were furnishing racing news to persons unlawfully engaged in accepting wagers did not render the subscriber swearing to the affidavits guilty of "perjury", since the allegations in the affidavit were unnecessary, and trial court, in injunction suit, could not have been improperly influenced thereby in determination of any material issue raised by the pleadings in the injunction suit. Pen.Code, §§ 118, 337a.

32. Perjury ⇐6, 11(1)

Before a charge of perjury can be made out against a defendant, it is necessary that the allegedly false statements of the defendant have been given in a judicial proceeding, and that they are material to a valid issue made therein. Pen.Code, § 118.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Russell L. Brophy was convicted on two counts for perjury, and he appeals.

Judgments reversed, and cause remanded with directions to dismiss indictment.

Charles H. Carr, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Warren Olney and Herbert E. Wenig, Deputy Attys. Gen., for respondent.

WHITE, Justice.

In an indictment returned by the grand jury of Los Angeles County, defendant was accused in two counts of the crime of perjury. Following pleas of not guilty, a trial by jury resulted in the conviction of defendant on both counts. From such judgment of conviction and from the order denying his motion for a new trial this appeal is prosecuted.

The factual background upon which this prosecution was based may be thus summarized: Leonard J. Nevans and defendant, Russell L. Brophy, as individuals, were doing business in the city of Los Angeles under the fictitious firm name and style of Los Angeles Journalist Publishing Company. On or about November 6, 1939, defendant's firm entered into a contract with Southern California Telephone Company, a corporation, hereinafter referred to as the telephone company, under the terms of which agreement the telephone company agreed to furnish and did furnish to Nevans and Brophy at their place of business a telephone connection and service, consisting of ten No. 51 order tables, one hundred trunk lines and four business trunk lines. Nevans and Brophy paid to the telephone company all installation costs as well as all charges for telephone service rendered by the telephone company.

On December 18, 1939, the Honorable Earl Warren, in his capacity as Attorney General of the State of California, addressed a letter to the telephone company reading as follows:

"Mr. N. R. Powley, President
"Pacific Telephone and Telegraph Company
"140 New Montgomery Street
"San Francisco, California

"Dear Sir:

"On November 30, 1939, a letter was addressed to you in which I called your attention to a law enforcement problem which affects practically every community in California, and with which the peace officers are struggling at the present time. This letter was directed to the particular problem of the furnishing of information to book-making establishments through the use of telephonic and telegraphic equipment by Normile and Brophy for Southern California, and Kreling and Cohen for Northern California, whereby bookmakers throughout the state could carry on their illegal activities.

"At that time I requested your cooperation and the immediate discontinuance of telephone service to these individuals on the grounds that it aided, abetted, and encouraged the perpetration of unlawful acts, to wit, violation of section 337a of the Penal Code. I also pointed out to you section 638 of the Penal Code which section clearly authorized the immediate cancellation of any contracts that may have been in force with these individuals and which would further authorize communication companies to decline to enter into contracts for similar service.

"Through your good offices the Kreling and Cohen service was canceled and it was announced that Normile and Brophy had abandoned their service. I, however, now find that it is necessary for me to again call upon you to cancel the service of Russell L. Brophy and Leon J. Nevins, both of them having been previously connected with the Nationwide News Service, who are still furnishing information to bookmaking establishments throughout the state through the use of telephonic equipment furnished by your company. These individuals are operating from 650 South Spring Street, Los Angeles, California, and I have in my possession definite evidence, which has been substantiated, that will prove that such illegal activities are being carried on by these individuals.

"It is therefore requested that you immediately cancel the service of Russell L. Brophy and Leon J. Nevins.

"Sincerely yours.
"Earl Warren,
"Attorney General."

Thereupon the telephone company addressed a communication to Leonard J. Nevans, reading as follows:

"Dear Sir:

"Mr. Earl Warren, Attorney General of the State of California, has written a letter dated December 18, 1939, requesting us immediately to discontinue telephone service to you on the ground that such service aids, abets, and encourages the perpetration of unlawful acts committed by you; to-wit, vio-

lations of section 337a of the Penal Code of the State of California. In accordance with the request of the Attorney General, we therefore give you this notice that the service enumerated in the list attached hereto will be discontinued at the close of business on December 23, 1939.

"Yours very truly,
"F. N. Rush,
"Vice President and General Manager."

Following the receipt of this letter, to-wit, on December 23, a complaint for injunction against the telephone company was filed on behalf of defendant and Leonard J. Nevans, such complaint being signed and verified by the latter. This complaint alleged the application by plaintiffs in the injunction action to the telephone company for the installation of service as aforesaid; acceptance by the telephone company of such application; installation of the requested service; payment by plaintiffs of all deposits and service charges as required by the telephone company; and the complaint contained the further averment that plaintiffs had complied with the rules and regulations of the telephone company, and further set forth plaintiffs' protest against the threatened discontinuance of telephone service and the fact that such protests were unavailing; that the contemplated action of the telephone company to remove their telephone service was unwarranted, discriminatory, and would result in serious and irreparable damage to the plaintiffs and their business, which was alleged to be that of publishing and printing daily publications giving the news of prospective horse races, such as the names of horses, their positions, jockeys, scratches, and probable odds. The complaint for injunction further alleged that the telephone service was used to disseminate free racing information on incoming calls made over such telephones by the readers of and subscribers to plaintiffs' publication.

On the day of the filing of said complaint for injunction the superior court issued its order to show cause and temporary restraining order against the telephone company, by and through which the latter was restrained from discontinuing plaintiffs' telephone service pending hearing on the order to show cause.

On January 2, 1940, the city of Los Angeles, a municipal corporation, filed a complaint in intervention in the injunction proceeding, alleging as grounds for intervention that the city had an interest in the litigation, in that the police department of such city had the duty to enforce the laws of the State of California within the corporate limits of such city; that the defendant telephone company, in furnishing service to plaintiffs, used the streets of the city by virtue of the authority of franchises; that the Attorney General had asked the mayor to cause the city to intervene; that the use of the telephone service would aid and assist in violation of penal statutes of California, and in particular section 337a of the Penal Code; that the plaintiffs' business was unlawful; that the law enforcement agencies of California were real parties in interest in the action, in that the effect of a judgment restraining the telephone company from discontinuing service to plaintiffs would tend to establish the legality of plaintiffs' business and would prevent law enforcement agencies from effectively preventing violations of section 337a of the Penal Code. The city's complaint in intervention further alleged that the business conducted by plaintiffs was unlawful, in that the latter published so-called scratch sheets which disclosed information concerning horse races to be run on various tracks throughout the United States; that such scratch sheets were published by plaintiffs primarily as an aid to gambling operations, and that the plaintiffs rendered aid and assistance to persons engaged in violations of bookmaking laws.

On January 4, 1940, the Attorney General of the State of California filed a complaint in intervention on behalf of the state. This complaint alleged that the State of California had an interest in the matter in litigation because the granting of the injunction to plaintiffs would enable them to aid and assist in the violation of gambling laws and contribute to the maintenance of public nuisances; that plaintiffs would use the telephone facilities to distribute horse-racing information to persons who would by the use of such information violate the gambling laws of this state, and that such persons would be enabled to maintain bookmaking establishments; that the granting of the injunction would compel the telephone company to aid and abet bookmaking and contribute to the maintenance of public nuisances.

The telephone company filed an answer in the injunction case on January 4, 1940, which pleading consisted of a general denial and one separate and affirmative de-

fense based entirely upon the letter from the office of the Attorney General hereinbefore quoted.

On January 9, 1940, plaintiffs in the injunction action filed demurrers to the answer of the telephone company and to the complaints in intervention interposed by the city and the state. On the same date there were filed motions to strike the complaints in intervention proffered by the city and the state and also to strike portions of the answer of the telephone company, as well as motions to vacate the orders granting permission to the state and city to intervene. The superior court denied the motions to vacate the orders granting leave to intervene and also the motion to strike portions of the answer of the telephone company, and overruled demurrers to the complaints in intervention and the answer of the telephone company. At the hearing on the order to show cause the temporary restraining order was dissolved and on January 11, 1940, plaintiffs filed a dismissal of the action, and the proceedings in the injunction litigation were thereupon terminated.

Count 1 of the indictment is predicated upon an affidavit sworn to by defendant herein, Russell L. Brophy, and filed by him on January 2, 1940, in the injunction action, while the same was pending before the superior court. That portion of the affidavit which is alleged to be perjurious in count 1 of the indictment reads: "Affiant further states that the plaintiffs have no arrangements whatsoever with any wagering establishments or persons engaged in the business of accepting wagers whereby the plaintiffs supply any turf news as aforesaid whatsoever by telephoning to any such establishments or persons."

Count 2 of the indictment is based upon an affidavit sworn to by defendant and filed by him in the injunction action on January 6, 1940. The portions of the affidavit alleged in count 2 of the indictment to be false and contrary to the oath taken by said Russell L. Brophy read as follows:

"Affiant states that they have not given out to any readers or distributors secret telephone numbers for use by them in making calls to plaintiffs' place of business. Affiant further states that the plaintiffs do not keep their telephone numbers secret. Affiant states that plaintiffs have not to his knowledge ever given any telephone numbers to any 'pool sellers' and 'bookmakers.' That it is not the purpose of the plaintiffs, nor do they use the said telephone lines installed by the defendants, for the dissemination of 'rapid, up to the minute horse racing information including the names of horses, positions, jockeys and betting odds,' knowingly to any 'bookmaker' or 'pool seller.' Affiant further states that at no time do they ever give any information to any person calling concerning up to the minute betting odds or any betting odds. That the only information given to readers are opinions as to probable odds, as formulated by the so-called handicappers of the continental press or the plaintiffs' handicapper.

"Affiant further states that no information is given by plaintiffs to its readers concerning track odds prior to the running of a race nor any news whatsoever concerning the running of a race until such race has been run and the results thereof have become public news.

"Nor was this affiant ever financially interested at any time in any so-called Annenberg Enterprises, or in their employ.

"Affiant further states that the plaintiffs do no have regular subscribers who are given numbers different than Vandyke 8172."

Appellant first assails the judgment on the ground that the matter constituting the assignments of perjury in both counts 1 and 2 was not material to any issue in the suit for injunction. In defining a material allegation, section 463 of the Code of Civil Procedure provides: "A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient." Section 1867 of the Code of Civil Procedure provides that none but a material allegation need be proved.

[1-6] It is axiomatic that perjury can be predicated upon the giving of false testimony only when such testimony is material to the issues presented in the cause in which the alleged false testimony is given. Ordinarily it may be said that the testimony is material when it could have properly influenced the trial judge before whom the case was being tried upon the material issue or issues involved therein; and it cannot be questioned that the materiality of the testimony for the giving of which perjury is charged is within the right of the trial judge in the criminal case to decide in the first instance, and for this court to decide on appeal. In fact,

the question of the materiality of evidence, whenever or however it arises, is one for the court. People v. Curtis, 36 Cal.App.2d 306, 319, 98 P.2d 228; People v. Macken, 32 Cal.App.2d 31, 41, 89 P.2d 173; People v. Bradbury, 155 Cal. 808, 103 P. 215. Section 118 of the Penal Code, under which appellant was convicted, reads: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury." In the case of People v. McDermott, 8 Cal. 288, the court said: "The rule is well established, that the false oath must be material to the issue, and, therefore, prejudicial to some one, otherwise, however willful, it cannot be perjury." It is equally well established that the issue must be valid and not false or fictitious.

In arriving at a conclusion as to the materiality of the portions of appellant's affidavit in the injunction suit which are assigned as perjury, and to the validity of the issues as well, we must give consideration to the nature and purpose of the litigation in which such affidavits were filed. The record reveals that appellant's complaint for injunction against the telephone company was nothing more than an action to enforce his alleged rights under a simple contract by the terms of which appellant had agreed to pay for and the telephone company had agreed to furnish and was furnishing telephone service in the form of one hundred telephone lines.

Defendant telephone company's answer, in addition to express denials, some on information and belief, purported to allege an affirmative defense based on the letter received by the company from the Attorney General. In that connection, the company's answer alleges that on or about December 18, 1939, Mr. N. R. Powley, president of defendant company, received a letter from the Attorney General of the State of California stating that Russell L. Brophy and Leonard J. Nevans were furnishing information to bookmakers through the use of telephonic equipment furnished by defendant company and that said letter concluded with a request that the telephone service rendered to said Brophy and Nevans immediately be cancelled. The affirmative defense further alleged that following the receipt of said letter from the Attorney General, the defendant made inquiry of said Attorney General and his deputies and assistants as to the nature of the evidence of and against the said Brophy and Nevans referred to in said letter of the Attorney General; that "the Attorney General and his assistants and deputies informed the defendant that law enforcement officers had been present at bookmaking establishments in the County of Los Angeles and had observed that information which was used for the purpose of and in connection with the placing of wagers upon the results of horse races was being received at said establishments over telephone equipment installed therein; that the said law enforcement officers had investigated the source of the information thus received, and had found that it emanated from room 917, 650 South Spring Street, Los Angeles, California, and was transmitted from said source by means of telephone communication to said bookmaking establishments."

The affirmative defense concludes with the allegation that the company then sent the letter hereinbefore set forth in full, to-wit, the letter from the company to Nevans under date of December 20, 1939, informing plaintiff of the company's intention to discontinue service at the close of business on December 23, 1939.

It is especially important to note and also to emphasize that the answer contains no allegations of fact whatsoever purporting to set up a defense under and by virtue of section 638 of the Penal Code, which section was referred to in the letter of the Attorney General as above noted. But the reason for the failure of defendant company to urge such a defense is obvious from an examination of said section, which section clearly affords no grounds for the action of the company nor for the statement of the Attorney General as contained in his letter of December 18. That section refers only to the refusal to send or deliver *messages received for transmission*, and the willful refusal or neglect to do so is made a misdemeanor, unless such *message* is calculated to instigate or encourage the perpetration of any unlawful act. It is not even remotely applicable to the situation presented in the civil action nor to the subject matter of the Attorney General's letter.

By reason of the pleadings and the law as above outlined, it becomes necessary to

determine whether the telephone company was bound to follow and obey the order of the Attorney General, for although literally in the form of a request, nevertheless, in the light of the substance and form thereof, such request was but an order in polite terms. And that it was so interpreted by the telephone company there can be no question, for manifestly, unless so interpreted, it would have been considered presumptuous and accordingly ignored. If the company was bound as a matter of law to obey the order of the Attorney General, then the affirmative defense as above set forth would have been valid; if not, its invalidity is obvious. In order to determine that question, it becomes necessary to consider the powers and duties of the office of the Attorney General. Those powers and duties are now derived from section 21 of article V of the Constitution of California, which section was adopted by the people of the state as an initiative measure on November 6, 1934. Formerly the constitution was silent upon this subject, and such powers and duties were set forth only in section 470 of the Political Code. The powers and duties now set forth in the constitutional provision are largely the same as those set forth in section 470 of the Political Code.

Section 21 of article V of the Constitution reads in part as follows:

"Subject to the powers and duties of the Governor vested in him by Article V of the Constitution, the Attorney General shall be the chief law officer of the State and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such written reports concerning the investigation, detection, prosecution and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest, or directed by the Governor, he shall assist any district attorney in the discharge of his duties. * * *

"He shall also have such powers and perform such duties as are or may be prescribed by law and which are not inconsistent herewith. * * *"

[7-9] As will be seen from an examination of the above section of the Constitution, the powers of the Attorney General are not without limitation. Manifestly, "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law" does not contemplate absolute control and direction of such officials. Especially is this true as to sheriffs and district attorneys, as the provision plainly indicates. These officials are public officers, as distinguished from mere employees, with public duties delegated and entrusted to them, as agents, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which they, as agents, are active. Coulter v. Pool, 187 Cal. 181, 201 P. 120. Moreover, sheriffs and district attorneys are officers created by the Constitution. In that connection it should be noted that there is nothing in section 21 of article V that indicates any intention to depart from the general scheme of state government by counties and cities and counties, as well as local authority in cities, as provided by sections 7½, 7½a, 8 and 8½, of article XI. By interpreting section 21 of article V in the light of the above-mentioned provisions, it is at once evident that "supervision" does not contemplate control, and that sheriffs and district attorneys cannot avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment. The sole exception appears to be that whenever "in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute," in which cases "he shall have all the powers of a district attorney." But even this provision affords no excuse for a district attorney or a sheriff to yield the general control of his office and duties to the Attorney General.

[10-12] If the powers of the Attorney General are thus limited in the most direct performance of the duties of that office,

by what authority may that official invade the affairs of other governmental agencies in general and public utility companies in particular? If there is any such authority at all, it must be by virtue of the first sentence of section 21, which as above noted reads as follows: "The Attorney General shall be the chief law officer of the State and it shall be his duty to see that the laws of the State of California are uniformly and adequately enforced in every county of the State." Manifestly, enforcement of the laws contemplates enforcement according to law, the procedure for which is definitely established. There is nothing in section 21 of article V which authorizes the Attorney General to depart from that procedure; and in that connection, no provision has been called to our attention, nor have we been able to find any, which directly or indirectly empowers the Attorney General to issue any orders in the nature of those contained in the letter to the telephone company. The expression, "the Attorney General shall be the chief law officer," as provided in section 21 of article V, obviously confers no such authority, for at most such an expression, interpreted in the light of the limitations that follow, can be no more than descriptive, and vests no more authority in the Attorney General than the expression in section 1 of article V, viz., "The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled the Governor," vests in the governor.

[13] It is evident from the foregoing that the law vests no authority in the office of the Attorney General to order a telephone company to discontinue its service, and this being true, the telephone company was not bound to abide by the order of the Attorney General, as was done in the circumstances disclosed by the record herein.

If there can be any question as to the above conclusion it is at once removed by a consideration of another phase of the situation, which definitely fixes the exclusive authority over public utility companies in the railroad commission. The people of California, through the adoption of section 23 of article XII of the Constitution, have seen fit to repose such power to supervise and regulate public utilities, which include telephone companies, solely and alone in the railroad commission, which governmental agency is clothed with such power of supervision and regulation as the legislature may confer upon it. As declared by the cited constitutional section, "the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities *is hereby declared to be plenary and to be unlimited by any provision of this Constitution.*" (Italics added.) Pursuant to the grant of such power by the Constitution, the legislature adopted what is commonly referred to as the Public Utilities Act, Stats.1915, p. 115 and amendments thereto; 2 Deering's Gen. Laws, Act 6386, section 30 of which provides: "Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in the matters herein specified, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees."

In the exercise of its powers under the Constitution and the Public Utilities Act, the railroad commission has promulgated rule and regulation No. 11, governing the right and power of Southern California Telephone Company at Los Angeles to discontinue service. Railroad Commission Revised Sheet No. 34263-T, canceling Revised Sheet No. 7986-T. The rule in question reads in part as follows: "D. Legal Requirements: The Company may refuse to establish service for an applicant or it may discontinue and disconnect service to a subscriber, whenever the use made or to be made of the service, or the furnishing of service to the premises of the applicant or subscriber, is prohibited under any law, ordinance, regulation, or other legal requirement."

It inevitably follows from the foregoing that the so-called affirmative defense was invalid and therefore raised no issues. In both substance and effect it amounted to no more than a recital of certain information that respondent telephone company had received, and the source thereof added nothing to its value as a defense.

[14, 15] The law is clear and decisive on the question of the enforceability of a contract even though one of the parties thereto has knowledge of an intended purpose of the other party, by means of the contract, or the performance thereof, to violate some law or public policy of the state. The rule

in that regard is thus stated in 53 A.L.R. 1364 at page 1366:

"The rule, according to the great weight of authority, is to the effect that a contract legal in itself is not rendered unenforceable by the mere fact that one of the parties thereto has knowledge of an intended purpose of the other party thereto, by means of the contract or subject-matter thereof, to violate some law or public policy of some state; or, as is stated in 6 R.C.L. p. 696, 'where there is no moral turpitude in the making or in the performing of the contract, the mere fact that an agreement the consideration and performance of which are lawful incidentally assists one in evading a law or public policy, is no bar to its enforcement, and that, if the contract has been performed by the promisee, it is no defense that the promisor knew that the agreement or its performance might aid the promisee to violate the law or to defy the public policy of the state, when the promisor neither combined nor conspired with the promisee to accomplish that result, nor shared in the benefits of such a violation.'"

[16-18] The rule just quoted has been followed by the courts of this state in California Raisin Growers Ass'n v. Abbott, 160 Cal. 601, 117 P. 767, where it was held that the vendor of goods may recover the purchase price even though he knew that such goods were bought for an illegal purpose, provided such illegal purpose is not made a part of the contract. In the case of Gallick v. Castiglione, 2 Cal.App.2d 716, 38 P.2d 858, it was held that knowledge on the part of the seller of sugar that the purpose of the purchaser thereof was to illegally manufacture whiskey, was no defense to an action for the purchase price where the illegal purpose was not a part of the contract. Without doubt, therefore, the telephone company in the injunction case could have enforced its contract against appellant notwithstanding the letter written by the Attorney General, because no claimed illegal purpose was part of the contract itself. No citation of authority is necessary for the statement that if the contract was enforceable by one of the parties thereto it was equally enforceable by the other. Furthermore, in the instant case it is not claimed that appellant himself was violating the law, but that he was by means of the telephone supplying news and information to third persons who were violating the law. If it be the law that a contract is rendered unenforceable because one of the parties thereto, in the performance of his part of the contract, makes it possible for a third party to violate the law, there would be a rarity of enforceable contracts. A newspaper, for instance, would be unable to enforce its contract with a news service because, forsooth, it was printing news concerning horse races and selling its newspapers to people who used news contained therein for gambling purposes in violation of the law. Also, if the theory just mentioned be correct, courts of equity would be compelled to abandon their long-established doctrine that such courts will not undertake to enforce the criminal law and will not enjoin the commission of a threatened act merely because the act would be a crime. Weis v. Superior Court, 30 Cal.App. 730, 732, 159 P. 464. It is only where the threatened acts will constitute a public nuisance, as that term is defined by our statutes, that a court of equity is vested with jurisdiction to interpose its injunctive processes to prevent injury which will result from the maintenance thereof. Threatened crimes may not be enjoined as such, but the acts out of which they grow must come within the definition of a public nuisance before a court of equity will intervene.

[19] Section 3369 of the Civil Code provides: "Neither specific nor preventive relief can be granted * * * to enforce a penal law, except in a case of nuisance." The rule laid down in the quoted section applies where the acts complained of constitute merely a crime or series of crimes. People v. Seccombe, 103 Cal.App. 306, 314, 284 P. 725.

[20] That the dissemination of racing news to bookmakers does not per se constitute a nuisance was emphatically declared by our Supreme Court in Kreling v. Superior Court, 18 Cal.2d 884, 118 P.2d 470. It is significant and noteworthy that the acts charged against petitioner Kreling in the case just referred to were identical with the acts charged against appellant by the Attorney General's office in the injunction proceeding against the telephone company and as contained in the letter of that state officer to the telephone company hereinbefore noted, viz., the dissemination of and furnishing of services and supplies necessary to the functioning of bookmaking establishments; but it was held by the Supreme Court that such facts did not warrant the conclusion that the acts of petitioner in the Kreling case constituted a public nuisance within the terms of our statute. It was

there held that facts must be alleged from which it can be determined that the furnishing of such supplies or information are activities which are injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property. Civ. Code, §§ 3479, 3480; People v. Lim, 18 Cal. 2d 872, 118 P.2d 472. In the Kreling case, supra [18 Cal.2d 886, 118 P.2d 471] the court said: "In the absence of such allegations the court had no adequate basis for the issuance of its restraining order which, in broad terms, enjoined petitioners from printing or distributing racing forms and scratch sheets, from gathering or disseminating horse racing news and from using their printing plants *or communication facilities* for such purposes." (Italics added).

[21] Respondent's claim that the furnishing of racing news to bookmaking establishments by telephone constitutes an aiding and abetting in a violation of section 337a of the Penal Code is without merit. It is not the transmission by use of a telephone of information concerning the results or probable results of horse races that constitutes a violation of the quoted Penal Code section, but it is the use which persons may make of such information in the acceptance of bets or maintaining places for the reception of bets that constitutes a violation of the law. Neither the telephone company nor appellant in his capacity of a subscriber for telephone service was accused in the injunction suit of managing, operating or participating in any gambling place or enterprise maintained for the acceptance of wagers on horse races or other contests of skill between men or beasts; and the most that can be said of the charges made against the telephone company and appellant is that the telephone company placed in the hands of appellant the means of furnishing information to others locally and at distant points, which information might be used by such persons to contravene the provisions of section 337a of the Penal Code.

[22-24] Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands. Simply because persons who received information transmitted over the telephone facilities were enabled as a result of such information, if they were so inclined, to commit unlawful acts, does not make the telephone company a violator of the criminal laws. If such were the case, the telephone company would likewise be guilty in permitting its facilities to be used in transmitting information to the newspapers of the country as to prospective horse races or prize fights, because the information thus transmitted and published induced or enabled persons to engage unlawfully in betting on the results of such contests. The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense, or because the officers of such company were aware of the fact that the passengers were intent upon visiting a bookmaking establishment upon arrival at their destination, which establishment was maintained for the purpose of unlawfully receiving bets on horse races. Furthermore, the furnishing or receiving of racing or sporting information is not gambling and is not a crime. In re Teletype Machine No. 33335, 126 Pa. Super. 533, 191 A. 210, 213. For well considered and ably reasoned cases supporting the foregoing views, see Commonwealth v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59, 57 L.R.A. 614, 99 Am.St.Rep. 299, and State v. Shaw, 39 Minn. 153, 39 N.W. 305.

[25-28] The statements of appellant upon which all the assignments of perjury in count 2 are based were set up to meet allegations in the complaint in intervention filed by the state that appellant was disseminating racing news by use of his telephone lines. While, as we have pointed out elsewhere, the averments of appellant contained in his affidavits upon which the perjury charges were based were immaterial, it is also true that in connection with count 2 they were offered in response to allegations set forth in a pleading which had no validity. Neither complaint in intervention states facts sufficient to constitute a cause of action for or ground of intervention. Section 387 of the Code of Civil Procedure authorizes the intervention before trial of any person "who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." The burden rests upon the one seeking to intervene to show

that his is a proper case for intervention. 20 Cal.Jur. 523. When an intervener is admitted, the pleading which he presents and files must state facts sufficient, if true, to establish the right or interest which he claims, or else he has no longer a standing in court as a litigant if proper objection is made. Moran v. Bonynge, 157 Cal. 295, 107 P. 312.

[29, 30] And the interest which entitles a party to intervene must be an interest in the matter in litigation in the suit *as originally* brought, and of such a present, direct and immediate character that the intervener will either gain or lose by the direct effect of the judgment. Jersy Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 91 P. 2d 599; La Mesa Lemon Grove & Spring Valley Irr. Dist. v. Halley, 195 Cal. 739, 235 P. 999; McNeil v. Morgan, 157 Cal. 373, 108 P. 69. An intervener cannot be permitted to broaden the scope or function of such special proceeding by urging claims or contentions which have their proper forum elsewhere. Wright v. Jordan, 192 Cal. 704, 221 P. 915.

It is difficult to comprehend or understand what interest the state or city had in the injunction proceeding that was of such a direct or immediate character that either intervener would gain or lose by the immediate operation or effect of a judgment either for or against the telephone company. A judgment restraining the telephone company from discontinuing the telephone service would in no way affect the enforcement of the criminal laws regarding bookmaking by either state or city authorities. As we have pointed out, neither appellant nor the telephone company could be classed as aiders or abettors in violation of section 337a of the Penal Code, and the sole issue was the right of a subscriber for telephone service to compel a public utility to furnish service when its requirements for furnishing such service were met by the applicant therefor. If the offices of the Attorney General or the city attorney desired to aid the telephone company in its defense, they could have offered their aid to the court as amici curiae.

The sole claim of the interveners was that by discontinuance of the appellant's telephone service the duties of law enforcement would be materially lessened. Such an interest, however, to say the least, is indirect and inconsequential, as well as entirely remote. To hold that the Attorney General may intervene on behalf of the state in a lawsuit and the city attorney do likewise on behalf of the city simply because they believe that by the prevention of the performance of a contract between private litigants the burdens of their respective offices in the prosecution of violators of the law would be lessened, would lead to absurd results. Under such a holding it is not difficult to understand how, if a metropolitan Los Angeles newspaper brought suit against the Associated Press to restrain the latter from discontinuing its news service to the former under a contract providing therefor, the Attorney General or city attorney would have the right to intervene in such a lawsuit and insist that the Associated Press should be relieved of its contractual obligations because readers of the local newspaper utilized certain information contained in the Associated Press dispatches concerning horse races to accept and record bets upon such horse races, thereby violating section 337a of the Penal Code. And all this notwithstanding the fact that the office of the Attorney General could not, on behalf of the state, nor the city attorney, on behalf of the municipality, successfully prosecute a suit for injunction against the local newspaper to restrain it from disseminating such racing news simply because such information might be used to effectuate a violation of the criminal laws.

[31, 32] There can be no question, therefore, that plaintiffs' motion in the injunction action to vacate the orders permitting the city of Los Angeles and the State of California to intervene should have been granted. This being true, no valid issues were raised by the pleadings in intervention, and hence any issues sought to be raised thereby were false. As heretofore noted, perjury cannot be predicated on a false issue. There remained then properly for the court's consideration in the injunction action only plaintiffs' complaint and the defendant telephone company's answer, as the sole valid issue raised by these pleadings. The issue was simple, and from what we have herein stated it follows that the allegations made by appellant in his complaint for injunction, as well as the averments in his affidavits upon which both counts of perjury contained in the indictment were based, were wholly unnecessary, superfluous and immaterial, and the trial court in the injunction litigation could not therefore have been properly influenced

thereby in the determination of any material issue raised by the pleadings in the injunction case. Before a charge of perjury could be made out against appellant it was necessary that the alleged false statements contained in the indictment had been given in a judicial proceeding and that the same were material to a valid issue made therein. In this requirement the indictment was deficient.

None of the matters assigned as perjury in either counts 1 or 2 of the indictment, because of their immateriality to the issues framed by the pleadings in the injunction suit, could have properly influenced the court in determining the sole issue in such litigation, as to whether or not the telephone company should be restrained from discontinuing the service contracted for by appellant. If the contrary were the law, then the telephone company would be bound to investigate every application for use of its facilities to determine the purpose for which such service was going to be used. The only cause of action which could possibly result from the material facts stated in the legally filed pleadings was, as heretofore stated in this opinion, a cause of action based on contract. The fact that attorneys for the plaintiff in the action against the telephone company deemed it advisable to file affidavits for the purpose of denying the hearsay alleged in the affirmative defense of the telephone company, is no reason for holding the averments of such affidavits material. They could not rightfully influence the court in passing upon the contractual relation, and that was the only valid issue presented. The fact that the action was one in equity does not alter this situation. The court was bound to follow the law. The equitable relief sought in the action was merely ancillary and served only to hold the contractual relationship between the parties in statu quo until the legal aspects of the litigation had been determined.

In view of the foregoing conclusion arrived at by us, it becomes unnecessary to consider the numerous other issues of importance raised by this appeal.

For the reasons herein stated, the judgments and the order denying defendant's motion for a new trial are, and each of them is, reversed, and the cause remanded with directions to the court below to dismiss the indictment.

DORAN, J., concurred.

YORK, Presiding Justice (dissenting).

I dissent. I cannot agree with the foregoing opinion because of the fact that the false statements sworn to, and referred to in said opinion, were made for the purpose of influencing the court in an application made to it for equitable relief. Appellant makes numerous specifications of error occurring in the trial of the cause, but after an examination of the entire record, including the evidence, I am unable to say that the errors complained of resulted in a miscarriage of justice. § 4½, art. VI, Const. of Cal.

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